

title XVIII of the Act to which the person, after applicable reconciliation, is not entitled under such title.

*Person* means a provider (as defined in § 400.202) or a supplier (as defined in § 400.202).

**§ 401.305 Requirements for reporting and returning of overpayments.**

(a) *General.* (1) If a person has identified that it has received an overpayment the person must report and return the overpayment in the form and manner set forth in this section.

(2) A person has identified an overpayment if the person has actual knowledge of the existence of the overpayment or acts in reckless disregard or deliberate ignorance of the existence of the overpayment.

(b) *Deadline for reporting and returning overpayments.* (1) A person with an identified overpayment must report and return the overpayment by the later of either of the following:

(i) The date which is 60 days after the date on which the overpayment was identified.

(ii) The date any corresponding cost report is due, if applicable.

(2) The deadline for returning overpayments will be suspended when either of the following occurs:

(i) OIG acknowledges receipt of a submission to the OIG Self-Disclosure Protocol until such time as a settlement agreement is entered, the person withdraws from the OIG Self-Disclosure Protocol, or the person is removed from the OIG Self-Disclosure Protocol.

(ii) CMS acknowledges receipt of a submission to the Self-Referral Disclosure Protocol until such time as a settlement agreement is entered, the person withdraws from the Self-Referral Disclosure Protocol, or the person is removed from the Self-Referral Disclosure Protocol.

(c) *Applicable reconciliation.* (1) The applicable reconciliation occurs when a cost report is filed; and

(2) In instances when the provider—  
(i) Receives more recent CMS information on the SSI ratio, the provider is not required to return any overpayment resulting from the updated information until the final reconciliation of the provider's cost report occurs; or

(ii) Knows that an outlier reconciliation will be performed, the provider is not required to estimate the change in reimbursement and return the estimated overpayment until the final reconciliation of that cost report.

(d) *Contents of report.* An overpayment required to be reported under this section to a Medicare contractor must be made in writing and must contain all of the following:

(1) Person's name.  
(2) Person's tax identification number.  
(3) How the error was discovered.  
(4) The reason for the overpayment.  
(5) The health insurance claim number, as appropriate.

(6) Date of service.  
(7) Medicare claim control number, as appropriate.

(8) Medicare National Provider Identification (NPI) number.

(9) Description of the corrective action plan to ensure the error does not occur again.

(10) Whether the person has a corporate integrity agreement with the OIG or is under the OIG Self-Disclosure Protocol.

(11) The timeframe and the total amount of refund for the period during which the problem existed that caused the refund.

(12) If a statistical sample was used to determine the overpayment amount, a description of the statistically valid methodology used to determine the overpayment.

(13) A refund in the amount of the overpayment. A person may request an extended repayment schedule as that term is defined in § 401.603.

(e) *Reporting.* (1) A person must use the self-reported overpayment refund process set forth by the applicable Medicare contractor to report and return overpayments except as provided in paragraph (e)(2) of this section.

(2) A person satisfies the reporting obligations of this section by making a disclosure under the OIG's Self-Disclosure Protocol resulting in a settlement agreement using the process described in the OIG Self-Disclosure Protocol.

(f) *Enforcement.* Any overpayment retained by a person after the deadline for reporting and returning the overpayment specified in paragraph (b) of this section is an obligation for purposes of 31 U.S.C. 3729.

(g) *Lookback period.* An overpayment must be reported and returned in accordance with § 401.305 only if a person identifies the overpayment within 10 years of the date the overpayment was received.

**Subpart F—Claims Collection and Compromise**

**§ 401.607 [Amended]**

3. In § 401.607(c)(2)(i), the definition of "Hardship" is amended by removing the phrase "outstanding overpayments (principal and interest)" and adding in its place the phrase "outstanding overpayments (principal and interest and including overpayments reported in accordance with §§ 401.301 through 401.305.)"

**PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED**

4. The authority for part 405 continues to read as follows:

**Authority:** Secs. 1102, 1862, and 1871 of the Social Security Act as amended (42 U.S.C.1302, 1395y, and 1395hh).

5. Section 405.980 is amended by adding paragraph (b)(6) to read as follows:

**§ 405.980 Reopenings of initial determinations, redeterminations, and reconsiderations, hearings and reviews.**

\* \* \* \* \*

(b) \* \* \*

(6) Within 10 years from the date of initial determination or redetermination if the overpayment is reported in accordance with § 401.305.

\* \* \* \* \*

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: August 18, 2011.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: February 10, 2012.

**Kathleen Sebelius,**

*Secretary, Department of Health and Human Services.*

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**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 76**

[CS Docket No. 98–120; FCC 12–18]

**Carriage of Digital Television Broadcast Signals: Amendment to the Commission's Rules**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This Fourth FNPRM seeks comment on whether it would be in the public interest to extend the viewability rule and the HD carriage exemption, both of which are currently scheduled to sunset on June 12, 2012. First, we seek comment on whether to extend, in its current form, the "viewability" rule, which implements the statutory requirement that all cable subscribers, including those with analog equipment, be able to view must carry television signals. Second, given the apparent widespread reliance of small cable

operators on the HD exemption, we propose to extend it for an additional three years, but ask whether this should be the final extension. We note that both rule and exemption would have expired on February 17, 2012 if the DTV transition had not been delayed by Congress. The Commission is therefore concurrently issuing a Declaratory Order clarifying that both the viewability rule and the HD Carriage Exemption will sunset on June 12, 2012, absent Commission action to extend them.

**DATES:** Submit comments on or before March 12, 2012. Submit replies on or before March 22, 2012.

**FOR FURTHER INFORMATION CONTACT:** Lyle Elder, [Lyle.Elder@fcc.gov](mailto:Lyle.Elder@fcc.gov), or Steven Broeckaert, [Steven.Broeckaert@fcc.gov](mailto:Steven.Broeckaert@fcc.gov) of the Media Bureau, Policy Division, at (202) 418-2120.

**SUPPLEMENTARY INFORMATION:** The proceeding this Fourth FNPRM initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>1</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b). In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte*

presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules. Pursuant to §§ 1.415 and 1.419 of the Commission’s rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

■ **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.

■ **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

■ All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW-A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.

■ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

■ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

**People with Disabilities:** To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

**Availability of Documents.** Comments, reply comments, and *ex*

*parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY-A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

## Summary of the Final Rule

### I. Introduction

1. In 2007, the Commission adopted certain rules to protect consumers as the transition to digital television (DTV) approached.<sup>2</sup> Specifically, in order to ensure that cable operators continued to comply with the statutory obligation to make must-carry television stations<sup>3</sup> “viewable” to all subscribers,<sup>4</sup> the Commission adopted a rule providing cable operators two options to comply with the viewability requirement: (1) Carry the digital signal in analog format to all analog cable subscribers, or (2) carry the signal only in digital format, provided that all subscribers have the necessary equipment to view the broadcast content.<sup>5</sup> In order to retain flexibility to deal with concerns arising after the DTV transition, the Commission stated that the viewability rule would sunset three years after the transition, subject to review during the last year of this period to determine if it should be extended, revised, or allowed to sunset.<sup>6</sup> This rule will therefore expire on June 12, 2012 unless we take action to extend it.

<sup>2</sup> See generally *Carriage of Digital Television Broadcast Signals*, CS Docket No 98-120, Third Report and Order and Third Further Notice of Proposed Rulemaking, 73 FR 6043, 22 FCC Rcd 21064 (2007) (“*Viewability Order*” or “*Third FNPRM*”). As discussed below, the DTV transition was finalized on June 12, 2009.

<sup>3</sup> “Must-carry” stations are those stations subject to mandatory cable carriage (unless they elect to be carried only with their consent). These include both commercial (47 U.S.C. 534(a)) and non-commercial educational (47 U.S.C. 535(a)) full-power television stations.

<sup>4</sup> See 47 U.S.C. 534(b)(7) (“Signals carried in fulfillment of the requirements of this section [i.e., commercial must-carry signals] shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection”); 47 U.S.C. 535(h) (“Signals carried in fulfillment of the carriage obligations of a cable operator under this section [i.e., non-commercial must-carry signals] shall be available to every subscriber”).

<sup>5</sup> 47 CFR 76.56(d)(3).

<sup>6</sup> 47 CFR 76.56(d)(5) (“The requirements set forth in paragraph (d)(3) of this section shall cease to be effective three years from the date on which all full-power television stations cease broadcasting analog signals, unless the Commission extends the requirements in a proceeding to be conducted during the year preceding such date.”).

<sup>1</sup> 47 CFR 1.1200 *et seq.*

2. Also in 2007, the Commission adopted a related rule regarding the prohibition on material degradation of broadcast signals when carried by cable systems. One aspect of this rule is the requirement that any signal broadcast in high definition (“HD”) also be carried by cable operators in HD. In response to concerns from commenters about cost and technical capacity, the Commission granted a three-year exemption from this HD carriage rule to the operators of certain small cable systems. As with the viewability rule, the Commission held that the small cable HD exemption would sunset in three years absent action by the Commission to revise or extend it. Thus, this exemption will also expire on June 12, 2012 unless the Commission takes action to extend it.

3. We initiate this Fourth Further Notice of Proposed Rulemaking (Fourth FNPRM) in the DTV cable carriage docket to determine whether it would be in the public interest to extend this rule and exemption. For the reasons described below, we seek comment on whether to extend the “viewability” rule for three more years to ensure that all cable subscribers, including those with analog equipment, continue to have access to must carry television signals. Given the apparent widespread reliance of small cable operators on the HD exemption, we propose to extend it for an additional three years, but ask whether this should be the final extension. We note that both rule and exemption would have expired on February 17, 2012 if the DTV transition had not been delayed by Congress. The Commission is therefore concurrently issuing a Declaratory Order clarifying that both the viewability rule and the HD Carriage Exemption will sunset on June 12, 2012, absent Commission action to extend them.<sup>7</sup>

## II. Background

4. Pursuant to Section 614(b)(4)(B) of the Communications Act of 1934, as amended (the “Act”),<sup>8</sup> the Commission initially opened this docket in 1998 to address the responsibilities of cable television operators with respect to carriage of digital broadcast stations in light of the nation’s transition to digital television.<sup>9</sup> The 2007 *Viewability Order*, among other things, established a rule ensuring the viewability of must-carry signals on cable systems, as required by

statute.<sup>10</sup> That order also established the requirement for cable systems to carry HD broadcast signals in HD, in order for the signals to be carried without material degradation.<sup>11</sup> Based on further comments, the follow-up *Fourth Report & Order* granted an exemption from this latter requirement for the operators of certain small cable systems.<sup>12</sup> As mentioned above, both the viewability rule and the HD carriage exemption were scheduled to sunset three years after the conclusion of the full-power transition, subject to review during the last year of this period to determine whether they should be extended, revised, or allowed to sunset.<sup>13</sup>

## III. Viewability Rule

5. In the *Viewability Order*, the Commission found that “viewability” of must-carry digital signals was mandated by the Communications Act just as it had been for must-carry analog signals, and adopted a rule to ensure that these signals would be available to all cable subscribers.<sup>14</sup> The Commission recognized the need for flexibility in enforcing “the most fundamental interest expressed in the must carry rules,”<sup>15</sup> and that it is bound by statute to ensure that must-carry signals are actually viewable by all subscribers. This review provides an opportunity for us to determine whether extending the current rule is necessary to fulfill that statutory mandate, given the current state of technology and the marketplace.

6. Since passage of the 1992 Cable Act, the Commission has consistently found that “mere transmission of the must-carry signal is not sufficient to meet the requirements” of the statute.<sup>16</sup> As explained in 1993:

We believe that the 1992 Act is clear in its requirement that all local commercial television stations carried in fulfillment of the must-carry requirements must be provided to every cable subscriber and must be viewable on all television sets that are connected to the cable system by a cable operator for which the cable operator provides a connection. The Act does not give the Commission authority to exempt any class of subscribers from this requirement.<sup>17</sup>

<sup>10</sup> See generally *Viewability Order*.

<sup>11</sup> *Viewability Order* at para. 4.

<sup>12</sup> See generally, *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98–120, Fourth Report and Order, 23 FCC Rcd 13618 (2008) (“*Fourth Report & Order*”).

<sup>13</sup> *Viewability Order* at para. 16; *Fourth Report & Order* at para. 12.

<sup>14</sup> *Viewability Order* at para. 15.

<sup>15</sup> *Viewability Order* at para. 34.

<sup>16</sup> *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98–120, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 8803 (2007) (“*Second FNPRM*”).

<sup>17</sup> Implementation of the Cable Television Consumer Protection and Competition Act of 1992,

Therefore, must-carry stations must be viewable.<sup>18</sup> After the DTV transition, “the signals of must-carry stations [would have been] completely unavailable to analog cable subscribers” absent Commission action.<sup>19</sup> That is, because after the transition these signals are broadcast only in digital, cable subscribers that do not own a digital television or subscribe to a digital tier (and therefore lease or own a digital navigation device) would no longer be able to view these stations through their cable operator. Although the digital signals of these must-carry stations could theoretically be accessed over-the-air with the use of a digital converter box, the statute does not require subscribers to take that approach.<sup>20</sup> Moreover, even were the law to contemplate that approach, we note that, as a technical matter, not all analog cable subscribers are covered by the signals from their local must-carry stations or even own an antenna that would permit them to receive the signal if it were available. As stated in 2007, we remain “bound by statute to ensure that commercial and non-commercial mandatory carriage stations are actually viewable by all cable subscribers,”<sup>21</sup> and “[t]hese statutory requirements plainly apply to cable carriage of digital broadcast signals.”<sup>22</sup>

etc., MM Docket No. 92–259, Report and Order, 8 FCC Rcd. 2965, 2974 (1993) (“*Analog Must Carry Report and Order*”).

<sup>18</sup> We note that although Sections 614(b)(7) (commercial) and 615(h) (noncommercial) of the Act use different language, the Commission consistently has treated them as imposing identical obligations with regard to viewability. See e.g., *Analog Must Carry Report and Order*, 8 FCC Rcd. at 2974, at para. 32 (noting that all must-carry signals must be available to all subscribers); see also *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, CS Docket No. 96–46, Second Report and Order, 11 FCC Rcd 18223, 18308, at para. 162 (1996) (“Pursuant to Section 614(b)(7) and 615(h), the operator of a cable system is required to ensure that signals carried in fulfillment of the must-carry requirements are provided to every subscriber of the system.”).

<sup>19</sup> *Viewability Order* at para. 55.

<sup>20</sup> The Commission has long held, and the Supreme Court has agreed, that cable subscribers’ use of an “A/B switch” to access over-the-air signals is not a legitimate replacement for access to those signals on the cable system itself. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 at 219–221 (1997) (“*Turner Two*”). An “A/B switch” is a method of manually toggling between cable and broadcast programming without changing the viewing device.

<sup>21</sup> *Viewability Order* at para. 31.

<sup>22</sup> *Viewability Order* at para. 15; see also e.g., para. 22 (the digital viewability requirement is “based on a straightforward reading of the relevant statutory text”); para. 24 (“this language reflects Congress’s unambiguous determination that broadcast signals must be viewable by all cable subscribers”); para. 34 (“[i]f we declined to enforce the viewability requirement it would render the

Continued

<sup>7</sup> As discussed in detail in Section V, *infra*.

<sup>8</sup> 47 U.S.C. 534(b)(4)(B).

<sup>9</sup> *Carriage of the Transmissions of Digital Television Broadcast Stations: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98–120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15093, paras. 1–2 (1998).

7. As the Commission also made clear in 2007, viewability of broadcast signals is not only mandated by statute, but is also of vital importance to the broadcast stations that rely on the Commission's "must carry" rules and to all consumers of television programming. The Commission noted that,

[i]f cable operators did not downconvert the digital signals, broadcasters would stand to lose an audience of millions of households that are analog cable subscribers and the concomitant advertising revenues, thus jeopardizing their continued health and viability. Should these stations deteriorate or cease to exist, the impact of these lost programming options would fall most heavily on those that most need them: The roughly fifteen percent of Americans who rely solely on over-the-air television, which disproportionately consist of low-income and minority households.<sup>23</sup>

Furthermore, the Commission found that, without action, "analog cable subscribers and households that rely solely on over-the-air broadcast television may well face 'a reduction in the number of media voices' and the loss of 'the widest possible dissemination of information from diverse and antagonistic sources.'" <sup>24</sup> The Commission, in the *Viewability Order*, explained that at the time half of all consumers relied on the analog tuners in the equipment that they owned, and that the welfare of those consumers "drives the Commission's decisions on viewability."<sup>25</sup> Thus, in adopting the *Viewability Order*, the Commission acted in light of both the statutory directive and the important governmental interests of preserving the benefits of free, over-the-air local broadcast television for analog cable subscribers and over-the-air viewers alike, and promoting the widespread dissemination of information from a multiplicity of sources.

8. In order to ensure that digital signals would be actually viewable by all subscribers, the Commission adopted a two-part rule and allowed systems to choose how they would comply. Section 76.56(d)(3) of the Commission's rules provides:

(3) The viewability and availability requirements of this section require that, after the broadcast television transition from analog to digital service for full power television stations cable operators must either:

(i) Carry the signals of commercial and non-commercial must-carry stations in

regime almost meaningless, contrary to the clearly expressed will of the Congress as upheld by the Supreme Court").

<sup>23</sup> *Id.* at para. 55 (internal citations omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at n. 131.

analog format to all analog cable subscribers, or

(ii) For all-digital systems, carry those signals in digital format, provided that all subscribers, including those with analog television sets, that are connected to a cable system by a cable operator or for which the cable operator provides a connection have the necessary equipment to view the broadcast content.<sup>26</sup>

This rule ensures that all subscribers are able to view must-carry programming, while still providing flexibility to operators who have been, and continue to be, transitioning to an all-digital system on their own schedules.<sup>27</sup> Once a particular cable operator has begun transmitting its content exclusively in a digital format, all subscribers will have access to digital broadcast signals via the digital equipment necessary to view all of the other programming offered by the cable operator. Thus, under the current rule, an all-digital cable operator can comply by transmitting all of its content in a digital format to all of its subscribers.

9. We seek comment on whether we should extend the viewability rule or permit it to sunset.<sup>28</sup> The proceeding we begin today provides an opportunity for us to consider whether extending this rule best fulfills the statutory mandate, by reviewing it "in light of the potential cost and service disruption to consumers, and the state of technology and the marketplace."<sup>29</sup> As discussed below, the available market evidence seems to indicate that the viewability requirements remain important to consumers.<sup>30</sup> In 2007 there were approximately 40 million analog-only cable subscribers,<sup>31</sup> and there are still millions today. According to data provided by NCTA, the rate at which customers switch to digital has slowed

<sup>26</sup> 47 CFR 76.56(d)(3).

<sup>27</sup> Under this rule, in combination with the material degradation rule, discussed *infra*, a "hybrid" system (providing both analog and digital service) would also have to carry an HD broadcast signal in HD. As the Commission has previously explained, "there should be no perceivable difference between" SD digital and analog picture quality, so "our rules do not require cable operators \* \* \* to carry an SD digital version of a broadcast station's signal, in addition to the analog version" as long as all subscribers can view the channel. See *supra* n. 12, *Fourth Report & Order* at para. 5.

<sup>28</sup> If we decide to extend the term of the viewability rule, we propose that the Commission should conduct a further review of this rule prior to June 12, 2015, and if the Commission does not act to extend it by that date, the viewability rule will sunset.

<sup>29</sup> *Viewability Order* at para. 16.

<sup>30</sup> The data upon which we rely includes data gathered by the Commission via the Annual Cable Operator Report and the annual Cable Price Survey, and commercially produced data such as that provided by SNL Kagan. See *e.g.*, *infra* notes 31–34.

<sup>31</sup> *Viewability Order* at note 3.

since the DTV transition,<sup>32</sup> and as of the third quarter of 2011, more than twelve million cable households were reliant on analog cable delivery.<sup>33</sup> Moreover, the vast majority of cable subscribers are served by "hybrid" systems that provide both analog and digital service, even if they receive digital service to one or more television sets.<sup>34</sup> A number of these digital subscribers still rely on analog cable for second televisions in the home, meaning that there are potentially millions more subscribers who rely on analog to some extent.<sup>35</sup> We seek comment on whether the figures discussed above reflect the current market for cable service and how that should impact the Commission's decision on whether to allow the viewability rule to sunset.

10. The sunset of the viewability rule would potentially impact millions of subscribers, and the broadcasters who would be unable to reach them.<sup>36</sup> There are hundreds of broadcast stations that rely on the must carry rules to ensure carriage on cable systems—in 2010, almost 40 percent of all broadcast stations elected or defaulted to must carry rather than electing retransmission

<sup>32</sup> NCTA Industry Data, <http://www.ncta.com/Statistics.aspx>, <http://www.ncta.com/Stats/CableAvailableHomes.aspx>, <http://www.ncta.com/Stats/BasicCableSubscribers.aspx>, visited 2/9/12.

<sup>33</sup> As of the third quarter of 2011, Kagan indicates that there are more than 58 million cable subscribers, of whom approximately 46 million are digital cable subscribers. *Q3 video subscriber trends improve but still lack real strength*, Broadband Technology (SNL Kagan, Charlottesville, VA), November 25, 2011, at 2. The vast majority of these digital cable subscribers are served by hybrid, rather than all-digital, systems. Staff analysis of 2010 Annual Cable Operator Report (Form 325) (indicating fewer than eight million cable subscribers were served by all-digital systems).

<sup>34</sup> Staff analysis of 2010 Annual Cable Operator Report (Form 325) (indicating fewer than eight million cable subscribers were served by all-digital systems). The *Viewability Order* stated that "[t]o assist the Commission in this review, we will include questions in our annual Cable Price Survey to assess, for example, digital cable penetration, cable deployment of digital set-top boxes with various levels of processing capabilities, and cable system capacity constraints." *Id.* at n. 39. Based on data submitted to the Commission as part of the 2010 Cable Price Survey, only 9.4% of subscribers are served by all-digital systems.

<sup>35</sup> A recent survey indicates that 31 percent of homes do not have a digital television. See *CES: Over Two Thirds of U.S. Homes Have HDTVs*, Broadcasting & Cable tvfax, Jan. 5, 2012, at 4–5 (discussing the results of a survey conducted by the Leichtman Research Group, Inc.).

<sup>36</sup> See *In the Matter of TiVo, Inc.*, 26 FCC Rcd 12743, 12747 (2011) ("NCTA notes, however, that although the cable industry has significantly increased the penetration of its digital services since the Commission adopted the *Digital Plug and Play Order* in 2003, many cable systems 'continue to carry substantial numbers of channels only in analog,' and 'even on systems that simulcast all channels in digital, some customers may subscribe only to analog service.'" (NCTA Comments at 2–3).

consent.<sup>37</sup> Without the viewability rule, many cable subscribers would be required to pay more for access to must-carry broadcast stations, by replacing existing and still-functional analog equipment with digital equipment or leasing set top boxes to view the complete service they currently pay for and receive in analog.<sup>38</sup> As the Supreme Court has made clear, “preserving the benefits of free, over the air local broadcast television” is an “important governmental interest” at the very heart of the must-carry regime.<sup>39</sup> In this regard, we seek comment on how the sunset of the viewability requirement would impact the financial resources of must carry stations. We seek specific information that will allow us to build a solid record that supports either the retention or the sunset of the viewability rule. Also, given that “viewability” of must-carry digital signals is mandated by the Communications Act, we seek comment on whether it is necessary to extend the rule in its current form as opposed to relying on stations to file carriage complaints to enforce compliance with the statutory mandate.<sup>40</sup>

11. As discussed in the *Viewability Order*, compliance with this rule may result in some costs to cable operators.<sup>41</sup> In some cases operators may be required to carry more than one version of a channel, using more bandwidth than they would if they carried only a single version, and in some cases they may be required to down-convert a broadcast signal to make the additional version available to analog subscribers. At the time of the *Viewability Order*, however, these costs were not only determined to be necessary to carry out the statutory “viewability” directive, but were determined to be outweighed by the benefits of the viewability rule. Although many broadcast stations elect must-carry status, a cable system carries many more non-broadcast channels. The

Commission explained that the comparatively small number of must-carry stations carried by any given system meant that the incremental additional bandwidth consumed by compliance with this requirement would be “negligible”<sup>42</sup> even for hybrid systems, which are required by this rule to devote at least one 6 MHz channel to each must-carry station.<sup>43</sup> We seek comment on the extent to which these conclusions still hold true today.

12. Furthermore, the Commission affirmed in the *Viewability Order* that the “one-third carriage cap,” under which cable operators need dedicate no more than one-third of their channel capacity to commercial broadcast stations, remains in effect in the digital carriage context, and that all versions of a signal would count toward this cap.<sup>44</sup> As a result, no cable system need ever dedicate more than one-third of their bandwidth to carriage of commercial broadcast stations, and may choose which signals not to carry if they ever reach this cap. We seek comment on whether the situation has changed regarding bandwidth usage, and whether any cable system has reached the one-third carriage cap. Regarding the cost of downconversion, some commenters in the 2007 viewability proceeding claimed they would face large costs to down-convert broadcast signals.<sup>45</sup> The Commission was skeptical of at least some of these claims, all of which concerned up-front expenses. Given the up-front nature of the claimed expenses, they presumably would have already been incurred by now and would not impose an additional cost. We seek comment on the accuracy of this presumption in the current marketplace. Would retention of the viewability rule impose any additional expenses on cable operators? If so, we request a detailed description of any claimed expenditures and associated cost information.

13. We note that some cable operators, such as RCN and BendBroadband, transmit only digital signals and have eliminated analog service in all of their systems.<sup>46</sup> As discussed above, these providers can comply fully with their viewability obligations by simply

carrying a must-carry signal in digital, often in the same manner as it is provided by the broadcast station. We therefore also seek comment about costs associated with transitioning to an all-digital system, rather than carrying analog versions of must-carry signals. According to information in the 2007 record, virtually all cable operators are planning to eventually transition to all-digital systems, regardless of our decision on the viewability rule.<sup>47</sup> How many hybrid systems plan to go all-digital in the near future, and how many subscribers will be impacted by this shift? What is the range of costs per digital box for cable operators, and the range of rental fees charged to subscribers who are first-time digital subscribers? How has the rate at which consumers voluntarily drop analog service changed in the time since the DTV transition? What is the current rate at which they are doing so? We seek comment on the business environment in which hybrid systems operate. Are competitive pressures on these systems such that they are transitioning to all-digital service at a faster rate than customers are switching on their own? Are any cable operators considering transitioning to an all-digital system more quickly than originally planned specifically because of the viewability obligations? What additional costs would be associated with an early transition? Commenters stating that they intend to or know of cable systems that intend to transition early due to the viewability rule should provide a detailed description of the claimed expenditures and cost information that they would face as the result of this early transition.

14. We seek comment on whether to extend the existing viewability rule. To the extent the Commission decides to retain the rule, we seek comment on whether it should be retained for another three years or a different period of time. Is three years too long or is a sunset at some later date more advisable? The Commission considered possible alternative rules in the *Viewability Order*, but each was rejected. The alternatives were rejected in each case because the Commission did “not believe we have the authority to exempt any class of subscribers from this requirement,”<sup>48</sup> and each of these alternative approaches would result in some subscribers losing access to must-carry signals.<sup>49</sup>

<sup>37</sup> Staff analysis of 2010 Annual Cable Operator Report (Form 325) (indicating approximately 780 of approximately 2000 stations elected or defaulted to must carry). Based on data submitted to the Commission as part of the 2010 Cable Price Survey, over 96% of cable systems carry at least one must-carry station, and, on average, each system carries more than seven must-carry stations.

<sup>38</sup> Subscribers to Direct Broadcast Satellite systems must have boxes for all televisions in the home; this requirement was not changed as a result of the DTV transition. Similarly, subscribers to all-digital cable systems must either have a box for each set, or own equipment capable of displaying digital signals without a box. In this case, subscribers face no additional expense or effort to receive must-carry signals in digital.

<sup>39</sup> Turner Two, *supra* n. 21.

<sup>40</sup> Carriage complaints may only be filed by the affected station, not by viewers or other parties. 47 CFR 76.61.

<sup>41</sup> *Viewability Order*, at paras. 26–35.

<sup>42</sup> *Viewability Order*, at para. 26.

<sup>43</sup> The bandwidth that must be allotted (due to the related prohibition on material degradation, discussed *infra*) increases only slightly if the must-carry station is broadcasting in high definition, due to the efficiencies of digital carriage.

<sup>44</sup> *Viewability Order*, at para. 36.

<sup>45</sup> *Viewability Order*, at para. 35.

<sup>46</sup> Basic Service Tier Encryption; Compatibility Between Cable Systems and Consumer Electronics Equipment, FCC 11–153, Notice of Proposed Rulemaking, 26 FCC Rcd 14870, 14876, para.8 (2011).

<sup>47</sup> *Viewability Order*, at para. 20.

<sup>48</sup> *Viewability Order*, at para. 39.

<sup>49</sup> For instance, Entravision, licensee of a number of commercial broadcast stations, proposed

15. Unlike the alternatives proposed, the rule the Commission adopted in 2007 ensures viewability by all subscribers, while simultaneously giving cable operators the flexibility to choose the best option for complying with their viewability obligations.<sup>50</sup> We seek comment on whether this rule is still necessary to ensure subscriber access to must-carry signals and support the continued viability of must-carry stations. What are the costs and benefits, for subscribers, broadcasters, and cable operators, of retaining this rule for another three years? To the extent feasible, commenters should quantify in dollars any asserted costs or benefits. We have not received any complaints under this rule, nor have we received any requests to waive it, from cable systems large or small. This speaks well of the compliance efforts of operators. It also seems to indicate that the burden of compliance has been relatively minimal and that the actual costs of compliance have likely not been onerous. We seek comment on whether this observation is accurate. How many subscribers, particularly those with some digital service, still rely in part on analog cable service? We seek comment generally on the cost and service disruption to consumers if the current rule was allowed to sunset. In particular, we seek comment on the

requiring all must-carry stations to be provided in analog to all of a cable system's subscribers until 85 percent of the served population had the means to view a digital signal. At that point, the operator could drop the analog version of all must-carry signals. *Viewability Order* at para. 39. The Commission rejected this proposal because it concluded that its statutory authority precluded the exemption of any class of subscribers from the viewability rule no matter how small that class might be. *Id.* Comcast and other cable operators proposed a rule that would allow them to carry must-carry signals in digital so long as they made equipment available for lease or sale to subscribers that would allow the subscribers to view the digital signal. *Id.* at para. 22. The Commission rejected this proposal because it would essentially require current analog subscribers to pay extra for the digital tier to watch must-carry signals they have a statutory right to receive on every tier of service, noting that "[f]or every receiver 'connected to a cable system by a cable operator or for which a cable operator provides a connection,' that operator must ensure that the broadcast signals in question are actually viewable on their subscribers' receivers." *Id.*, citing 47 U.S.C. 534(b)(7). The National Association of Broadcasters proposed a rule that would require all broadcast signals to be carried in the same manner by a cable system—that is, "if one must carry station is carried in analog, all broadcasters, whether carried pursuant to retransmission consent or must carry, would be carried in analog." *Id.* at para. 21. A system could therefore decline to provide any broadcast signals in analog without violating this comparative rule, even if that disenfranchised all of its analog subscribers. In each of the proposals outlined above, there is the potential, if not a certainty, that must-carry signals would not be viewable by analog subscribers.

<sup>50</sup> *Viewability Order* at para. 38.

number of cable subscribers whose residences lie outside the digital noise limited service contour of their local broadcast must-carry stations and therefore would have difficulty receiving a quality broadcast signal over the air.<sup>51</sup> Further, we seek comment on the number of cable subscribers that own antennas capable of receiving their local broadcast must-carry stations where such signals are available.

16. Finally, we seek comment on any other proposals that would achieve the results necessary to assure the viewability of must-carry signals through an approach different than that of our existing rule. To the extent any parties find the current rule burdensome, we seek comment on proposals that will satisfy the statute in a less burdensome manner. Is any rule necessary to effectuate the statutory intent? If so, any proposals for an alternative rule to ensure the actual viewability of must-carry signals should include specific proposed wording, as well as an analysis of how the proposal is consistent with the statute.<sup>52</sup> In the *Viewability Order*, we previously determined that the viewability rule was consistent with constitutional requirements.<sup>53</sup> We seek comment on any marketplace or other changes that have since occurred that may impact our analysis of the constitutional issues. To the extent that we allow the rule to sunset, we seek comment on how, as a legal and technical matter, the Commission would ensure cable operators' compliance with the statutory requirement to make all must-carry broadcast signals actually viewable to all subscribers.<sup>54</sup>

#### IV. HD Carriage Exemption

17. The Act also requires that cable operators carry broadcast signals "without material degradation."<sup>55</sup> As

<sup>51</sup> See e.g., 47 CFR 73.622(e).

<sup>52</sup> To the extent we retain the rule for a specified period, we believe that it is appropriate to again consider the state of the marketplace before allowing the rule to sunset.

<sup>53</sup> *Viewability Order*, 22 FCC Rcd at 21083–21099.

<sup>54</sup> 47 U.S.C. 534(b)(7); 47 U.S.C. 535(h).

<sup>55</sup> See 47 U.S.C. 534(b)(4)(A) ("The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.") and 535(g)(2) ("A cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified

the Commission has interpreted the Act in the context of carriage of digital signals, this requirement has two parts: Cable operators may not discriminate in their carriage between broadcast and non-broadcast signals, and HD broadcast signals must be carried to viewers in HD.<sup>56</sup> In the *Third FNPRM*, the Commission sought comment on alternatives to these rules<sup>57</sup> that would "minimize the economic impact for small cable operators while still complying with the statutory requirements."<sup>58</sup>

18. Based on the comments received in response to the *Third FNPRM*, and in consideration of the effect of this requirement on operators of small cable systems, the *Fourth Report & Order* adopted a temporary exemption from the HD carriage requirement for certain small systems.<sup>59</sup> Commenters in that proceeding argued that, without an exemption from the material degradation rules, "small systems [would] be forced to absorb or impose significant and unsustainable price increases, or in some instances to shut down altogether."<sup>60</sup> This is because some small systems did not have the technical capability or system capacity to carry high definition digital signals, and in some cases had so few subscribers that per-subscriber costs to upgrade to that capacity would be so high as to make it not worthwhile to continue operating the system.<sup>61</sup> The exemption adopted by the Commission applies to operators of cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers, and to those with an activated channel capacity of 552 MHz or less. It permits such systems to carry broadcast signals in standard definition (SD) digital or analog, even if the signals are provided in HD.<sup>62</sup>

19. The exemption was not intended to be permanent, however. The Commission instead provided it for a three-year window, in order to give small systems "a clear opportunity to come into compliance with the rules by spreading their effort and costs over an extended period."<sup>63</sup> Recognizing the connection to the viewability rule,

local noncommercial educational television station without material degradation.").

<sup>56</sup> *Viewability Order*, at para. 4.

<sup>57</sup> See 47 CFR 76.62.

<sup>58</sup> *Third FNPRM* at para. 80, citing the *Second FNPRM* at para. 12.

<sup>59</sup> See generally *Fourth Report & Order*.

<sup>60</sup> National Cable & Telecommunications Association Comments at 12 (March 3, 2008).

<sup>61</sup> *Fourth Report & Order* at paras. 6–7.

<sup>62</sup> *Fourth Report & Order* at para. 18.

<sup>63</sup> *Fourth Report & Order* at para. 11.

which was adopted at the same time as the HD carriage requirement and also has an impact on cable carriage of broadcast signals, the Commission determined that this exemption should be reviewed in conjunction with that rule.<sup>64</sup>

20. We tentatively conclude that it is in the public interest to extend the small-system HD exemption for another three years because the number of systems relying on the exemption indicates that three years did not provide sufficient time for some small systems to come into compliance in a cost-effective way.<sup>65</sup> As discussed above, the Commission originally declined to make this exemption permanent in order to retain flexibility, and in order to have an opportunity to review the state of the marketplace several years after the digital broadcast transition.<sup>66</sup> Although the Commission anticipated that the three year exemption would give small systems an opportunity to come into compliance by making relatively large expenditures over a longer period of time, based on the most recent available data from the Annual Cable Operator Report, 37 percent of small systems that reported data, and that would be eligible for the exemption, were still not providing any HD service.<sup>67</sup> To the extent that most markets have at least one station broadcasting in HD, a system is almost certainly relying on the exemption if it is not carrying any signals in HD.<sup>68</sup> Thus, the Form 325 data indicate that a large number of small systems are relying on the exemption.<sup>69</sup> Form 325 does not provide information about why these small systems are not providing HD service, but at the time the exemption was adopted the Commission anticipated that the most likely reason would be the savings from not upgrading the cable plant to provide digital signals. We seek comment on this analysis. How many small cable operators are currently relying on this exemption? We seek comment on why they are doing so, rather than offering HD programming to their subscribers. We seek comment on the business

<sup>64</sup> *Id.* at para. 12.

<sup>65</sup> We propose to have the Commission conduct a further review of this exemption during the last year of the three year period (between June 12, 2014 and June 12, 2015), and if the Commission does not decide to extend it, the exemption will sunset.

<sup>66</sup> Fourth Report & Order at para. 11.

<sup>67</sup> Staff analysis of 2010 Annual Cable Operator Report (Form 325).

<sup>68</sup> Approximately 99% of non-eligible cable systems are carrying at least one HD signal. Staff analysis of 2010 Annual Cable Operator Report (Form 325).

<sup>69</sup> See *infra* Appendix B (discussing our analysis of FCC Form 325 data).

environment in which these systems operate; are competitive pressures from direct broadcast satellite providers and over builders on these systems such that they would be carrying broadcast signals in HD if it were cost effective? As we stated we would in the *Fourth Report & Order*, we seek comment on the “cost and service disruption to consumers” who subscribe to these cable systems and do not receive any high definition programming, and on any disruptions that would occur if we retain the exemption. Have any broadcasters or cable operators received viewer complaints concerning the lack of HD programming from subscribers to such systems?

21. As noted above, the central purpose of the exemption was to provide small systems with additional time to upgrade and, where necessary, expand their systems to come into full compliance with the material degradation provisions of the carriage rules by carrying HD versions of all HD broadcast signals without making relatively large expenditures over a short period of time.<sup>70</sup> Have systems taken, or are systems taking, the opportunity to do so? As discussed above, commenters cited in the *Fourth Report & Order* argued that the costs of providing digital service were simply too high for some systems to bear.<sup>71</sup> Will any of these systems still lack sufficient opportunity to upgrade if the exemption is extended for three years? Given that not all eligible systems are taking advantage of the exemption,<sup>72</sup> and no non-eligible system has sought an exemption from this requirement, should the definition of “small system” for the purposes of this exemption be narrowed? Are there any systems providing some HD service but not carrying all broadcast signals in high definition? Should we consider revising the exemption such that stations would be required to carry all local broadcast signals in HD if they provide any HD service? We particularly seek data regarding any systems that have taken advantage of the exemption, but either already have begun or have firm plans to begin providing HD broadcast signals in HD. We also seek comment more generally on the costs and benefits of the exemption, for subscribers, broadcasters, and small cable operators. For example, has the exemption benefited small cable system operators by allowing them to direct capital expenditures to upgrade or introduce new services? Conversely, has the

<sup>70</sup> Fourth Report & Order at para. 11.

<sup>71</sup> See *supra* para. 16.

<sup>72</sup> See *infra* Appendix B.

exemption unnecessarily allowed small cable operators simply to delay compliance with their material degradation obligations, thereby denying subscribers access to HD broadcast signals? To the extent feasible, commenters should quantify in dollars any asserted costs or benefits.

22. Comments at the time of the initial grant of this exemption indicated that it was necessary to protect the economic health of some small systems, and indeed that some systems might become too expensive to continue operation without the exemption.<sup>73</sup> We seek comment on whether and to what extent this remains the situation today. We seek comment more generally on “the state of technology and the marketplace” as they relate to this exemption. Finally, we seek comment on whether the benefits to the operators of small cable systems of extending this exemption for three years would outweigh the costs to subscribers and broadcasters. In proposing to extend the HD carriage exemption, we are guided by the Commission’s determination in the *Fourth Report and Order* that “[a] three-year sunset provides the Commission with the opportunity after the transition to review these rules in light of the potential cost and service disruptions to consumers, and the state of technology and the marketplace.”<sup>74</sup> We are unaware of any marketplace changes that would make extension of the exemption for three additional years inadvisable. However, we assume the need for this exemption will not be permanent; if we extend the exemption, should we clarify that the Commission will not consider another extension? If the proposal to extend for three more years is adopted, small systems will have had a total of six additional years to come into compliance with the HD carriage requirement. We seek comment on whether three years is an appropriate amount of time, or if the HD carriage exemption should be retained for a different period of time.

## V. Declaratory Order

23. Subsequent to the Commission’s adoption of the *Viewability Order* and the *Fourth Report and Order*, the full-power transition was successfully completed on June 12, 2009, after Congress chose to delay it from the originally scheduled conclusion on February 17, 2009.<sup>75</sup> When adopting the *Viewability Order*, the Commission

<sup>73</sup> Fourth Report & Order at para. 7.

<sup>74</sup> Fourth Report & Order, at para. 11.

<sup>75</sup> *Full-Power TV Broadcasters Go All-Digital*, Federal Communications Commission, Press Release (June 13, 2009).

stated that, barring later action, the sunset of the viewability rule would occur “three years from the date on which all full-power television stations cease broadcasting analog signals,” which will be June 12, 2012.<sup>76</sup> The HD carriage exemption was intended to be “in force for three years from the date of the digital transition” and reviewed “simultaneously with the viewability rule[ ].”<sup>77</sup> The Commission stated that the exemption would therefore be in force “from February 18, 2009 through February 17, 2012,” or three years after the originally scheduled conclusion of the transition.<sup>78</sup> The Commission expressed a clear intent to have the HD carriage exemption and viewability sunsets running in parallel, and did not at the time anticipate the subsequent congressionally mandated extension of analog broadcasting. It is clear from the text of the *Viewability Order* and the *Fourth Report and Order* that the Commission intended the rule/exemption to remain in effect 3 full years from the conclusion of the transition, and thus having them sunset four months early in February 2012 would be contrary to the stated intent of the Commission.<sup>79</sup> Therefore, we hereby issue this Declaratory Order that the HD carriage exemption, like the viewability rule, will be in effect up to and until June 12, 2012, absent further Commission action.

## VI. Procedural Matters

### A. Initial Paperwork Reduction Act of 1995 Analysis

24. The *Fourth FNPRM* has been analyzed with respect to the Paperwork Reduction Act of 1995 (“PRA”).<sup>80</sup> This document does not contain new or modified information collection requirements subject to the 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).

### B. Initial Regulatory Flexibility Analysis

25. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”) <sup>81</sup> the Commission has

prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible economic impact on a substantial number of small entities by the policies and rules proposed in this *Fourth Notice of Proposed Rulemaking* (“*Fourth FNPRM*”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Fourth FNPRM* as indicated on its first page. The Commission will send a copy of the *Fourth FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>82</sup> In addition, the *Fourth FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.<sup>83</sup>

#### 1. Need for, and Objectives of, the Proposals

26. This *Fourth FNPRM* seeks comment on rules relating to the manner in which broadcast DTV content will be displayed when it is carried by a cable system. The current viewability rule and the exemption from the HD carriage rule for certain small systems were both intended to expire three years after the conclusion of the transition, subject to a simultaneous review during the prior year. This *Fourth FNPRM* seeks comment on whether to extend for three years the current viewability rule, which requires that cable operators must either carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or, for all-digital systems, carry those signals in digital format, provided that all subscribers, including those with analog television sets, that are connected to a cable system by a cable operator or for which the cable operator provides a connection have the necessary equipment to view the broadcast content. Viewability of must-carry signals is required by the Communications Act, and as a result the current rule must be extended or replaced by an alternative that provides the same level of subscriber access to must-carry programming. The *Fourth FNPRM* also proposes to extend for three years the HD carriage exemption, which exempts certain small systems from the obligation to carry HD broadcast signals in HD. The exemption applies to operators of cable systems with 2,500 or fewer subscribers that are

not affiliated with a cable operator serving more than 10% of all MVPD subscribers, and to those with an activated capacity of 552 MHz or less. The *Fourth FNPRM* seeks comment on the exemption’s impact and importance.

#### 2. Legal Basis

27. The authority for the action proposed in this rulemaking is contained in Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 303, 534, and 535.

#### 3. Description and Estimate of the Number of Small Entities to Which the Proposals Will Apply

28. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules if adopted.<sup>84</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>85</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>86</sup> 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).<sup>87</sup> The rule changes proposed herein will directly affect small television broadcast stations and small cable operators. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

29. *Television Broadcasting*. The SBA defines a television broadcasting station as a small business if such station has no more than \$14.0 million in annual receipts.<sup>88</sup> Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”<sup>89</sup> The Commission has

<sup>84</sup> 5 U.S.C. 603(b)(3).

<sup>85</sup> 5 U.S.C. 601(b).

<sup>86</sup> 5 U.S.C. 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.”

<sup>87</sup> 15 U.S.C. 632.

<sup>88</sup> *See* 13 CFR 121.201, NAICS Code 515120 (2007).

<sup>89</sup> *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These

<sup>76</sup> Viewability Order at para. 16.

<sup>77</sup> Fourth Report & Order at paras. 11–12.

<sup>78</sup> *Id.* at paras. 12, 18.

<sup>79</sup> *See* Viewability Order, at para. 16; Fourth Report and Order, at para. 11.

<sup>80</sup> Paperwork Reduction Act of 1995 (“PRA”), Public Law 104–13, 109 Stat 163 (1995) (codified in Chapter 35 of Title 44 U.S.C.).

<sup>81</sup> *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business

Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Public Law 104–121, Title II, 110 Stat. 857 (1996).

<sup>82</sup> *See* 5 U.S.C. 603(a).

<sup>83</sup> *See id.*

estimated the number of licensed commercial television stations to be 1,392.<sup>90</sup> According to Commission staff review of the BIA/Kelsey, MAPRO Television Database (“BIA”) as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations<sup>91</sup> (or about 74 percent) have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 390.<sup>92</sup> We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>93</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

30. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the

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

<sup>90</sup> See News Release, “Broadcast Station Totals as of December 31, 2009,” 2010 WL 676084 (F.C.C.) (dated Feb. 26, 2010) (“*Broadcast Station Totals*”); also available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296538A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296538A1.pdf).

<sup>91</sup> We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra* note 83; however, we are using BIA’s estimate for purposes of this revenue comparison.

<sup>92</sup> See *Broadcast Station Totals*, *supra* note 83.

<sup>93</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 CFR 121.103(a)(1).

entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

31. *Cable and Other Program Distribution*. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”<sup>94</sup> The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees.<sup>95</sup> According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.<sup>96</sup> Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.<sup>97</sup> Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the Fourth FNPRM.

32. *Cable Companies and Systems*. The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.<sup>98</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>99</sup> In addition, under the

<sup>94</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>95</sup> 13 CFR 121.201, NAICS code 517110 (2007).

<sup>96</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>97</sup> See *id.*

<sup>98</sup> See 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. See *Implementation of Sections of the 1992 Cable Television Consumer Protection and Competition Act: Rate Regulation*, MM Docket Nos. 92–266, 93–215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 para. 28 (1995).

<sup>99</sup> These data are derived from R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable*

Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>100</sup> Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.<sup>101</sup> Thus, under this second size standard, most cable systems are small and may be affected by rules adopted pursuant to the Fourth FNPRM.

33. *Cable System Operators*. The Act also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>102</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>103</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.<sup>104</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>105</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

34. *Open Video Services*. The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming

Factbook 2006, “Ownership of Cable Systems in the United States,” pages D–1805 to D–1857.

<sup>100</sup> See 47 CFR 76.901(c).

<sup>101</sup> Warren Communications News, *Television & Cable Factbook 2006*, “U.S. Cable Systems by Subscriber Size,” page F–2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

<sup>102</sup> 47 U.S.C. 543(m)(2); see also 47 CFR 76.901(f) & nn.1–3.

<sup>103</sup> 47 CFR 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

<sup>104</sup> These data are derived from R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D–1805 to D–1857.

<sup>105</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to 76.901(f) of the Commission’s rules.

services by local exchange carriers.<sup>106</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>107</sup> OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”<sup>108</sup> The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 3,188 firms in this previous category that operated for the entire year.<sup>109</sup> Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more.<sup>110</sup> Thus, under this size standard, most cable systems are small and may be affected by rules adopted pursuant to the Fourth FNPRM. In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>111</sup> Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>112</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

#### 4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

35. The *Fourth FNPRM* seeks comment on a rule revision that would

<sup>106</sup> 47 U.S.C. 571(a)(3)–(4). See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06–189, Thirteenth Annual Report, 24 FCC Rcd 542, 606 para. 135 (2009) (“Thirteenth Annual Cable Competition Report”).

<sup>107</sup> See 47 U.S.C. 573.

<sup>108</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>109</sup> U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

<sup>110</sup> See *id.*

<sup>111</sup> A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovscer.html>.

<sup>112</sup> See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606–07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

extend for three years the existing viewability rule, which would affect small television broadcast stations and cable operators by requiring cable systems to continue to make must-carry broadcast signals viewable in analog on hybrid systems, or in digital on all-digital systems. This should impose no compliance burden on small cable systems, because they will simply be continuing current practices, and should continue to have a positive impact on small television broadcast stations. The *Fourth FNPRM* also seeks comment on extending the HD carriage exemption, which would affect small television broadcast stations and cable operators. It is beneficial to small cable operators by providing them with flexibility, and imposes no compliance burden on small television broadcast stations who need take no action as a result of this proposed extension.

#### 5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

36. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>113</sup> We seek comment on the applicability of any of these alternatives to affected small entities.

37. The requirements proposed in the *Fourth FNPRM* would in most cases create minimal economic impact on small entities, and in some cases would provide positive impact. The viewability requirement has been mandated by Congress, and continuation of the current rule could minimize economic impact on small cable systems and television broadcast stations by maintaining the status quo and not requiring any additional investment in engineering or legal services. The HD carriage exemption does not impose a negative economic

<sup>113</sup> 5 U.S.C. 603(c)(1)–(c)(4).

impact on any small cable operator, and provides a positive economic impact to any operator of a system that chooses to take advantage of the exemption. The exemption does not impose any significant burdens on small television stations. We invite small entities to submit comment on the impact of extension or sunset of the viewability rule and the HD carriage exemption, and on how the Commission could further minimize potential burdens on small entities.

#### 6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

38. None.

#### VII. Ordering Clauses

39. *It is ordered* that, pursuant to sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 303, 534, and 535, this *Fourth Further Notice Of Proposed Rulemaking and Declaratory Order* is adopted.

40. *It is further ordered* that, pursuant to sections 5(d) of the Administrative Procedure Act, Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, and 1.2 of the Commission’s rules, 5 U.S.C. 554(e); 47 U.S.C. 154, 303, 534, 535; 47 CFR 1.2, the viewability rule and the HD Carriage exemption will be in effect up to and until June 12, 2012, absent further Commission action.

41. *It is ordered* that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

#### List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Equal employment opportunity, Political candidates, Reporting and recordkeeping requirements.

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 76 as follows:

**PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE**

1. The authority citation for part 76 continues to read as follows:

**Authority:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.56 is amended by revising paragraph (d)(5) to read as follows:

**§ 76.56 Signal carriage obligations.**

\* \* \* \* \*  
(d) \* \* \*

(5) The requirements set forth in paragraph (d)(3) of this section shall cease to be effective June 12, 2015, unless the Commission extends the requirements prior to that date.

\* \* \* \* \*

The following pages will not appear in the Code of Federal Regulations.

**Appendix**

**325 Data Analysis for Viewability Sunset**

1. The FCC collects data from cable operators annually on the “Annual Report of Cable Systems” also called “Form 325.” Through this form, the FCC collects basic operational information from cable television systems nationwide, including data about their architecture, capacity and number of subscribers. Each year the FCC designates a sample of cable systems having fewer than 20,000 subscribers and all systems having 20,000 or more subscribers to file Form 325. Staff performed an analysis of the Form 325 data from the 2010 filing year for use in the viewability proceeding.

**Must Carry/Retransmission Consent**

2. Filers of Form 325 report information on the channels carried, including for broadcast channels whether the channel is carried pursuant to a must-carry designation or a retransmission consent agreement. Staff analyzed the 2010 filings and found that approximately 780 of 2000 full-service and low-power stations elected or defaulted to must carry.

3. To make this approximation, staff first extracted from the Form 325 database all

records where a cable operator marked a channel as either retransmission-consent or must-carry. A single broadcast station often has multiple entries on the Form 325 if the operator carried multiple versions to comply with the viewability requirements or if the operator chose to carry multicast streams of a single station. For example, WXXX-TV was reported 92 times by 25 cable systems with 7 different spellings.

WXXX  
WXXX WEATHER NOW  
WXXX 7  
WXXX-TV  
WXXX WEATHER  
WXXX HD  
WXXX RETRO TV NETWORK

4. Next, the staff reduced the number of entries per cable system to one by considering that if at any one of those entries was marked as must-carry, then that station was must-carry on that cable system. The dataset for WXXX was then reduced to one report for each of the 25 cable systems. If any one of the entries for a cable system was marked as must-carry, the report for that cable system was must-carry.

5. Due to either different elections on different cable systems or accidental misreporting by cable operators, many stations had a mixture of must-carry and retransmission-consent reports.

|            | Must-Carry | Retransmission-Consent |
|------------|------------|------------------------|
| WXXX ..... | 2          | 23                     |

6. The staff aggregated the reports, and if operators reported a station as must-carry as or more often as operators reported that station as retransmission-consent, the staff considered that station to prefer must-carry. In this case, the majority of cable systems reports retransmission consent, so WXXX was assigned a single preference:

| WXXX ..... | Retransmission-Consent |
|------------|------------------------|
|            |                        |

7. The process was repeated for each of the approximately 2000 broadcast stations listed in the 325 reports. In the event of an equal number of systems reporting must-carry and retransmission consent, the station was considered to have chosen must-carry.

**Subscribers Served by Hybrid Cable Systems**

8. Staff analyzed the “number of digital channels activated” and “number of analog channels activated” data fields in the Form 325 reports from filing year 2010. A hybrid system has at least one activated analog channel and at least one activated digital channel. As the Form 325 is collected by a sample of cable systems, staff performed the below analysis to determine that 56.8 million of the 62 million cable subscribers are on hybrid systems.

9. Of the 565 systems that reported more than 20,000 subscribers, 542 were hybrid systems, with those systems serving 46.6 million subscribers. No scaling factor was necessary as reports must be filed by all systems with more than 20,000 subscribers.

10. Of the 249 systems that reported between 5,000 and 20,000 subscribers, 233 were hybrid systems serving 2.7 million subscribers. A representative sample of systems with between 5,000 and 20,000 is asked to file reports each year. Based on previous years’ Form 325 reports and other research, staff estimated that there are 451 such systems in total. When the data was extrapolated, staff estimated that 422 of the 451 systems are hybrid. Thus, the 2.7 million subscribers were scaled by a multiple of (422/233), yielding an estimated total of 4.9 million subscribers.

11. Of the 154 systems that reported fewer than 5000 subscribers, 91 were hybrid systems serving 184 thousand subscribers. A representative sample of systems with fewer than 5000 subscribers is asked to file reports each year. Based on previous years’ Form 325 reports and other research, staff estimated that there are 4450 such systems in total. When the data was extrapolated, staff estimated that 2630 of the 4450 systems are hybrid. When scaled by a multiple of (2630/91), staff estimated that there are a total of 5.3 million subscribers served by these systems.

12. Staff summed the total number of subscribers served by hybrid systems and came up with a result of 56.8 million such subscribers (46.6 million + 4.9 million + 5.3 million).

Staff used a similar process as described above to estimate the total number of cable subscribers in the U.S. as approximately 62 million. This total is close to other publicly available estimates of cable subscribers.

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