

cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 16, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 49

Environmental protection, Administrative practice and procedure, Air pollution control, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: September 22, 2008.

Michelle Pirzadeh,

Acting Regional Administrator, Region 10.

■ Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 49—[AMENDED]

■ 1. The authority citation for part 49 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart M—[Amended]

■ 2. Section 49.9930 is amended by adding a note to the end of the section to read as follows:

§ 49.9930 Federally-promulgated regulations and Federal implementation plans.

* * * * *

Note to § 49.9930: EPA entered into a Partial Delegation of Administrative Authority with the Coeur d’Alene Tribe on August 26, 2008 for the rules listed in paragraphs (b), (g), and (i) of this section.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 98–120; FCC 08–193]

Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission addresses the obligations of small cable systems, and grants them an exemption from the material degradation requirement to carry high definition broadcast signals under the Commission’s rules. The Commission holds that cable systems that either have 2,500 or fewer subscribers and are not affiliated with a large cable operator, or have an activated channel capacity of 552 MHz or less, are exempt from the requirement to carry high definition versions of broadcast signals. This exemption will sunset three years after the conclusion of the digital television (DTV) Transition. The Commission notes that the signals of all must-carry stations must continue to be made viewable to all subscribers pursuant to the Commission’s rules.

DATES: Effective November 17, 2008.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, please contact *Lyle Elder*, *Lyle.Elder@fcc.gov* of the Policy Division, Media Bureau, (202) 418–2120, or *Eloise Gore*, *Eloise.Gore@fcc.gov*, of the Media Bureau, (202) 418–7200.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission’s Fourth Report and Order in CS Docket No. 98–120, FCC 08–193, adopted August 20, 2008, and released September 4, 2008. 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).

Summary of the Final Rule

I. Introduction

1. In the *Third Report and Order*, 73 FR 6043, February 1, 2008, and *Third Further Notice of Proposed Rulemaking*, 73 FR 6099, February 1, 2008, we established rules governing the viewability of broadcast signals, retained and reaffirmed the standard governing material degradation of broadcast signals, and sought comment on the effect of these rules on small cable systems, and other issues. In this *Fourth Report and Order*, we address the obligations of small cable systems, and grant them an exemption from the material degradation requirement to carry high definition (HD) broadcast signals under the Commission’s rules, as discussed below.

2. We hold that cable systems that either have 2,500 or fewer subscribers and are not affiliated with a large cable operator, or have an activated channel capacity of 552 MHz or less, are exempt from the requirement to carry high definition versions of broadcast signals for three years following the digital television (DTV) Transition. We emphasize, however, that no exemption from the viewability requirements is necessary; nor, indeed, would it be appropriate. The mandatory carriage rules serve their purpose only when must-carry stations are viewable by all cable subscribers. We therefore remind cable operators that the signals of all must-carry stations must be made viewable to all subscribers pursuant to the Commission’s rules, and acknowledge the continued pledges of cable industry commenters, including the operators of small systems, to ensure viewability.

II. Discussion

3. The Communications Act of 1934, as amended (the “Act”), at section 614(b)(4)(A), requires that cable operators carry broadcast signals “without material degradation,” and, in particular, instructs the Commission to “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.” In 2001, the *First Report and Order*, 66 FR 16533, March 26, 2001, in this docket

established the following requirement to avoid material degradation of digital signals: "A cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer (e.g., non-broadcast cable programming, other broadcast digital program, etc.) carried on the cable system, provided, however, that a broadcast signal delivered in HDTV [i.e., high definition] must be carried in HDTV." The *Third Report and Order* retained and reaffirmed this standard. The Commission also adopted rules requiring that broadcast signals carried pursuant to the must-carry rules be made viewable to all subscribers. In the *Third FNPRM*, we expressed concern about the impact these rules might have on small cable operators, and sought comment on ways to minimize any harms. In particular, we sought comment on a number of proposals offered by cable commenters, including a waiver or revision of the Commission's 2001 decision to require carriage of HD signals in HD. We also asked for comment on "system characteristics" for the purposes of any changes to the rules that came in response to the *Third FNPRM*.

4. Both the National Cable and Telecommunications Association (NCTA) and the American Cable Association (ACA), as well as individual cable operators, filed comments and replies on these questions, along with a number of *ex parte* filings and presentations. Taken together, the cable commenters do not lodge strong objections to the requirement to "provide all subscribers with a viewable signal," but rather ask the Commission to exempt "small systems from any requirement to also provide a digital signal under the FCC's interpretation of the 'no material degradation' provisions of section 614."

5. First, we clarify that our rules do not require cable operators, irrespective of system size, to carry an SD digital version of a broadcast station's signal, in addition to the analog version, to satisfy the material degradation requirement retained in the *Third Report and Order*. This is because both an SD digital version and an analog version of the digital broadcast signal received at the headend should have the same resolution—480i—and thus there should be no perceivable difference between the two versions of the signal. We also reiterate that, for purposes of the Viewability requirements, any cable operator, irrespective of system size, may be required to carry an SD version of a must carry station's signal if there are digital subscribers to the system who

would otherwise be unable to view the analog version of that station's signal. Therefore, cable systems subject to the exemption in this order, which exempts certain cable systems as described herein from carrying broadcast signals in HD or any other digital format, would not be required to carry an HD or an SD version as long as all subscribers can receive and view the downconverted analog signal.

6. Commenters state that, without an exemption from the material degradation rules, "small systems will be forced to absorb or impose significant and unsustainable price increases, or in some instances to shut down altogether." The National Association of Broadcasters and Maximum Service Television (NAB), in a joint comment and joint reply, expressed opposition to this small system exemption. Section 614(b)(4)(A) of the Act directs the Commission to adopt material degradation standards ensuring 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 for any other type of signal."

7. We are persuaded by the comments filed by cable operators that requiring small systems with certain characteristics to carry HD versions of all broadcast television stations' HD signals would not be appropriate. Regarding the question of what system characteristics are appropriate under this exemption, we will first use the technical standard originally adopted for waivers of these rules, and apply the exemption to systems of 552 MHz or less. We will also exempt systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all multichannel video programming distributor (MVPD) customers. The Rural Independent Competitive Alliance (RICA) argues that "pressing uneconomic digital carriage upon small * * * rural systems may well * * * limit access to broadcast signals for rural consumers generally by creating a regime in which the required carriage is too expensive to operate." The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) expresses a similar concern, stating that this could lead to the loss of lower-priced video offerings in many markets, thus reducing consumer choice. Charter Communications, Inc. (Charter), operator of a number of small systems, provides specific examples of systems with very few subscribers, where per-

subscriber upgrade costs would be so high as to make it not worthwhile to continue operating the system. As even NAB and MSTV acknowledge, in some markets there is no local-to-local Direct Broadcast Satellite (DBS) service, so the loss of a small cable system could mean the effective loss of all MVPD service for some customers. Indeed, in some areas, due to poor over-the-air reception, loss of a small cable system could mean loss of any access to some or all broadcast signals as well. The Commission will review these exemptions between February 18, 2011 and February 17, 2012, and they will expire at the conclusion of that period if not renewed. We note that as with all Commission rules, systems that do not fall within either of these exemption categories may still file for individual waivers. We will expedite the review process for cable operators that are requesting a waiver for systems with 5,000 or fewer subscribers, which could require shortening the comment and reply period to 10 days for comment and 5 days for reply, so that the Bureau will resolve the request no later than 30 days after it is received by the commission.

8. Cable commenters, including NCTA, argue that because all must-carry stations will remain viewable and available to all cable subscribers even after the grant of a material degradation exemption, any harm to broadcasters will be less than the harm that would be suffered by small cable system operators if these exemptions were not granted. This argument is not directly contradicted by NAB and MSTV.

9. ACA proposed also looking to the number of subscribers served by a system to determine the scope of the exemption. Based on the record in this proceeding, we find that for some systems with a small number of subscribers, the cost of mandatory HD carriage warrants an exemption from compliance. Therefore, we will also exempt systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all multichannel video programming distributor (MVPD) customers. In systems with 2,500 or fewer subscribers, the cost-per-subscriber could be significant, even if costs were borne in part by analog subscribers (who would receive no direct benefit from the HD carriage). We recognize, however, that small cable systems may be part of larger, multiple-cable-system, networks. This potentially allows even very high costs to be spread over large numbers of subscribers, easing the upgrade cost burden even in systems with small numbers of subscribers. Therefore, we

exclude from this exemption any system affiliated with a cable operator serving more than 10% of all multichannel video programming distributor (MVPD) subscribers.

10. In their comments to the *Second FNPRM*, 72 FR 31244, June 6, 2007, ACA proposed that must-carry broadcasters should be required to pay the cost of downconverting their signals for carriage in analog. The Commission declined to adopt this proposal for all cable operators, noting that “post-transition downconversion will be undertaken by operators, at their discretion, in order to comply with the Act.” We raised this issue for comment in the *Third FNPRM*, asking whether must-carry stations should be required to pay the costs associated with downconversion by small cable operators in particular. No commenters supported this proposal, and we decline to adopt it.

11. The exemptions adopted in this Fourth Report and Order shall be in force for three years from the date of the digital transition, subject to review by the Commission during the last year of this period (i.e., between February 2011 and February 2012). In light of the numerous issues associated with the transition, it is important to retain flexibility as we deal with emerging concerns. 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 disruption to consumers, and the state of technology and the marketplace. Additionally, providing a window of time to phase in new technology gives systems a clear opportunity to come into compliance with the rules by spreading their effort and costs over an extended period.

12. In conclusion, we are granting relief 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 channel capacity of 552 MHz or less, from the requirement to carry HD versions of broadcast signals. The Commission will review these material degradation exemptions simultaneously with the viewability rules adopted in the *Viewability Order*, and they will expire on February 17, 2012 if not renewed. All operators must continue to ensure that every subscriber to a cable system is able to view every must-carry signal, by downconverting it if necessary and carrying it in a format or formats that can be viewed by all subscribers. We find that the record in this case supports the cable commenters’ suggestion that this exemption will best ensure the

continued viability and competitiveness of small cable systems in markets throughout the country, thereby ensuring the broadest possible cable carriage after the transition.

III. Procedural Matters

A. Final Regulatory Flexibility Act Analysis

13. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Third Further Notice of Proposed Rulemaking (Third FNPRM)*. The Commission sought written public comment on the proposals in the *Third FNPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

1. Need for, and Objectives of, the Fourth Report and Order

This *Fourth Report and Order* exempts certain cable systems from the material degradation requirement to carry HD versions of HD broadcast signals that was reaffirmed in the *Third Report and Order*. We are granting relief 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 Commission will review these material degradation exemptions simultaneously with the viewability rules adopted in the *Viewability Order* (i.e., between February 18, 2011 and February 17, 2012), and they will expire on February 17, 2012 if not renewed. All operators must continue to ensure that every subscriber to a cable system is able to view every must-carry signal, by downconverting it if necessary and carrying it in a format or formats that can be viewed by all subscribers.

2. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

14. No comments were filed in response to the IRFA.

3. Description and Estimate of the Number of Small Entities to Which the Report and Order Will Apply

15. 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 rules adopted herein. The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has

the same meaning as the term “small business concern” under the Small Business Act. 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”). The decision of the Commission in this *Fourth Report and Order* primarily affects cable operators and television stations. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

16. *Cable Television Distribution Services*. 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.” The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having \$13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million. Thus, the majority of these firms can be considered small.

17. *Cable Companies and Systems*. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rate regulation rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission’s rate regulation rules, a “small system” is a cable system serving 15,000 or fewer subscribers. 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. Thus, under this rate regulation size standard, most cable systems are small.

18. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a separate size standard for small cable system operators with respect to rate regulation requirements, 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.” 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. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this rate regulation size standard. 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, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

19. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.” The SBA has created the following small business size standard for Television Broadcasting firms: Those having \$14 million or less in annual receipts. The Commission has estimated the number of licensed commercial television stations to be 1,379. In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) had revenues of \$13 million or less. We therefore estimate that the majority of commercial television broadcasters are small entities.

20. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations 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. 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 does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

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

21. So long as cable operators already maintain accurate business and technical records that would allow them to determine whether or not they fall within one of the two exemption classes, the *Fourth Report and Order* creates no additional reporting, recordkeeping, or compliance requirements for small cable operators. Small broadcast stations will also be affected by the rules in the *Fourth Report and Order*, but we do not have any reason to expect that the compliance burden will be any greater than under the prior rules.

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

22. 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.

23. Because the requirements in this Order are in the manner of an exemption from existing cable rules, they do not impose a negative economic impact on any small cable operators, and provide a positive economic impact to any operator that operates a system that is exempted. Although we sought comment on whether there was a specific legal basis for affording relief to small cable operators, we have declined to adopt exemptions based on such grounds. Instead, we extend the

exemptions to specific cable systems with certain characteristics. Many of these systems are owned by small entities, who, as noted, will receive positive economic impact from the exemptions. The rules do not impose any significant burdens on small television stations.

B. Report to Congress

24. The Commission will send a copy of the *Fourth Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Fourth Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Fourth Report and Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

C. Paperwork Reduction Act of 1995 Analysis

25. The *Fourth Report and Order* has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA). 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).

D. Congressional Review Act

26. The Commission will include a copy of this *Fourth Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

E. Additional Information

27. For more information on this *Fourth Report and Order*, please contact Lyle Elder, Lyle.Elder@fcc.gov, of the Media Bureau, Policy Division, 202–418–2120, or Eloise Gore, Eloise.Gore@fcc.gov, of the Media Bureau, 202–418–7200.

IV. Ordering Clauses

28. Accordingly, *it is ordered*, that, pursuant to authority found in sections 4(i), 4(j), 303(r), 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), 534, and 535, and § 1.3 of the Commission’s rules, 47 CFR 1.3, this *Fourth Report and Order* is hereby adopted and shall become effective November 17, 2008.

29. *It is further ordered* that cable systems with (1) 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10% of all MVPD subscribers, or (2) an activated channel capacity of 552 MHz or less, are exempt, from February 18, 2009 through February 17, 2012, from the requirement, under 47 CFR 76.62, to carry high definition versions of broadcast stations' signals.

30. *It is further ordered* that the Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Fourth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

31. *It is further ordered* that the Commission shall send a copy of this *Fourth Report and Order* in a report to be sent to Congress and the General

Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Cable television.
Federal Communications Commission.
Marlene H. Dortch,
Secretary.
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