

FCC Announces Sunset of Viewability Rule

June 12, 2012

On June 12, 2012, the Federal Communications Commission (FCC or Commission) released a Fifth Report and Order (Order) announcing that the so-called "Viewability Rule," which mandates that cable operators with hybrid systems carry digital must-carry signals in an analog format for the benefit of analog-service customers, will sunset following a six-month transition period. As of December 12, 2012, cable operators will have additional flexibility in complying with the statutory mandate that must-carry television signals be viewable by all cable subscribers. In addition, the Commission extended the high-definition (HD) carriage exemption for eligible small cable system operators.

The Communications Act provides that must-carry television 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." As part of broadcasters' transition to digital television and consistent with the terms of the statute, the FCC in 2007 adopted rules to ensure that after the broadcast Digital Television (DTV) transition, analog cable subscribers would continue to be able to view must-carry broadcast stations. Cable systems had two options to comply with the rule: (1) for non-digital or "hybrid" systems, carry the signals of must-carry stations in analog format to all analog cable subscribers in addition to any digital version carried; or (2) for all-digital systems, carry the signals of must-carry stations only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast content. In implementing the Viewability Rule, the Commission rejected a plan that would allow hybrid cable systems to offer equipment to analog customers so that they would be able to view digital broadcast signals, reasoning that a compliance option that involved additional subscriber equipment

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would be inconsistent with the statutory mandate. The Viewability Rule was put in place for three years, with the proviso that the Commission would assess its continued necessity before it was scheduled to sunset on June 12, 2012.

Citing technological and marketplace changes, the Commission will allow the rule to sunset and permit hybrid-system cable operators to comply with the statutory viewability requirement by either: (1) continuing to down-convert digital must-carry stations to analog format or (2) offering equipment for sale or lease "for free or at an affordable cost that does not substantially deter use of the equipment." According to the Order, "affordable" means subscribers would be able to obtain downconversion equipment for no more than a two dollar per month fee. In support of its decision, the Commission emphasized that the number of analog-only cable subscribers has decreased since 2007 and that low-functionality/low-cost digital conversion equipment is now available.

Pursuant to the Order, the new compliance options will take effect after December 12, 2012. The six-month transition period, the Order states, will allow cable operators to (1) acquire an adequate supply of equipment and (2) provide adequate notice to broadcasters and customers about changes in carriage and service as well as new equipment needs. The Commission notes that cable operators have committed to provide broadcasters with ninety (90) days notice before dropping analog signals. The Order did note that if no- or low-cost equipment was unavailable to a particular cable operator, that operator must continue analog carriage of must-carry stations.

In deciding to allow the rule to sunset and to sanction an equipment-based compliance solution, the Commission revised its 2007 statutory interpretation, stating that "[n]othing in the language of the statute plainly prohibits cable operators from offering equipment to satisfy the viewability requirement." The Order noted that "[t]he Commission did not make the viewability rule permanent," that its new statutory interpretation "hinges on a cable operator making equipment available at no cost or an affordable cost."

The Order also rejected claims made by broadcasters that the *NPRM* did not provide proper notice that the rule would not be renewed for three years, stating that "there was nothing new" about proposals by cable operators to satisfy the viewability requirement by providing the necessary equipment. In addition, the FCC was not persuaded by arguments that expiration of the Viewability Rule would threaten the viability of must-carry stations. The Commission held that no- or low-cost equipment would ensure customer access to these channels on the same basic tier and elimination of the Viewability Rule would benefit cable operators by providing flexibility to meet consumer demand for increased HD and high-speed broadband.

The Order underscored that the statutory Viewability Rule remains in effect. If a must-carry station believes a cable operator has failed to meet its viewability obligations, it may file a complaint under FCC rules. The Order also cautioned that if the Commission receives a significant number of "well-founded" consumer complaints, the agency may mandate that a cable operator resume analog carriage of a must-carry station.

The Act also requires that HD broadcast signals be carried to viewers in HD. The Commission afforded small cable systems with 2,500 or fewer subscribers that are not affiliated with a cable operator serving more than 10 percent of all multichannel video programming distributor (MVPD) subscribers, and those with an activated channel capacity of 552 MHz or less an exemption from the HD carriage requirement. Specifically, the exemption allows such systems to carry broadcast signals in standard-definition (SD) digital and/or analog format. The Commission will extend that HD carriage exemption for three years. Notably, the FCC declined to further restrict the exemption for small systems by eliminating it for systems that carry any signal in HD.