



December 3, 2007

## MEMORANDUM TO CLIENTS

### Re: FCC Releases Text of “Dual Carriage” Order, Solicits Additional Comment

The FCC has released the text of the “dual carriage” rulemaking order adopted at its September meeting. The order requires cable operators to ensure that, following the February 17, 2009 digital transition deadline, all local must carry broadcast stations are “viewable” by all subscribers, either by providing customers with both a digital and downconverted analog version of such stations (and in some instances also providing a standard definition digital signal) or by deploying an “all-digital” system platform prior to the February 17, 2009 deadline. While the text of the order clarifies certain aspects of the post-digital transition carriage obligations, it also raises several questions for which the FCC is requesting additional comment.

**Background.** Section 614(b)(7) of the 1992 Cable Act provides that local must carry signals “must be provided to every subscriber of a cable system” and “shall be viewable via cable on all television receivers” connected to a cable system. The Act also provides that cable operators must carry the signals of local broadcast signals “without material degradation.” Earlier this year, the FCC commenced a rulemaking proceeding to consider how these provisions should be applied to the carriage of digital broadcast signals following the February 17, 2009 digital transition deadline. The FCC originally proposed to require cable operators to satisfy the “no material degradation” standard by retransmitting all of the “bits” transmitted by a broadcaster. This approach, which would have restricted the ability of cable operators to employ compression techniques to conserve bandwidth, represented a significant revision of the FCC’s current material degradation rule, which employs a more subjective approach and requires only that broadcast signals be provided at no less quality than the system’s non-broadcast channels. The FCC also proposed requiring that cable operators carry both the broadcaster’s digital signal and a downconverted analog version of the signal in order to ensure that all subscribers can view local broadcast signals following the digital transition.

**Material Degradation Rule.** After considering the comments filed in response to its rulemaking notice, the FCC retreated from its proposal to adopt an objective “all bits” standard for assessing whether a cable operator is engaging in material degradation of a local broadcast signal. Instead, the FCC reaffirmed its existing “nondiscrimination” approach, under which cable operators are required to deliver local commercial broadcast stations with no less than the same quality of signal processing and carriage that is provided by the system for any other signal (broadcast or non-broadcast). Local non-commercial stations must be provided with bandwidth and technical capacity equivalent to that provided commercial stations.

The FCC further reconfirmed that local broadcast stations that transmit a high definition picture must be carried by the cable operator in high definition. There apparently is one exception to this requirement: a system that is “all-analog” can continue to deliver analog versions of local stations without also carrying a digital version. (Of course, such systems are increasingly rare given the competitive pressures to provide some digital service).

Lastly, the FCC clarified that it is not material degradation for a cable operator that otherwise is complying with the non-degradation rule to provide an additional downconverted analog version of a local signal. It should be noted that the FCC left unresolved the issue of whether its post-transition material degradation rule applies only to stations that have elected must carry or to all local signals (i.e., both must carry and retransmission consent signals). The FCC is seeking comment on this issue in its further notice of proposed rulemaking released simultaneously with the order.

**“Dual Carriage” (or “Viewability”) Rule.** As noted above, the Cable Act requires that local must carry stations be provided to all subscribers and be “viewable” on all receivers connected to the cable system. The statute also provides that this requirement does not apply where a cable operator authorizes subscribers to install “additional receiver connections” but does not provide the subscriber with such connections or with the equipment and materials needed for such connections.

In response to the FCC’s proposal to require that cable operators provide both digital and downconverted analog versions of local must carry signals in order to ensure that such signals are viewable on all sets, the cable industry argued that requiring cable operators to carry a broadcaster’s signal in both digital and analog formats would violate the First and Fifth Amendments to the Constitution. Cable operators also argued that the Cable Act’s viewability requirement merely obligates an operator to provide notice to subscribers with analog receiving equipment that if they do not obtain the necessary digital-to-analog converter, they may not be able to view all of the must carry signals being retransmitted and to offer to lease such a converter.

The FCC rejected all of these arguments and adopted rules that require cable systems that are not “all-digital” to provide both digital and downconverted analog versions of local must carry signals (and, in some instances, a downconverted standard definition digital version as well). The FCC rejected the industry’s claims that such a rule imposed a mandatory dual carriage requirement; according the FCC, the new rules give cable operators the choice of either providing all-digital service (in which case there is no downconversion requirement) or to continue to provide mixed digital-analog service, in which case compliance with the statutory viewability requirement requires that the signal be provided in formats matching the receiving capabilities of the system’s subscribers. The FCC also found that the downconversion requirement did not constitute a “taking” under the Fifth Amendment because the transmission of bits of data over a cable operator’s bandwidth did not involve a permanent physical occupation of the cable operator’s physical property (which the FCC narrowly defined as the operator’s headend equipment). As for the industry’s statutory argument, the FCC found that the exception

to the viewability requirement cited applies only to “additional” receiver connections and that cable operators must ensure that all subscribers can view all local must carry stations on at least one television set.

Key details of the rules adopted by the FCC are as follows:

*Mixed digital-analog systems.* First, with respect to systems that have not converted to all-digital (i.e., the system is still retransmitting some analog signals), the cable operator must carry local digital must carry signals not only in digital format with no material degradation, but also must provide a downconverted version of those signals that can be received by a subscriber with an analog tuner. Moreover, to the extent that a system offers subscribers equipment that is capable of receiving standard definition digital signals but cannot receive high definition signals or analog signals, the system must also provide a standard definition digital version of the high definition broadcast signal that is viewable by that subscriber. (If the operator’s standard digital customers are provided “hybrid analog/standard digital” boxes capable of receiving an analog signal, the downconversion of high definition signals to analog will satisfy the operator’s obligation with respect to those customers).

*All-digital systems.* Second, systems that have converted to all-digital are not required to continue to provide a version of local must carry signals that can be received via an analog tuner. Rather, these systems only have to retransmit the broadcaster’s digital signal, since all subscribers will be capable of receiving that signal. In theory, even systems that are “all-digital” may have to provide local broadcast signals in both high definition and downconverted standard definition if the equipment provided to customers cannot automatically downconvert high definition digital signals to standard definition for subscribers without high definition equipment.

*Scope of rule and sunset provision.* The FCC made clear that the “dual carriage” obligation for mixed digital-analog systems applies (1) to local stations that elect must carry, not to stations that elect retransmission consent (which can be carried in any manner that comports with the private agreement between the station and cable operator) and (2) regardless of whether the cable operator is subject to effective competition (and thus exempt from rate regulation). Additionally, the FCC specified that the dual carriage requirement would sunset three years after the digital transition unless the FCC extends the requirement in a proceeding to be conducted in the year prior to the sunset.

*Application of one-third capacity limitation.* Additionally, in determining whether a system’s carriage obligations exceed one-third of the system’s channel capacity (the cap on a system’s must carry obligations under the Cable Act), the operator that is complying with the dual carriage requirement may count both the digital and analog versions of the same signal against that cap. This calculation is performed by taking the system’s activated capacity in megahertz, dividing it by three, and measuring the result against the number of megahertz used to carry digital and analog versions of local must carry and retransmission consent signals.

*Cost of downconversion.* Another element of the new rules addressed in the FCC's order is the cost of compliance. Specifically, during the pre-transition period, the FCC has held that a digital broadcast station seeking mandatory carriage in analog format must bear the cost of the equipment needed for the cable operator to downconvert the station's signal. However, under the new rules, the post-digital transition cost burden of downconverting a digital signal to analog (or a high definition signal to standard definition) will shift to the cable operator.

*Notice obligations.* Under the FCC's current rules, changes in programming service trigger certain subscriber notification obligations. In addition, cable operators are required to provide equipment compatibility information to subscribers, both at the time of the initial connection and on an annual basis. The FCC's order contains a reminder to cable operators that if they convert to all-digital they must provide advance written notice to subscribers about the switch, including any information that subscribers need or actions that they will have to take in order to continue receiving service.

*Small system relief.* Smaller cable operators argued strenuously that compliance with a dual (or in some instances triple) carriage requirement was beyond their capability and could force them to terminate operations. The order expresses skepticism about the small operators' claims regarding the cost of installing equipment needed to comply with a dual carriage obligation. Nonetheless, the order states that operators of systems with an activated channel capacity of 552 MHz or less that do not have the capacity to carry the additional digital must-carry stations may seek a waiver from the FCC to allow them to continue to provide service in analog. The order offers no additional guidance as to what sort of showing an operator must make to obtain such a waiver. However, as described below, the FCC has included the issue of relief for small operators in a further notice released simultaneously with the order.

**Further Notice of Proposed Rulemaking.** While the FCC's order established the general framework for the cable industry's post-transition must carry obligations, it acknowledged that a number of details remained to be addressed. Consequently, the FCC simultaneously issued a further notice of proposed rulemaking seeking comment on some specific applications of the new rules.

*Small cable operators.* The further notice seeks comments on several issues relating to the post-transition carriage obligations of small cable operators. In particular, the FCC asks for comment regarding the cost of providing high definition service and of format conversion where a signal is downconverted. The notice also seeks comment on (1) whether small operators should be allowed to shift downconversion costs to the broadcast station being downconverted and (2) whether small operators should be allowed to downconvert stations into a single format that can be received by all subscribers (i.e., analog for a system still providing analog service and standard definition digital for all-digital systems). Finally, the FCC notes that there are at least four different approaches to measuring the size of a cable operator and asks which one should be adopted for purposes of any small system relief.

*Channel placement issues.* The Cable Act generally requires that commercial must carry stations be placed on either the station's over-the-air channel number or on a mutually agreeable channel assignment. As applied to digital signals during the pre-transition period, the FCC has found that cable operators can comply by passing through channel mapping information linking the digital channel number with the appropriate video and program-related content. In the further notice, the FCC asks how the channel positioning rules should apply where a cable operator transmits more than one version of a station's signal. The FCC proposes that the analog version be physically located on the appropriate channel as determined by the current rules, and the digital version appear on that same channel for digital subscribers. The FCC also asks whether it will be technically possible for multiple digital versions to appear on the same channel from a subscriber perspective and, if so, whether such a requirement should be adopted.

*Format.* Typically, when a high definition digital signal that is broadcast with a 16:9 aspect ratio is downconverted to analog, the programming must be reformatted to fit the standard 4:3 analog aspect ratio. The further notice asks how downconverted signals should be adjusted (e.g., letterboxing, centering, etc.) and, if reformatting is to be left to the parties, who should make the decision (the broadcaster, the cable operator, or the subscriber).

*Notice.* As noted above, cable operators are required to notify their subscribers prior to converting to all-digital. The further notice requests comment on whether any changes to the existing notice rules are sufficient or whether more specific rules governing such transitions should be adopted.

*Material degradation.* The pre-transition material degradation rules have been held to apply to all local broadcast signals (i.e., must carry and retransmission consent signals). However, the cable industry has argued that the rules applicable to digital signals apply only to must carry stations. The further notice seeks comment on this issue.

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We would be pleased to respond to any questions regarding these matters.

**FLEISCHMAN AND HARDING LLP**