

## Communications Alert

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## FCC Order Permits Sunset of the “Viewability Rule,” Allowing Hybrid Cable Operators More Flexibility in Providing Analog Customers Access to Must-Carry Station Signals

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The FCC has released an Order announcing the sunset of the Commission’s current “viewability” rule, which required cable systems offering both analog and digital cable service (“hybrid systems”) to carry must-carry broadcast stations in both digital and analog format to all subscribers. The viewability rule was set to expire on June 12, 2012, three years after the date of the DTV transition. In the Order, the Commission concurrently instituted a six-month transition period, until December 12, 2012, during which hybrid systems will continue to deliver dual analog and digital feeds of must-carry TV station signals. Separately, the Order extended until 2015 the exemption for eligible small operators with financial or channel capacity constraints from the statutory requirement that must-carry high definition (“HD”) broadcast signals be furnished to viewers in HD (“HD carriage exemption”).

Reversing its 2007 interpretation of what is required to satisfy the statutory viewability mandate, the Commission reasoned that marketplace and technological changes over the last half-decade now provide alternative, less restrictive means by which must-carry television signals can be made viewable to analog customers who are served by hybrid systems. The Commission also was persuaded by cable operator arguments that elimination of the viewability rule would free up additional capacity to meet accelerating consumer demands for HD cable services and high-speed broadband services. In a statement supporting the Commission’s decision, Commissioner Ajit Pai observed that “[c]able operators present a powerful argument that renewing the viewability mandate on the state of the current record would run afoul of the First Amendment.”

The Commission found that the Communications Act’s viewability requirement can reasonably be met if hybrid cable operators make must-carry broadcast signals accessible to subscribers by offering customers with analog televisions “the necessary equipment for sale or lease, either for free or at an affordable cost that does not substantially deter use of the equipment.” The Order expressly acknowledged the growing prevalence and availability of small, low-cost set-top (STB) boxes known as Digital Transport Adaptors (“DTAs”) that enable analog-only households to view digital signals without having to obtain more costly, full-featured digital STBs.

The Commission observed, however, that monthly DTA lease fees that are “materially higher” than a monthly fee of \$2 would not meet the viewability requirement as newly interpreted. According to the Commission, fees in excess of that amount could discourage customer use of the equipment needed to ensure viewability on a hybrid cable system, thereby effectively frustrating analog subscribers’ accessibility to must-carry stations.

The six-month transition period is intended to provide time for hybrid cable operators to comply with existing FCC rules providing for notification to broadcasters and customers about any planned changes in carriage or service. The Commission also noted its reliance on cable operators’ commitment to giving broadcasters a minimum of 90 days’ notice before undertaking any carriage changes, providing repositioned must-carry stations sufficient time to communicate the changes to their viewers. The viewability rule’s sunset does not otherwise affect the must-carry requirements of Section 76.56 of the Commission’s rules.

Lastly, the Order also extended the HD carriage exemption for eligible small cable system operators until June 12, 2015. This exemption allows small operators to carry broadcast signals in standard definition (“SD”) digital and/or analog format—even if the signals are broadcast in HD—as long as all subscribers can receive and view the signal.

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