**Before the**
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**Washington, D.C.**

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|---|---|---|
| Retransmission of Digital Broadcast Signals | ) | Docket No. RM-2005-5 |
| Pursuant to the Cable Statutory License | ) | |

**COMMENTS OF THE**
**NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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## COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association for the cable television industry in the United States. Its members include owners and operators of cable systems serving more than 90 percent of the nation's cable television household, as well as more than 200 program networks. NCTA's members also include suppliers of equipment and service to the cable industry.

## INTRODUCTION

On February 17, 2009, all full power television stations in the United States are scheduled to cease broadcasting analog signals and broadcast exclusively in digital, as required by Congress in the Digital Television and Public Safety Act of 2005.[1] Ensuring a smooth digital transition that causes the least disruption to consumers is one of the nation's highest priorities, requiring a coordinated effort on the part of both industry and government. For its part, the cable industry has been at the forefront of efforts to facilitate and promote the transition by, *inter alia*, voluntarily carrying many broadcast signals in both analog and digital prior to the transition and

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[1] Pub. L. No. 109-171 (2006) at Title III.

by participating in a regulatory compromise under which many operators will continue to provide "dual carriage" after the transition (by downconverting the digital signal to analog).[2]

The Copyright Office's *Notice of Proposed Rulemaking* ("Notice") is a direct outgrowth of the digital transition and of the cable industry's efforts to ensure that the digital transition is, essentially, a non-event for its customers. Specifically, the Notice seeks comment on a variety of issues relating to the reporting and calculation of royalty fees for cable carriage of digital broadcast signals.[3] While the Office's efforts in this regard are undoubtedly well-intentioned, certain proposals contained in the Notice threaten to impede the seamless changeover to digital broadcasting by imposing new transition-related costs on the cable industry and its customers. These costs inevitably will disrupt long-settled consumer expectations with regard to the complement of broadcast signals (local as well as distant) available from their cable operators.

To be sure, given the interplay between copyright royalties and FCC rules, the transition to digital brings with it the need to interpret how existing copyright compulsory license principles apply. But in some instances, the Office's proposals involve the creation of entirely new rules and new theories of royalty payments that adversely impact viewers' continued receipt of certain broadcast stations simply because of the transition of broadcasting from analog to digital. As discussed below, the overriding goal of the Copyright Office, we submit, should be to adopt rules and policies that facilitate a smooth transition to digital by preserving the status quo to the greatest extent possible.

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[2] Ted Hearn, "FCC: Dual Carriage Plan Will Last Three Years," *Multichannel News*, Sept. 17, 2007, available online at http://www.multichannel.com/article/CA6478706.html.

[3] *Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License*, 73 Fed. Reg. 31399 (June 2, 2008).

## DISCUSSION

### I. THE OFFICE SHOULD NOT REQUIRE OPERATORS TO TREAT EACH DISTANT DIGITAL MULTICAST SIGNAL AS AN INDIVIDUAL DIGITAL STATION FOR COPYRIGHT PURPOSES

#### A. The Office Correctly Decided that Double Payment Should Not Be Required for Carriage of Simulcast Distant Stations

Several scenarios arise with respect to the carriage of distant digital signals both before and after the transition deadline. Prior to that deadline, cable operators may choose to carry duplicative digital and analog signals from the same distant station for which the operator already is paying royalties. After February 17, 2009, when broadcasters cease transmitting an analog signal, cable operators may choose to carry a distant digital signal and change its format into analog. We agree with the Office's common sense interpretation of the Copyright Act to allow cable operators, in both of these scenarios, to pay only once for such carriage.[4] These interpretations are consistent with NCTA's Comments on the Notice of Inquiry ("NOI") in this proceeding, which demonstrated that the language of Section 111 does not require operators to pay twice when they retransmit the same programming using two different transmission technologies or when they provide the same signal in more than one format.[5]

#### B. Additional Royalties Should Not Be Assessed for Multicast Digital Carriage

The Notice also identifies a less common occurrence, where a cable operator may choose to import one or more multicast streams from a distant broadcast station in addition to the station's primary digital signal. The Office proposes to require that each multicast stream be treated as a separate DSE so that "a cable operator must pay royalties on each retransmitted

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[4] *Id.* at 31405, 31410.

[5] Comments of the National Cable & Telecommunications Association (filed Nov. 6, 2006) at 4-7.

distant digital multicast stream carrying different programming from the channel line-up on other streams."[6] Sound principles of statutory interpretation compel a different result, one that would not require additional payments for carriage of additional streams of programming when an operator already pays to carry that distant signal. NCTA's NOI Comments demonstrated that Section 111 does not provide for multiple royalty payments for carriage of a single station; showed that the Act does not provide a mechanism for assigning additional "distant signal equivalent" ("DSE") values in such case; and urged the Office to refrain from doing so without explicit statutory authority.[7]

The Office acknowledges that NCTA's interpretation is "reasonable."[8] Nonetheless, it has rejected NCTA's approach, citing an unexplained, undocumented risk of "regulatory chaos" and enunciating a new principle that stacks the deck against copyright users and viewers by equating as the "most reasonable" interpretation of Section 111 the "one that best compensates copyright holders for the public performance of their works."[9] But Section 111 nowhere suggests that Congress regarded the interest of the copyright holders in maximizing their revenues as paramount. Rather, as the Supreme Court has made clear, Section 111 reflects a balance of interests:

> In devising [the cable compulsory license], Congress has clearly sought to further the important public purposes framed in the Copyright Clause, U.S. Const., Art. I, § 8, cl. 8, of rewarding the creators of copyrighted works and of "promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnote omitted); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 428-429 (1984). Compulsory licensing not only protects the commercial value of copyrighted works but also enhances the ability of cable systems to retransmit such programs carried on

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[6] Notice at 31405.

[7] NCTA NOI Comments at 6.

[8] Notice at 31405.

[9] *Id*.

> distant broadcast signals, thereby *allowing the public to benefit by the wider dissemination of works carried on television broadcast signals*.[10]

Moreover, in other contexts, the Office has found that that action by Congress is necessary to address anomalies in the application of the compulsory license to changed conditions.[11] While NCTA has not always agreed with the Copyright Office's decisions as to when the Office can – or cannot – interpret the Act in a way to advance common sense policy goals, it is incumbent on the Office to demonstrate a modicum of consistency in this regard. Here, where the Act is understandably silent with respect to multicasting (a concept unknown in 1976) and where the Office itself has conceded that its proposed regulatory "fix" requires a "strained reading of the statutory definition of DSE,"[12] the Office should not adopt a rule that imposes additional royalty payments for digital multicasts. Rather, the Office should limit itself to recommending that Congress address the issue – a step that the Office has indeed already taken.[13]

### C. The Office Should Not Treat Multicast Digital Streams Differently from the Primary Digital Stream.

The Office's interpretation of the Act to require cable operators to treat a broadcaster's digital multicast streams as separate signals for which additional payments must be calculated unavoidably presents issues regarding what royalty rate should apply to retransmissions of those streams. Having teed up these issues, the Office addresses them by making various assumptions about how the Federal Communications Commission ("FCC") would have treated multicast signals, if only they had been in existence at the time that certain now-defunct distant signal rules

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[10] *Capital Cities Cable v. Crisp*, 467 U.S. 691, 710-711 (U.S. 1984) (emphasis supplied).

[11] *See, e.g.*, *Definition of Cable System*, 73 Fed. Reg. 25627 (Dec. 12, 2007).

[12] United States Copyright Office, Satellite Home Viewer Extension and Reauthorization Act § 109 Report (rel. June 30, 2008) at page 111.

[13] *Id.*

were in effect. In particular, the Office proposes to require that each multicast stream be evaluated separately from the broadcaster's primary signal under the relevant FCC rules to determine for copyright purposes whether that stream should be deemed: (1) "permitted" or "non-permitted,"[14] (2) "significantly viewed" or not "significantly viewed,"[15] or (3) "grandfathered" or not-grandfathered.[16] The Office's approach is indefensible.

### 1. Permitted/Non-Permitted Status

With respect to the permitted/non-permitted designation, the Notice fails to justify why an operator should be required to pay the penalty rate for retransmitting the multicast stream(s) of a broadcast station whose primary stream qualifies as a permitted signal. The FCC market quota rules, used to determine whether the penalty rate applies, were adopted at a time when there were no multicast signals. It is pure speculation to believe that the FCC would have considered such signals to be outside the bounds of permissible signal importation. In particular, the Notice offers no support for the conclusion that the FCC, faced with the ability of stations, local and distant, to provide multiple streams of programming, would have demanded that operators only carry a single stream from a station that it otherwise was authorized to carry. Indeed, it is equally if not more plausible that the FCC would have allowed proportionate distant signal importation – in other words, if each local station could multicast six signals, it would have increased the amount of distant streams that an operator could import proportionately. It also is at least as plausible that the Copyright Royalty Tribunal would have found it

[14] Notice at 31408-09 (proposing that "each unique multicast stream retransmitted by a cable operator above the FCC market quota limitations as referenced in (or applied pursuant to) Section 111 shall be treated as a separate DSE and subject to the 3.75% fee, assuming no other legitimate basis of permitted carriage applies").

[15] *Id*. at 31408 ("declin[ing] to consider [new multicast streams from a station that had originally been accorded 'significantly viewed ' status] permitted for Section 111 purposes until the time that the FCC makes a determination on this matter").

[16] *Id*. at 31409 ("a new digital multicast stream transmitted by a television station whose analog signal has 'grandfathered' status should not be able to claim the latter's status because it was not in existence prior to March 31, 1972").

inappropriate to apply the 3.75% rate to these non-primary, subsidiary programming streams. There is no Mr. Peabody Wayback machine that can lend credibility to the assumptions in the Notice as to how the FCC or the CRT would have concluded decades ago.

### 2. Significantly Viewed Status.

The Office similarly fails of offer a rational explanation for its proposal not to attribute a broadcast station's significantly viewed status to each of that station's multicasts. For purposes of Section 111, a station that the FCC deems to be "significantly viewed" is considered local (and thus not the basis for additional royalty payments). The Notice acknowledges that the FCC has determined that the public interest is best served by according a broadcast station's digital signal the same significantly viewed status accorded its analog signal. But the Office proposes that such station's non-simulcast digital multicast streams should not "inherit" the significantly viewed status of the station's primary digital stream.[17] The Office's tentative conclusion in this regard is at odds with the FCC's express reasoning in deciding to extend an analog station's significantly viewed status to its digital signal and should be reconsidered.

The significantly viewed standard uses over-the-air viewership as a surrogate of a station's coverage, establishing a presumption that if a station is able to achieve a certain ratings level in a community, it is "local" to that community. In extending significantly viewed status to an analog station's digital "counterpart," the FCC acknowledged this relationship. It noted that "in adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to insure that a station's digital over-the-air coverage would replicate as closely as possible its current over-the-air analog coverage area."[18] While the FCC did not expressly

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[17] *Id*.

[18] *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2642 (2001).

address the significantly-viewed status of multicasts, a station's multicasts have the same coverage as its primary signal, and this is compelling evidence that a station's significantly viewed status adheres to all of its digital streams. As the primary signal goes, so goes the multicast signals. Indeed, the Office itself appears to recognize this point, acknowledging in the Notice that the determination of a station's significantly viewed status is "unaffected by the switch to digital television."[19] Under the circumstances, and in light of the Office's failure to identify any statutory reason for treating signals that are technically identical as different with regard to their local/distant status, the Office should accept the designation of all of an analog significantly viewed station's digital streams as significantly viewed as well.

#### 3. Grandfathered Status.

The Office should also allow cable operators to designate as "grandfathered" any digital signal transmitted by a broadcast station whose analog signal was deemed grandfathered. The Office's narrower approach, under which the grandfathered status of an analog station would not be extended to the station's digital streams, has no support in any decision by the FCC. Where the FCC has not addressed an issue at all, the Office should refrain from creating out of whole cloth suppositions about how the FCC, as a matter of communications policy, would have acted. This particularly is the case where, as here, the Office's proposed approach would result in steep increases in royalties for systems that continue to carry stations whose prior carriage was grandfathered – and therefore exempt from the 3.75% rate.[20]

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[19] Notice at 31408.

[20] The Notice, while not completely clear, appears to draw a distinction between a grandfathered analog station's primary digital signal, which <u>would</u> share the analog station's grandfathered status, and the station's digital multicasts, which would <u>not</u>. The problem with this approach is that in order to carry the grandfathered signal, a cable operator today will need to obtain the station's retransmission consent. And the "price" for that consent could well be a demand that the operator also carry the station's multicast streams. In such circumstances, operators would have no choice, given the crushing burden of paying the 3.75% royalty rate for each stream, to

## II. THE OFFICE SHOULD NOT ELIMINATE A DIGITAL STATION'S SIGNAL STRENGTH AS A CONSIDERATION IN DETERMINING THE STATION'S STATUS FOR PURPOSES OF THE COMPULSORY LICENSE

For many cable operators and their customers, the complement of local and distant signals carried has been well-settled for decades, influenced by FCC signal carriage rules adopted in the 1970s and essentially incorporated into the workings of the compulsory license. As indicated above, reference to these rules is critical in determining whether a station is deemed local or distant for purposes of Section 111 as well as in determining what royalty rate applies to a distant signal. Changing the rules so that signals currently considered "local" are turned into "distant" signals or "permitted" signals are turned into "non-permitted" signals would significantly increase copyright payments and ultimately disrupt channel line-ups and consumer expectations. Yet this is precisely the extreme result that one of the Office's proposals would produce.

Specifically, the past and present FCC rules incorporated into the operation of the compulsory license rely in certain instances on a measure of a station's signal strength – known as the station's "Grade B" contour – to determine whether a station is local or distant, permitted or non-permitted. For example, the Grade B contour was highly relevant under the FCC's rules – and thus remains highly relevant for purposes of the compulsory license – to decide whether a commercial television is local in situations where the cable system is located "outside all television markets."[21] The Grade B contour also played a major role in determining whether certain stations, such as UHF stations, were considered to be "permitted" and therefore is relevant today to whether carriage of such stations is exempt from the 3.75% penalty rate. And,

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abandon carriage of a station that, in all likelihood, the system has been providing to consumers for more than three decades.

[21] *Cable Television Report and Order,* 36 FCC 2d 143, 170 (1972).

in the case of non-commercial educational stations, signal strength has long been a critical element to determine mandatory carriage rights for FCC purposes and local status for copyright purposes.[22]

With the change from analog to digital broadcasting, the terminology for measuring signal strength also has changed. As the Notice points out, "digital signal coverage is defined by 'noise limited service contours,' not Grade B contours."[23] According to the Office, this change in terminology presents a "conundrum" because the "the new DTV contour parameters did not exist in 1976 (like the Grade B contours)" nor are they used by the FCC in the rules referenced in Section 111's definition of a local signal.[24] In order to solve this "conundrum," the Office leaps to propose a radical solution – eliminating altogether reliance on a signal strength standard in determining the status of a broadcast signal for purposes of the compulsory license.

The extreme nature of this proposal is illustrated by its impact on the carriage of non-commercial television stations. Under both the current FCC must carry rules and the version of those rules in effect in 1976, a non-commercial educational station could qualify for mandatory carriage based either on a mileage test <u>or</u> on a signal strength test. The Office's proposal would, with a stroke of the pen, transform into distant signals numerous non-commercial stations have been carried for years as local signals on based on their signal strength measurement.

The approach proposed by the Office is neither necessary nor reasonable. The definition of a station's "local service area" in Section 111(f) is best read to mean that if a station had been

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[22] Under the FCC must carry rules in effect in 1976, non-commercial educational stations were entitled to carriage in communities that were located, in whole or in part, either within the station's 35-mile "specified zone," or within the station's Grade B contour. Under the current must carry rules, non-commercial stations have must carry rights with respect to cable systems whose principal headends are located within 50 miles of the station's reference point or are within the station's Grade B contour.

[23] Notice at 31408.

[24] *Id*.

entitled to mandatory carriage under rules in effect in 1976, it still should be considered local for copyright purposes.[25] As Congress explained, its purpose in including a date in the definition was neither to freeze technological developments nor to affect communications policy, but to ensure that communications policy did not affect royalty payments. The House Report accompanying the 1976 Copyright Act makes plain that the reference in the "local service area" definition to the FCC's rules "in effect on April 15, 1976" was "to insure that any subsequent rule amendments by the FCC that either increase of decrease the size of the local service area for its purposes do not change the definition for copyright purposes. The Committee believes that any such change for copyright purposes, which would materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute."[26] Thus, in proposing to eliminate altogether reliance on signal contours, the Office's proposal runs counter to Congressional intent.

Second, the FCC has repeatedly stated explained that the "noise limited service contour" is the "functional equivalent" the Grade B contour.[27] As discussed above, with respect to the reporting of digital signals (and, in particular multicast signals), the Office has fashioned a complex set of rules based on assumptions fashioned out of whole cloth. Here, there is a long history of using signal strength to determine a signal's status for purposes of Section 111. Under the circumstances, the Office can, and should, take the simple and obvious step of allowing cable

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[25] 17 U.S.C. § 111(f).

[26] H. Rep. No. 94-1476, 94th Cong., 2d Sess. at 99 (emphasis supplied).

[27] *See, e.g.*, *WRNN License Company LLC*, 21 FCC Rcd 5952 (MB, 2006) at ¶ 14 (referring to digital broadcast station's 41 dBu signal as "the functional equivalent of a Grade B signal). *Carriage of Digital Television Broadcast Signals*, supra, 16 FCC Rcd at 2642; *Coxcom Inc.,* 19 FCC Rcd 4509 (MB, 2004) at note 27 (stating that the 41 dBu signal strength contour of a digital television station generally approximates the Grade B contour of the corresponding analog station"). *See also Carriage of Digital Television Broadcast Signals*, *supra*, 16 FCC Rcd at 2642 (FCC sought to insure that a station's digital over-the-air coverage area "would replicate as closely as possible" the station's current analog over-the-air coverage area).

operators to continue to refer to a station's analog Grade B contour to determine the station's status under rules referring to that signal strength measurement or to allow operators to rely on the digital signal strength contour in lieu of the Grade B contour. Given the importance of achieving a seamless digital transition, the one thing that the Office should not do is to adopt a policy that will disrupt longstanding consumer expectations based on what is essentially a change in nomenclature.[28]

## III. THE OFFICE HAS CORRECTLY DECLINED TO PROPOSE NEW RULES REGARDING THE MARKETING OF DIGITAL BROADCAST SIGNALS OR DIGITAL EQUIPMENT CHARGES

The Copyright Office previously has interpreted Section 111 as requiring cable operators to include in their gross receipts the revenues for any tier of service that a subscriber must purchase in order to access a tier which contains broadcast signals.[29] The Notice explains that "our existing policies need not be changed as a result of the digital television transition. A tier is a tier regardless of the type of broadcast signals carried on it. As such a cable operator must include in its gross receipts calculation all sales of services or tiers that must be purchased in order for subscribers to access any type of digital broadcast signals, whether they are duplicative digital broadcast signals or unique multicast signals."[30] We do not dispute that this policy is nothing new. We agree with the Office that there is no need for any new rules in this regard.

NCTA also agrees with the Office that the transition to digital broadcasting does not occasion any need for the adoption of new rules regarding the reporting of equipment revenues.

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[28] As indicated above, adoption of the Office's proposal to eliminate any reliance on signal strength measurements in the application of the compulsory license not only would jeopardize the continued availability of historically "local" signals, but also would convert stations that have consistently been recognized, for both FCC and copyright purposes, as "permitted signals" based on a signal strength measurement rule into "non-permitted signals." This will result in the widespread dropping of these signals.

[29] Notice at 31411.

[30] *Id*. at 31412.

As the Notice indicates, operators must include in the gross receipts used to calculate their royalty payments those fees received for the provision of "converters necessary to receive broadcast signals."[31]

While there is no need for the Office to adopt any new rules, the discussion of the equipment issue in the Notice does merit a few clarifying comments. When the Office first addressed the status of converter fees for purposes of the compulsory license, it specifically focused on the inclusion in gross receipts of the fees charged for converters that a subscriber "must have" in order to receive all of the broadcast signals retransmitted by the cable operator "in usable form."[32] Indeed, the Office expressly acknowledged that the fees charged by operators for other types of devices – those that were not "must have" equipment – did not have to be included in the gross receipts tabulation.[33]

Consequently, the Notice overstates the case when it avers that the availability of alternative means to obtain broadcast signals has no impact on whether to include charges for equipment leased from a cable operator in an operator's gross receipt calculation.[34] A number of factors, including regulatory and technological developments, influence whether a particular device is "must have" for a particular cable subscriber.[35] For example, if a cable operator

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[31] *Id*.

[32] *Compulsory License for Cable Systems*, 43 Fed. Reg. 27827, 27828 (June 27, 1978). Under Section 111(d), a cable operator is required to report its gross receipts "for the basic service of providing secondary transmissions of primary transmitters." Neither the Act nor its legislative history specifically provides for the inclusion of converter revenues in an operator's gross receipts; rather, the legislative history indicates that "only" the revenues from an operator's "basic" retransmission service are to be included. H. Rep. No. 94-1476, 94th Cong., 2d Sess. at 96 (1976).

[33] 43 Fed. Reg. at 28828.

[34] Notice at 31413.

[35] An overly broad approach to inclusion of equipment charges in the royalty charges ignores myriad actions by the federal government since 1976 designed to ensure that cable subscribers can receive retransmitted broadcast signals without having to lease equipment from cable operators. These include the adoption of rules: (i) requiring operators to include broadcast signals (other than a limited universe of superstations) on the lowest-priced tier of service; (ii) prohibiting operators from encrypting the basic tier; (iii) promoting the establishment

delivers broadcast signals using a technology (such a switched digital video or a proprietary encryption system) that requires the subscriber to lease equipment from the cable operator in order to obtain broadcast signals retransmitted by the operator, the fees charged for such equipment should be included in the operator's gross receipts.

On the other hand, neither law nor logic compels the Office's suggestion that a cable operator is obligated to report revenue from equipment leased to subscribers where obtaining the equipment from the cable operator is not a prerequisite to receiving the operator's broadcast signal retransmissions. As the D.C. Circuit recognized in *Cablevision Systems Development Co. v. MPAA*, only those fees that a cable subscriber has to pay to the operator in order to receive basic cable service are reportable as part of the operator's gross receipts for basic cable service.[36]

Nor is there merit to the argument that applying a "necessity" rationale in determining whether equipment fees must be reported logically leads to the omission of subscriber fees because television signals can be received over-the-air. In fact, that example highlights why equipment revenues are <u>not</u> reportable if the cable operator is not the sole source for such equipment: while payment of a subscription fee to a cable operator is always a prerequisite for

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of a retail market for digital cable ready devices by prohibiting the deployment of converters with integrated security; and (iv) requiring dual carriage of analog and digital versions of local broadcast signals after the digital transition

[36] *Cablevision Systems Development Company v. MPAA,* 836 F. 2d 599 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988). The Cablevision case is instructive in two other respects. First, in upholding an FCC ruling that required certain "bundled" fees to be included in gross receipts, the court indicated that the Office's position was bolstered by the fact that its ruling allowed the cable operator to control its own destiny by changing its marketing practices. Here, the Office is suggesting that equipment fees must be included even though the operator has taken every step possible to ensure that consumers have a choice other than to lease the equipment from the operator. *Id*. at 612. Second, the court pointed out that while it was appropriate to include other fees in gross receipts where failing to do so would open the door for the operator to manipulate its gross revenues by subsidizing service with equipment charges (*i.e*., charging $2 for basic service and then forcing subscribers to pay $19 for a required "buy through" service, no such manipulation can occur where subscribers have the option not to pay the other fee to the cable operator. *Id*. at 614-16. Equipment capable of receiving a cable operator's retransmissions of broadcast signals is widely available both on-line and from brick and mortar retail outlets and a cable operator cannot under price cable service and hope to recover its losses through higher equipment charges where the consumer has the option of going elsewhere to obtain the necessary equipment.

obtaining that operator's broadcast signal retransmissions, it is virtually never a requirement that the operator be paid for equipment in order to receive those retransmissions.

Thus, for example, insofar as a cable operator delivers broadcast signals "in the clear," fees received for CableCARDs are not to be included in the operator's gross receipts calculation. This is because the function of a CableCARD is to decrpyt encrypted signals, and "in the clear" signals don't need to be decrypted. A subscriber with a CableCARD-enabled device can receive broadcast signals that are retransmitted in the clear whether or not the device is actually used with a CableCARD. Indeed, the FCC's rules expressly require disclosure of the fact that a "digital cable ready" device (*i.e.*, a CableCARD-enabled product) is "capable of receiving" analog and digital basic programming by "direct connection" to a cable system providing such programming and that a "security card provided by your cable operator <u>is required to view encrypted</u> programming."[37]

[37] 47 C.F.R. § 15.123(d) (emphasis supplied).

## CONCLUSION

While the Office pays lip service to the need to avoid "regulatory chaos," some of its proposed rule changes threaten to cause significant dislocations and disruptions to cable system line-ups and consumer expectations. The need for stability and certainty is paramount as the nation moves into the digital television era. Congress, not the Office, is best suited to address many of the issues raised in the Notice. The Office should only take such steps as are necessary to maintain the status quo.

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