

335.225; 335.241 (except (b)(4) and (d)); 335.241(d), (January 1, 1997); 335.251; 335.261 (except (e)); 335.271; 335.272;

Chapter 335, Subchapter O—Land Disposal Restrictions—335.431; Chapter 335, Subchapter R—Waste Classification—335.504 introductory paragraph—(2); 335.504(3) and (4), (December 31, 1999).

Copies of the Texas regulations that are incorporated by reference are available from West Publishing Company, 620 Opperman Drive, P.O. Box 64526, St. Paul, Minnesota 55164-0526; Phone: 1-800-328-4880; Web site: <http://west.thomson.com>.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 98-120; FCC 08-224]

Carriage of Digital Television Broadcast Signals

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission clarifies a number of existing rules relating to cable carriage of digital signals. As explained, the carriage elections that must be made by October 1, 2008, will determine a station's carriage rights throughout the entire 2009-2011 carriage election cycle. We also clarify the channel placement options applicable to digital must-carry stations, based upon the *First Report and Order* and the statute. Also, for those low-power stations that have the right to demand carriage by cable operators, we clarify that their statutory carriage rights extend to broadcasting in digital.

DATES: Effective October 29, 2008.

ADDRESSES: You may submit comments, identified by FCC 08-224, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site:* <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional

information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

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 Declaratory Ruling in FCC 08-224, adopted September 24, 2008, and released September 26, 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. Pursuant to section 614(b)(4)(B) of the Communications Act of 1934, as amended (the "Act"), the Commission initiated this proceeding in 1998 to address the responsibilities of cable television operators with respect to carriage of digital broadcasters in light of the significant changes to the broadcasting and cable television industries resulting from the Nation's transition to digital television. Now that Congress has established February 17, 2009, as the date certain for the end of analog broadcasts by full-power television licensees, and low-power and class A television licensees are beginning their transition to digital broadcast, we must further clarify the digital carriage responsibilities of cable operators.

2. Specifically, we clarify that the carriage elections that must be made by October 1, 2008, will determine a station's carriage rights throughout the entire 2009-2011 carriage election

cycle. We also clarify the channel placement options applicable to digital must-carry stations, based upon the *First Report and Order*, 66 FR 16533, March 26, 2001, and the statute. Low-power broadcasters, while not required to make their transition to digital by February 17, 2009, nevertheless are doing so in increasing numbers, and will continue to do so of their own volition. For those low-power stations that have the right to demand carriage by cable operators, we clarify that their statutory carriage rights extend to broadcasting in digital.

II. Background

3. Under the Act, cable systems are presumptively required to carry all local television stations in all television markets they serve. Commercial television stations may, however, choose to be carried pursuant to voluntary retransmission consent agreements rather than by mandatory carriage. Generally, every three years commercial television stations must elect to either grant retransmission consent or pursue their mandatory carriage rights. Noncommercial television stations may only elect mandatory carriage, but are nonetheless free to negotiate carriage with cable operators.

4. In this docket, the Commission has determined the broadcast signal carriage responsibilities of cable television operators during and after the transition is completed. The statutory provision triggering this rulemaking is found in section 614(b)(4)(B) of the Act, which states:

5. At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

6. The Notice of Proposed Rulemaking ("1998 NPRM") in this proceeding sought to amend the cable television broadcast signal carriage rules, embodied in must-carry and retransmission consent, to accommodate the carriage of digital broadcast television signals.

7. The Commission's *First Report and Order and Further Notice of Proposed Rulemaking* in this proceeding adopted rules for carriage of digital broadcast signals pursuant to retransmission consent and mandatory carriage when a local television station is broadcasting only a digital signal. The Commission

decided that a commercial television station broadcasting both an analog signal and a digital signal may choose must-carry or retransmission consent for its analog signal and retransmission consent for its digital signal. The Commission acknowledged that the Act does not specifically require mandatory carriage for noncommercial digital television signals, but concluded that Congress did not intend to exclude such signals from mandatory carriage. As an interim measure during the transition, a digital-only television station may demand that one of its video programming streams be carried on the cable system for delivery to subscribers in an analog format.

8. In the *First Report and Order*, the Commission also concluded that the statutory term "primary video" required cable operators to carry only a single digital programming stream of a local digital television station as well as content related to that stream. The Commission further found that section 614(b)(4)(B) of the Act neither requires cable operators to carry nor prohibits them from carrying both the broadcaster's analog and digital signals (*i.e.*, "dual carriage") during the transition period.

9. In February 2005, the Commission issued the *Second Report and Order and First Order on Reconsideration*. Among other things, the *Second Report and Order* declined to require cable operators to carry any more than one programming stream of a digital television station that multicasts. The Commission's actions in the *Second Report and Order* were limited to questions of carriage of multiple signals or streams, however. In September 2007, we adopted the *Third Report and Order and Third Further Notice of Proposed Rulemaking ("Viewability Order")* in order to address two important remaining issues.

10. The *Viewability Order* ensures that all cable TV viewers, including the 98 million analog-only cable TV viewers, retain the same access to their local stations after the transition as they have today. The rules will require cable operators to comply with the statutory viewability requirement by choosing to either: (1) Carry digital signals in analog format, or (2) for all-digital systems, carry the signals only in digital format, provided that all subscribers have the necessary equipment to view the broadcast content. This decision rendered moot the outstanding questions about post-transition carriage of broadcast signals on a "basic tier" under 47 U.S.C. 543(b)(7) (raised in the *First Report and Order*). The requirement that signals carried

pursuant to mandatory carriage be made actually viewable to all subscribers, regardless of their equipment or level of service, means that a cable operator may provide those signals solely in digital so long as all subscribers are capable of receiving and viewing digital signals. If some subscribers can only view analog signals, however, broadcast stations carried pursuant to mandatory carriage must also be made viewable to them. The viewability requirements will be in force from the date of the transition through February 2012, subject to review by the Commission during the last year of this period. The Commission also reaffirmed the existing material degradation standard for cable carriage of digital broadcast signals, prohibiting preferential treatment of cable programmers or retransmission consent stations and reiterating the requirement that cable systems carry high definition ("HD") broadcast signals in HD format.

11. Now, the conclusion of the transition approaches. Therefore, in this Order we explain the carriage election process for stations that will make their final transition from analog signals to digital signals for the February 17, 2009, transition deadline.

12. In addition, although low-power broadcasters are not required to participate in the full-power digital transition, many have chosen to begin their transition. We therefore also take this opportunity to clarify the effect on carriage rights of a voluntary transition to digital by a low-power broadcaster that is qualified for mandatory carriage of its analog signal.

III. Discussion

13. As we approach the deadline for the full-power digital transition, we clarify that the full-power carriage elections that must be made by October 1, 2008, will determine a station's carriage rights throughout the entire 2009–2011 carriage election cycle. Low-power broadcasters, while not required to make their transition to digital by February 17, 2009, nevertheless are doing so in increasing numbers, and will continue to do so of their own volition. For those low-power stations that have the right to demand carriage by cable operators, we clarify that their statutory carriage rights apply to digital broadcasting.

A. Full-Power Carriage Elections

1. Effect of October 1, 2008 Elections

14. The Cable Television Consumer Protection and Competition Act of 1992 established the requirement that "television stations, within one year after the date of enactment of [the Act]

and every three years thereafter, make an election between the right to grant retransmission consent" to cable operators or the right to mandatory carriage by those cable operators. In compliance with this statutory mandate, the Commission established a regular schedule for carriage elections. The election in 1996 covered 1997–1999, the election in 1999 covered 2000–2002, etc. In accordance with this schedule, the Act requires broadcasters to elect, by October 1, 2008, whether they wish to engage in retransmission consent negotiations with cable operators or demand carriage on their systems for the three year period beginning January 1, 2009. Full-power broadcasters may choose to be carried on all of those cable systems in the same DMA to which they can deliver a good quality signal (must-carry), or they may choose to require those cable systems to seek the broadcaster's consent before carrying the signal (retransmission consent). The broadcaster must notify affected cable systems if electing retransmission consent, or the station's status will default to must-carry. 47 CFR 76.64. As noted above, full-power broadcasters will cease all analog broadcasts by midnight on February 17, 2009.

15. We take this opportunity to clarify that the October 1, 2008, election determines carriage of a station's signal for the entire 2009–2011 carriage cycle. The carriage election rule for stations that voluntarily return their analog spectrum allocation and begin operating as digital-only prior to the 2009–2011 carriage cycle in which the DTV transition concludes provides that "stations that return their analog spectrum allocation and broadcast in digital only shall make their initial election any time between 60 days prior to commencing broadcast and 30 days after * * * commencing broadcasting in digital only; such initial election shall take effect 90 days after it is made." 47 CFR 76.64(f)(4). If a station elects must-carry on October 1, 2008, for the 2009–2011 carriage cycle, the cable operator(s) will provide carriage of the station's analog signal beginning (or continuing) on January 1, 2009, and concluding no earlier than the actual termination of analog service by that broadcaster. Once the station terminates analog service and begins broadcasting in digital, the carrier shall commence carriage of the station's digital signal without any gap in carriage. To facilitate carriage and the final transition process, beginning January 1, 2009, cable operators must immediately commence carriage of the digital signal of stations that cease analog broadcasting prior to the

February 17, 2009, statutory deadline; provided, however, that broadcasters must notify the cable operator(s) 30 days before the date on which they anticipate termination of their analog signal if it will be earlier than February 17, 2009.

2. Channel Placement

16. We clarify that the channel placement options in sections 614(b)(6) and 615(g)(5) of the Act, as implemented in § 76.57 of the Commission's Rules, remain in effect after the digital transition. Section 614(b)(6) of the Act generally provides that commercial television stations carried pursuant to the mandatory carriage provision are entitled to be carried on a cable system on the same channel number on which the station broadcasts over-the-air. Under section 615(g)(5) noncommercial television stations generally have the same right. The Act also permits commercial and noncommercial television stations to negotiate a mutually agreeable channel position with the cable operator. Historically, channel positioning has been part of the carriage election process, with must-carry stations choosing from among the statutory options as part of the must-carry election. 47 U.S.C. 534(b)(6), 535(g)(5). There are four channel positioning options in the Act for commercial television stations. The statutory options are "the channel on which it was carried on July 19, 1985," "the channel on which it was carried on January 1, 1992," "the channel number on which the local commercial television station is broadcast over the air", or any alternative channel by mutual agreement. Noncommercial stations may not elect the channel number on which they were carried on January 1, 1992, but otherwise have identical options.

17. As noted above, one of those statutory options is carriage on the broadcast channel number. In digital broadcasting, a broadcast station's channel number is no longer identified by reference to its over-the-air radio frequency. Instead, in compliance with the ATSC standard, the station's "major channel number" is identified in its program and system information protocol ("PSIP"). The Program and System Information Protocol ("PSIP") contains metadata about both the program currently being aired and broadcast signal as a whole. One of the most important elements in the PSIP is the Major Channel Number ("MCN"), the channel "location" identified with a given station regardless of its over-the-air broadcast frequency. ATSC receivers (whether a TV set in a home or a

receiver at a cable headend) can use this data to determine the information that will be displayed to viewers. Therefore, if the analog signal of a station was broadcast on channel 12, its digital signal will appear on channel 12 when tuned by an over-the-air viewer, even if the signal is being broadcast on a frequency corresponding to, for instance, channel 37. See *Program and System Information Protocol for Terrestrial Broadcast and Cable*, ATSC Document A/65 (Dec. 23, 1997). This usually corresponds to the radio frequency at which the station previously broadcast its analog signal. Therefore, in the *First Report and Order*, the Commission required that channel mapping information be passed through as part of the PSIP, linking the digital channel number with the appropriate primary video and program-related content. Thus, the cable operator can identify the correct channel location by reference to the PSIP.

18. We clarify that any station carried pursuant to mandatory carriage may demand carriage on its major channel number as broadcast in the station's PSIP. We also clarify that although the *First Report and Order* did not specifically address the significance of the statutory provisions and rules with respect to the "historic" carriage options, these statutory options remain available to digital must-carry broadcasters, who will make digital channel placement elections pursuant to §§ 76.57(a) or (b) just as they previously have for analog channel placement elections. § 76.57(c), adopted in the *First Report and Order*, should be read as clarifying the manner in which cable operators are to determine the channel number on which a local commercial or qualified NCE station is "broadcast over the air" when implementing such a station's election under §§ 76.57(a) or (b). The statute also permits carriage on "such other channel number as is mutually agreed upon by the station and the cable operator." This negotiated option, as reflected in our Rules, also remains an option. We also note that § 76.57(f) continues to apply to determine where a station must be carried if it makes no affirmative election.

B. Low-Power Carriage Rights

19. NCN Cable Advertising, licensee of WKFK-LP, Pascagoula, Mississippi ("WKFK"), filed a petition for a declaratory ruling that the FCC's cable must-carry rules apply to the digital signals of Class A, LPTV and TV translator stations after those stations flash-cut to digital operation and cease operating their analog signals.

Currently, our Rules provide for cable carriage of low-power stations (including Class A) in specific and limited circumstances. WKFK argues that a clarifying order is necessary to eliminate uncertainty about digital carriage rights for low-power stations. WKFK is not seeking new or additional carriage for low-power stations but rather a confirmation that low-power stations will have the same carriage rights for their digital signals as they currently have for their analog signals. In addition, WKFK wants low-power stations to have the same downconversion option for their digital-only signals as digital-only full-power stations have for their digital signals.

1. Applicability of 76.55(d) to Low-Power Digital Broadcasters

20. Under Section 614(c) of the Act and § 76.56(b)(3) of our Rules, a cable operator is, in some circumstances, required to carry the signal of one or two "qualified low-power stations." Like full-power commercial broadcast stations, low-power stations can earn must-carry status with regard to a specific cable system by conforming to a series of requirements (laid out in section 614(h)(2) of the Act). 47 U.S.C. 534(h)(2). The Commission's Rules implementing this section state that a low-power station becomes qualified for mandatory carriage if the station conforms to the Commission's LPTV rules, broadcasts for at least the minimum number of hours required of commercial broadcast stations by the Commission, and adheres to certain Commission requirements regarding non-entertainment programming and employment. However, an LPTV station will not be qualified unless the Commission determines that the provision of programming by such station would address local news and informational needs not being adequately served by full-power television stations, because such full-power stations are distant from the LPTV station's community of license. In addition, the LPTV station must comply with the Commission's interference regulations for LPTV stations; it must be within 35 miles of the cable system's principal headend and deliver to the headend a good quality over-the-air signal; its community of license and the franchise area of the cable system must both have been located outside of the largest 160 Metropolitan Statistical Areas ("MSAs") on June 30, 1990, and the population of the LPTV station's community of license on that date must not have exceeded 35,000; and there cannot be any full-power television station licensed to any community

within the county or other political subdivision (of a State) served by the cable system. 47 CFR 76.55(d). As noted above, the Commission has previously made clear that Section 614(a) of the Act, which applies to both commercial full-power and low-power stations, “does not distinguish between analog and digital signals and supports the argument that digital signals are entitled to mandatory carriage.” As the Commission stated in 2001, when a broadcast station that is otherwise entitled to carriage terminates its analog signals and operates as a digital-only station, it does not lose its carriage rights. We clarify here that this determination applies equally to full- and low-power stations. The *First Report and Order* determined that, for a “limited time,” digital-only full-power stations could either demand carriage in digital or pay to downconvert their signal to analog for carriage in analog. This interim viewability rule has been in effect since 2001, giving full-power must-carry stations the option to demand analog downconversion in order to make their signals as widely viewable as possible.

21. Although the *First Report and Order* did not specifically address the carriage of digital low-power stations, the Commission did tentatively conclude that, as to commercial full-power stations, low-power stations, and noncommercial educational stations it had “no need to deviate from the existing eligibility requirements for these three categories of stations.” The provisions establishing mandatory carriage of low-power stations, at section 614(h)(2) of the Act, make no distinction between digital and analog low-power stations. Indeed, by their terms these provisions apply to “any television broadcast station” conforming to the Part 74 Rules and the elements of section 614(h)(2). The Commission found in 2001 that simply the absence of a distinction between analog and digital supported mandatory digital carriage, and the stronger wording of section 614(h)(2) is significantly more persuasive. But, because of the growing number of low-power stations broadcasting in digital, and the potential for uncertainty, we see a need to provide additional guidance in this matter. We therefore clarify that qualified low-power digital-only stations should be accorded the carriage rights they could have demanded for their analog signal. The

Communications Act at section 614(b)(7) requires that all stations carried pursuant to mandatory carriage, including low-power stations, be made viewable to all subscribers. Nonetheless, in the period remaining before the full-power DTV transition, we will permit cable operators to carry low-power digital-only stations in the same manner as full-power digital-only stations—in either analog or digital, at the broadcaster’s discretion. Thus, if a qualified low-power station becomes digital-only, it may elect carriage of its signal in digital, or may choose to pay to downconvert the signal for carriage in analog. As of February 18, 2009, all signals carried pursuant to mandatory carriage must again be made viewable to all subscribers.

22. Although the language of the Act and our Rules does not distinguish between analog and digital-only stations, we do find that the Note to § 76.55(d) is no longer fully accurate, as it addresses only the signal strength of analog signals. Just as for commercial full-power stations, the Note currently states that a good quality signal level for analog is – 45 dBm for UHF signals and – 49 dBm for VHF signals. The Cable Act, which established the – 45/– 49 dBm standard for commercial full-power stations, is silent on the definition of “good quality signal” for the purposes of carriage of low-power stations. Acknowledging this, in a *Memorandum Opinion and Order* issued to finalize several questions regarding implementation of the Cable Act, the Commission, on its own motion, adopted the full-power commercial signal quality standards for low-power stations (and noncommercial stations). In the *1998 NPRM*, the Commission asked whether “new good quality signal parameters” were necessary for digital signals, and, consistent with the rules established in 1994, made no distinction among commercial, noncommercial, and low-power stations. In the *First Report and Order*, the Commission established – 61 dBm as the signal level necessary to provide a “good quality digital television signal at a cable system’s principal headend,” again making no distinction among commercial, noncommercial, and low-power stations.

23. In line with the Commission’s consistent practice of aligning the “good quality signal” standards for commercial, noncommercial, and low-

power stations, we find good cause to adopt, on a temporary basis, a digital signal strength requirement for carriage of low-power stations also using – 61 dBm at the cable system headend. WKFK’s Petition makes clear that a delay in resolution of this question could inhibit investment on the part of low-power station owners who seek to transition their stations to digital. As discussed above, there is ample history supporting an alignment of the full-power and low-power standards, and thus no basis on which an industry participant might have reasonably assumed that there would be a distinction between them in digital. Furthermore, the Commission sought comment on what would constitute a “good quality signal” for all digital signals in the *1998 NPRM*, and there is no evidence in the record that would support making any distinction among digital signals from different sources. Thus, pending the adoption of a final amendment to the Note to § 76.55(d), we will permit low-power mandatory-carriage analog stations that begin broadcasting in digital-only to demand carriage of their digital signal so long as they provide a signal strength of at least – 61 dBm to the cable system’s headend.

2. Petition for Declaratory Ruling of WKFK

24. In light of this clarification, we grant WKFK’s request for a declaratory ruling. If WKFK begins broadcasting in digital-only, it will have rights of carriage on the systems on which it may now demand carriage, so long as it provides a signal strength of – 61 dBm at each system’s headend.

IV. Ordering Clauses

25. It is ordered that, pursuant to the authority contained in sections 1, 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 303, 534, and 535, this *Declaratory Order* is adopted.

26. It is further ordered that the Petition for Declaratory Ruling filed by NCN Cable Advertising, licensee of WKFK-LP, Pascagoula, Mississippi, is granted to the extent described herein.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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