

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
DISCUSSION	3
A. There is No Legal or Policy Basis For Imposing Expanded Must Carry Obligations	3
B. The Cable Industry Should Not Bear the Cost of the Broadcast Industry’s ATV Spectrum Flexibility	14
C. The Broadcast ATV Standard Should Not Be Imposed on Cable or Other Distribution Media	17
CONCLUSION	22

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Advanced Television Systems)
and Their Impact Upon the)
Existing Television Broadcast)
Service)

MM Docket No. 87-268

**REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA") hereby submits its reply comments in response to the Commission's Fourth Notice of Proposed Rulemaking and Third Notice of Inquiry ("Fourth Notice") regarding the adoption of an advanced television system for broadcast licensees.

INTRODUCTION AND SUMMARY

Although advanced television systems are approaching introduction to the public, there are still many unknowns surrounding this next leap in television technology. No one knows what broadcast *digital* television will look like, what combination of services it will offer, and whether consumers will accept it. The record in this proceeding demonstrates that everything from the picture and sound quality of broadcast ATV services (HDTV vs.

SDTV) to the conversion period and surrender of the NTSC spectrum is up in the air. In light of these uncertainties, broadcasters urged the government to refrain from adopting rules until there is real world experience with new digital programming services.

While broadcasters seek the freedom to experiment with digital technology, they would put cable in a strait jacket in its efforts to serve its customers. By saddling cable with expanded must carry obligations, they would deny cable operators the very flexibility that broadcasters seek -- the ability to innovate and respond to market demands. They would force operators to carry multiple streams of digital programming services from every broadcast station for an indefinite period of time at the expense of cable programming diversity and system efficiency. This carriage obligation would apply, of course, whether or not consumers want these services.

Most importantly, given the specific statutory directive on ATV and the uncertainty as to whether the existing rules will withstand constitutional scrutiny, it would be unwise for the Commission to further intrude on cable operators' and cable programmers' First Amendment rights by imposing carriage obligations for new digital services that were not even anticipated when the must carry regime was enacted and for which a factual predicate is entirely absent.

Nevertheless, if any digital carriage requirements are adopted, NCTA strongly believes that cable operators should not bear the cost and burden of broadcaster spectrum flexibility. We also oppose broadcast industry efforts to gain competitive advantage by locking cable into the over-the-air broadcast ATV standard. As we have said from the very beginning of the ATV process, we support compatibility and interoperability between the video distribution media, as evidenced by our ongoing cooperation through CableLabs with the Advanced Television Test Center and the FCC Advisory Committee. We continue to believe that as long as the transmission media voluntarily agree to certain broad technical parameters to facilitate compatibility, there is no need to mandate a single standard. Imposing the broadcast standard on cable and other media will only stifle progress in digital technology and foreclose advancements to the American public.

DISCUSSION

A. There is No Legal or Policy Basis For Imposing Expanded Must Carry Obligations

The sentiment for a hands-off government approach permeates the broadcasters' comments with regard to their use of advanced television spectrum.¹ The National Association of Broadcasters ("NAB") requests

¹ See e.g., Comments of Broadcasters (over 90 broadcast organizations); The National Association of Broadcasters; the Association of Independent Television Stations, Inc.

“maximum latitude” to “explore the new medium” and “unrestricted experimentation to determine which service offerings will be enticing enough to sell and satisfy the viewing audience.”² The Broadcasters urge the Commission not to “rush[sic] into judgment where there is still insufficient data regarding the public’s demand for services, speed of equipment upgrade, and programming development.”³ NBC believes that flexibility is essential given such unknowns as the timing of consumer purchases of digital receivers.⁴ There is some divergence in views with regard to whether simulcasting and/or a minimum number of hours of HDTV programming should be required, but all broadcasters agree that the government should wait on the marketplace.⁵

At the same time the broadcast industry pursues unbridled discretion, it would handicap cable’s entry into the digital age. First, as discussed in the

² Comments of NAB at 2-5.

³ Comments of Broadcasters at 4.

⁴ Comments of NBC at 3.

⁵ NAB, for example, opposes simulcasting and any minimum on the number of hours of HDTV programming. Comments of NAB at 1-6. The Broadcasters will accept HDTV minimums only to the extent necessary and upon consideration of all relevant factors affecting the transmission of HDTV programming. Comments of Broadcasters at 17-20. NBC and ABC support minimum HDTV programming requirements and phased-in simulcasting. Comments of NBC at 4-8; Comments of Capital Cities/ABC at 7-10. The Grand Alliance advocates simulcasting “to avoid perpetuating unique NTSC programming that would make it difficult to cease NTSC broadcasts.” Comments of Grand Alliance at ii.

next section, it would lock cable into using a broadcast-optimized ATV standard. Second, it would dramatically increase cable carriage obligations by imposing a blanket requirement that cable systems carry both the local station's NTSC and ATV broadcast signals (excluding ancillary and subscription services) under any circumstances. Indeed, under the broadcasters' view, each licensee would be entitled to a separate and independent must carry/retransmission consent election for each "channel." The ATV "channel" would encompass multiple broadcast programming services. And since no one knows when (or even if) the NTSC spectrum will be recovered, this dual carriage obligation could go on indefinitely. On top of this burden, broadcasters demand preferred channel position for these new services by a requirement that such services be carried contiguously or grouped together with the NTSC channel. When all is said and done, broadcasters want cable to subsidize their cautious entry into digital television by guaranteeing them scarce capacity on cable systems.

The broadcasters look to the 1992 Cable Act to justify this further interference with cable operators' and cable programmers' First Amendment rights. But as NCTA asserted in our initial comments, the 1992 Cable Act must carry provision arose in the context of analog stations operating one channel in a market. Congress never contemplated a glut of new broadcast

services. And while Congress anticipated that broadcasters would convert to an HDTV standard, it did not mandate simultaneous carriage of both the NTSC and HDTV signals during the transition to advanced television. The only provision in the Act that deals specifically with advanced television has nothing to do with increasing the carriage obligation - - it simply instructs the Commission to alter its rules to ensure signal quality once stations have changed to conform to new standards. 47 U.S.C. section 534(b)(4)(B). At a minimum, it is premature for the Commission to consider any changes to the mandatory carriage rules because it has not yet adopted new advanced television standards for broadcasters. And even then it would be restricted solely to ensuring cable systems maintain signal quality for stations that have converted to the new standards.⁶

Moreover, with the validity of the existing must carry provisions still unresolved in the Turner case, the Commission should defer consideration of any further carriage requirements at least until the final Supreme Court decision.⁷ After the initial comments in this proceeding were filed, the three-judge district court charged with conducting further fact-finding to support

⁶ See generally Comments of NCTA at 6-8; Comments of Tele-Communications, Inc. ("TCI") at 7-9.

⁷ Turner Broadcasting System, Inc. v. FCC, No. 92-2247 (D.D.C. Dec. 12, 1995) (on remand from Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994)).

the Government's infringement on cable operators' and cable programmers' First Amendment rights reached a sharply divided decision upholding the statute. Each judge reached a different conclusion about the issues: Judge Sporkin concluded that the Government had met its burden; Judge Williams concluded that it had not; and Judge Jackson concluded that neither party was entitled to summary judgment and that the case should be set for trial. In order not to "prevail by stalemate," however, Judge Jackson voted to concur in Judge Sporkin's holding.⁸

In his dissent, Judge Williams interpreted the Supreme Court's mandate as requiring an inquiry into whether the must carry law is actually needed to maintain the health of the broadcast system as a whole, that is, to preserve access to free television programming for the 40 percent of Americans without cable. Turner Broadcasting System, Inc. v. FCC, No. 92-2247, Williams dissenting opinion at 5-7 (D.D.C. Dec. 12, 1995). In an exhaustive analysis of whether the Government had established that

⁸ Judge Sporkin concluded that the evidence introduced by the broadcast defendants in Congress and on remand was "substantial" enough for Congress to reasonably infer that the must carry law was necessary. Turner Broadcasting System, Inc. v. FCC, No. 92-2247, Slip. Op. at 8, 12 (D.D.C. Dec. 12, 1995). Although the Supreme Court instructed the district court that the proper inquiry was whether "the must carry rules are necessary to protect the viability of broadcast television", Judge Sporkin rejected the idea that "the Court should examine the broadcasting industry as a whole." Id. at 9,11-12,n.11. Instead, he concluded that "[t]he relevant inquiry is whether the health of those broadcasters protected by the must carry provisions would be in jeopardy without the provisions." Id. at n.11.

broadcasting is in “genuine jeopardy”, Judge Williams found “[t]he parties agree that there is no threat to the continued viability of broadcast television, either now in existence or looming on the horizon.” Id. at 2.

Citing undisputed evidence of growth in broadcast advertising revenues, growth in the number of broadcast stations, and broadcast profitability, Judge Williams discerned that there is insufficient evidence from which Congress could conclude that “broadcast television is in jeopardy.” Id. at 2. He found the record evidence clear, however, that must carry has substantial detrimental effects on the speech of cable operators and cable programmers in the form of many stations forced to be added and cable programming dropped as a consequence. With regard to the governmental interest in guarding against even isolated instances of unfair competition by cable operators, Judge Williams concluded that cable parties were entitled to summary judgment because “must carry is plainly not a remedy narrowly tailored to any such risk.” Id. at 33. Judge Williams also concluded that the undisputed evidence showed at least two less restrictive alternatives to a highly intrusive must carry regime: nondiscriminatory entitlements to carriage at regulated rates and the A/B or input selector switch. Accordingly, Judge Williams voted to invalidate the statute as violating the First Amendment.

On December 21, 1995, the cable parties filed a jurisdictional statement seeking plenary review of the district court's decision on an expedited basis in the Supreme Court. NCTA believes that mandatory carriage rules are unconstitutional and that this decision, particularly given the inconclusive result by the three-judge court, should not be allowed to stand without full consideration by the Court.

Even if the Court upholds the 1992 must carry statute, there is no justification to expand broadcasters' must carry rights to new digital broadcast services. There is no factual predicate anywhere for enlarging must carry obligations to services that do not yet even exist. Indeed, only one judge thought it permissible for NTSC signals. The Government would have to substantiate that there is a real threat to the system of free broadcasting absent carriage of these new programming services and that the rules are narrowly tailored to preserve that governmental interest.⁹ The Government may not merely speculate that the economic viability of the system of broadcasting is in peril without government intervention, it must demonstrate that this asserted interest is real -- a record that is wholly lacking.

⁹ Turner Broadcasting System v. FCC, 114 S. Ct. 2445 (1994), quoting United States v. O'Brien, 391 U.S. 367, 376-77(1968).

We seriously doubt that this burden could be sustained in a rapidly changing competitive environment. Turner Broadcasting noted that digital television broadcasting is from a technical, operational, and economic standpoint radically different from the traditional NTSC system.¹⁰ Neither Congress nor the FCC has made any findings as to the relationship of the broadcast and cable industries in the digital context -- i.e., whether cable possesses the market power and incentive to disadvantage broadcast licensees capable of transmitting multiple programming services simultaneously. Moreover, with broadcasters transformed into multi-platform providers with new revenue streams and access to new distribution outlets, the underlying policy basis of must carry breaks down entirely.¹¹ The Government's analysis would have to take into account vast changes in the video marketplace since the passage of the 1992 Act. Cable television is facing a variety of competitors -- DBS, MMDS, and telephone companies -- that have and will fundamentally affect over-the-air broadcasting. Furthermore, in the future, the versatility of digital technology and nongovernment-ordered changes in the receiver market may make A/B switches or other techniques a viable, less restrictive alternative to must

¹⁰ Comments of Turner Broadcasting System, Inc. at 6-7.

¹¹ See e.g., Comments of TCI at 11-13; Comments of United Video at 4; Comments of NCTA at 2.

carry's intrusion on the speech rights of cable operators and cable programmers.

Must carry requirements only interfere with competition in the video marketplace and impede the development of new programming by forcing cable operators to cede a significant portion of their capacity to the carriage of programming without regard to what viewers prefer. While broadcasters profess commitment to HDTV, they unabashedly admit that competitive survival is tied to diverse new programming services.¹² Broadcasters believe that the most important factor in consumer acceptance of new digital services will depend not on higher quality but on "creative product."¹³ Cable's creative product suffers mightily under a must carry regime. As explained by John Hendricks, President of Discovery Communications, Inc., a cable programmer, in his testimony during the Commission's en banc hearing on digital television:

[m]ust carry artificially restricts the availability of capacity to cable programmers who have no over-the-air access to viewers. As a result, the cable programmers cannot build and develop their audience and entrepreneurs will be unwilling to risk their capital by investing in new services and programming. Most importantly, must carry will deny the American public the

¹² See e.g., Comments of NAB at 3.

¹³ Comments of Broadcasters at 27.

choices and services that would evolve out of a more robust, unrestricted competitive digital TV environment.¹⁴

He rightly observes that the Commission's primary objective in this proceeding should be to create an environment in which "the widest possible range of programming is delivered to the broadest possible audience." Why then, the Commission should ask, should one class of speakers, cable networks, be relegated to second-class status to ensure a preferred position to another class of speakers?

Broadcasters' comments ignore the adverse impact of must carry on nonbroadcast cable programmers. Today no fewer than 178 national and regional cable programming networks compete for scarce channel space, up to one third of which is by law committed to commercial broadcast stations (and more for noncommercial outlets). In the near future, as Mr. Hendricks notes in his testimony, the number of nonbroadcast speakers will escalate as cable programmers prepare to offer digital niche services.

Broadcasters allege that system upgrades will alleviate any burden on cable operators. But the reality is that expanded carriage obligations will devastate operators. They will have no choice but to drop programming

¹⁴ Statement of John S. Hendricks, Chairman and Chief Executive Officer, Discovery Communications, Inc. before the Federal Communications Commission, En Banc Hearing on Digital Television, MM Docket No. 87-268, December 12, 1995.

services desired by their customers and will have little room for new nonbroadcast services.

As is well-documented in our initial comments, many systems have no excess cable channel capacity today and this condition will persist for some time to come. Eighty-six percent of all cable systems provide less than 54 channels, while 22 percent operate with less than 30 channels. Projected availability of system capacity in the future provides no basis for sanctioning discrimination among speakers. Indeed, as cable capacity increases, the supply of cable networks and other services increases much faster than available space.

In sum, the broadcasters' drive to maximize a valuable government-granted asset should not be accomplished at the expense the First Amendment rights of other speakers and all viewers. If the must carry rules survive constitutional challenge, we submit that during the uncertain transition period, when broadcasters will transmit services on both NTSC and ATV frequencies, broadcasters are only entitled to carriage of the NTSC signal. When the transition to digital occurs and if must carry is still in force, the rules will have to be applied in a digital context. That day is far off, as the "flexibility" sought by the broadcasters attests. At this stage, we believe that broadcasters should only be entitled to carriage of one video program

service in a fully digital environment.¹⁵ If must carry is overturned, the Commission would have no authority to adopt new ATV must carry rules.

B. The Cable Industry Should Not Bear the Cost of the Broadcast Industry's ATV Spectrum Flexibility

As noted above, the only conceivable must carry rules permitted under the record would apply to the NTSC signal (and that duty itself we believe is unconstitutional). Were the FCC to take the unwarranted and unconstitutional step of any greater must carry burden, we make the following additional points in reply.

First, although the Commission is committed to recovering the NTSC spectrum once the transition to digital broadcasting is complete, the comments show that no one knows when this will occur. It is likely that there will be continued demand for analog for a long time. With everyone questioning consumer reaction to digital television, the grant of ATV spectrum to existing broadcasters on a temporary, purely transitional, basis

¹⁵ As TCI recognizes, the Commission is required by statute to limit cable system carriage obligations to a broadcast station's "primary video" service. 47 U.S.C §§ 534(b)(3) and 535 (g)(1). If the Commission decides to impose digital must carry rules, TCI believes that "primary video" service should be defined during the transition period as comprising only the NTSC signal and after the transition period as comprising only the digital video stream that contains information that used to be carried in the broadcaster's NTSC signal. This primary digital video signal would be encoded in order to enable cable operators to readily identify this signal in the digital data stream for must carry purposes. Comments of TCI at 5.

is wishful thinking at this time. Thus, the notion that dual-channel carriage obligations would only be short-term is baseless.

Second, while it is difficult to fully assess the cost and technical consequences of cable carriage of broadcast digital services at this time, it is clear that ATV must carry obligations will greatly diminish cable operators' ability to use their broadband network efficiently for diverse offerings. This is because cable systems will be required to carve out a 6 MHz channel slot for each broadcaster even though the station may only transmit an occasional high-bit rate HDTV program.¹⁶ Forced to reserve this capacity at all times, operators will be denied alternative uses of the spectrum during the majority of the time that the space will be occupied by multiple low-bit rate SDTV signals.¹⁷

Moreover, as we explained in our initial comments, if any digital signals are given must carry status, operators will have to install expensive

¹⁶ As Chairman Hundt recognizes, the term "second channel" is a historical artifact and virtually meaningless in the digital world of megabits per second. "Digital TV: We Can Work It Out", speech before International Radio and Television Society, November 21, 1995. Thus, the trade of digital spectrum for the eventual recaptured analog channel arguably does not need to be a 6 MHz for 6 MHz exchange. The transition from broadcast analog to broadcast digital could be based on an entirely different spectrum allocation. Media Access Project argues that existing broadcasters should only be granted enough digital spectrum to provide one free digital signal. The remaining spectrum would be allocated in various alternative ways to other parties to provide broadcast and nonbroadcast services. Comments of Media Access Project at iii, 7-10.

¹⁷ See e.g. Comments of General Instrument Corporation at 19-20.

processing equipment in order to reconfigure and sort out these signals from the data stream.¹⁸ This process becomes even more complicated were broadcasters allowed to switch back and forth freely between SDTV program services, HDTV programs and other services. Broadcasters should not be permitted to extend must carry protection by technological ruse - - in other words, by mixing up the data stream in such a manner that it is costly and impractical to separate out the signal that must be carried. This abuse could result in cable operators being forced to carry signals, such as ancillary services, inextricable from the must carry signal.

Third, where there is no proven demand for the digital services, the Commission should not require cable operators to bear the cost of broadcaster flexibility. As TCI points out, if cable operators are required to carry any digital broadcast services before the system has become digital-capable, the cost to transmit such services should be borne by the broadcast station.¹⁹ With over 11,000 cable systems nationwide, each with differing technical, financial and service characteristics and size, the implementation of digital technology will be a complex enterprise. Just as broadcasters expect to implement digital on a staggered basis, the pace and breadth of cable

¹⁸ See also Comments of Intermedia Partners at 3-4.

¹⁹ Comments of TCI at 4-5.

deployment will vary from system to system. The FCC should not force cable conversion to digital prematurely.²⁰ As TCI and the Cable Telecommunications Association (“CATA”) describe in their comments, in markets where a cable operator has not deployed digital technology, must carry for new digital services would be a catastrophe for operators forced to convert them from digital to analog.²¹

C. The Broadcast ATV Standard Should Not Be Imposed on Cable or Other Distribution Media

In its comments, NAB urges the Commission to mandate that cable television use the ATV broadcast standard adopted by the FCC ATV Advisory Committee at its November 28, 1995 meeting. Since the inception of the Advisory Committee in 1987, the cable television industry has worked with the broadcast industry to develop a broadcast ATV system that can be effectively retransmitted over the cable network. In particular, Cable Labs conducted laboratory and field tests in coordination with the Grand Alliance manufacturers and the Advanced Television Test Center to ensure that the broadcast high definition system is compatible with cable television.

²⁰ As TCI points out, both Congress and the Commission have determined that governmentally imposed program carriage requirements should not result in additional cost burdens on cable operators. Comments of TCI at 14 - 17.

²¹ Comments of TCI at 18-19; Comments of CATA at 5-7.

But make no mistake: the FCC Advisory Committee's mandate is, has always been, to develop a broadcast ATV standard.²² Consequently, the Advisory Committee is primarily composed of broadcast industry representatives. The recommended standard possesses the attributes and technical capabilities most congenial to over-the-air broadcasting, not coaxial cable. We object, therefore, to the Broadcasters' erroneous reference to the Advisory Committee's development of "broadcasting and cable ATV transmission standards."²³ The cable industry representatives on the Advisory Committee endorsed the Grand Alliance digital HDTV system at the meeting, but the industry did not relinquish the opportunity to develop a cable-optimized system in order to better serve its subscribers.

Some in the the cable industry may, for example, use a modulation scheme different from the broadcast standard's modulation scheme. This alternative approach will not degrade the quality of retransmitted broadcast signals, and, in any event, may provide other benefits for cable-originated services. Setting these last-mile cable standards were neither the goal nor

²² In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Notice of Inquiry, 2 FCC Rcd 5125, 5125-26 (1987). See also Tentative Decision and Further Notice of Inquiry, 3 FCC Rcd 6520, 6521 (1988).

²³ Comments of Broadcasters at 38.

the output of the Advisory Committee and should be left to the ingenuity of the market.

As the Commission recognizes, cable and other distribution media are well on their way toward introducing digital television. Cable system operators are developing various approaches to digital set top box equipment that will enable consumers to access innovative new services. Meanwhile, cable programmers have announced plans to create new digital niche programming services. As digital technology evolves and becomes more affordable, it will grow over the next 10 to 20 years. The government should not chill this innovation by imposing regulations that limit the capabilities of one provider to the technical limitations of another.

NAB also argues that restricting cable to the broadcast ATV standard will “pave the way” for cable-ready ATV sets for consumers and ensure that digital cable-ready equipment achieves penetration in the marketplace. But digital technology is flexible, robust and highly versatile. Its very nature is that it can be manipulated to suit a variety of modulation and transmission schemes. It is simply not necessary, indeed it is counterproductive, to impose a single standard on all media. Provided the video distribution media use certain common baseline technical specifications to ensure compatibility and inter-operability in consumer in-home equipment, there is no need to

constrain all media to the broadcast standard and lock out further technological advancements.

The broadcasters claim that allowing cable to expand on the broadcast standard will force consumers to buy set top box equipment from cable companies. This is a specious argument. First, the broadcasters have made it clear that they intend to make digital services available to analog viewers. In fact, they plan to sell their own set top equipment to consumers until such time as substantial digital television sets are in the market. Second, the Cable-Consumer Electronics Advisory Group (C3AG) is focused on development of a hybrid analog/digital multi-pin Decoder Interface Connector for future cable-ready equipment to permit multiple set-back or set-top devices to be plugged into the home receiver. As the Commission recognizes, this technology will ensure that no video delivery system will be able to impede a competing system from accessing the consumer.²⁴ Consumers will have flexibility to lease or purchase set back equipment from the video provider that offers the combination of services that they desire. The Joint Engineering Committee of the Electronic Industries Association and NCTA

²⁴ In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment ET Docket No. 93-7, First Report and Order, 9 FCC Rcd 1981, 1988-89 (March. 4, 1994).

currently is working on designs that can accommodate digital sets and further advances in video transmission systems and services.

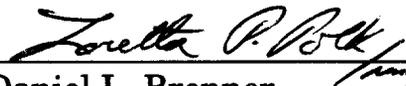
In recent statements, Chairman Hundt has expressed his desire not to “micromanage” the development of digital television or to substitute the FCC’s judgment for the marketplace.²⁵ We agree that the public’s access to these new services should be determined by market forces, not broadcaster prerogatives. We urge the Commission, therefore, not to freeze innovation in this field by imposing the broadcast ATV standard on cable and other media.

²⁵ “Digital TV: We Can Work It Out”, speech before International Radio and Television Society, November 21, 1995.

CONCLUSION

We again urge the Commission to reject the broadcast industry's efforts in this proceeding to game the ATV process to gain competitive advantage over cable and other media through must carry, or standards-setting measures. On both legal and policy grounds, the Commission should not pile on further intrusions on speech by forcing cable operators to turn over yet more free capacity for the carriage of new broadcast services that were not even on the horizon when the 1992 must carry law was passed. Such a policy would displace cable programmers and deny cable operators editorial choices over their own systems.

Respectfully submitted,


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