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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of	)	
	)	
Carriage of the Transmissions of	)	CS Docket No. 98-120
Digital Television Broadcast Stations	)	
	)	
Amendments to Part 76 of the	)	
Commission's Rules	)	

To: The Commission

COMMENTS  
OF  
PAXSON COMMUNICATIONS CORPORATION

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October 13, 1998

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## **SUMMARY**

The 1992 Cable Act established the must carry rights of local commercial television stations in both the analog and digital worlds. Section 614(b)(4)(B) clearly states that:

(B) **ADVANCED TELEVISION.** 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.

The only purpose given to the FCC as it applies to digital is contained in this language. Must carry rights have enabled UHF television stations to survive and even prosper in the highly competitive video world and have encouraged new, over-the-air networks, such as **PAXTV**, to be launched and to bring a new era of competition to television and a higher purpose to the spectrum the FCC is charged to manage. Congress granted the same cable carriage rights in the digital world and the Supreme Court's 1997 decision in *Turner Broadcasting* upheld the constitutionality of those must carry provisions. Taking away the digital must carry rights or diminishing them in any way will trigger legal action. The Supreme Court emphasized that preserving the benefits of free over-the-air broadcast television and promoting the widespread dissemination of information were important governmental

interests. This was true in the analog world and is equally true in the digital world.

The FCC must follow this congressional mandate as upheld by the Supreme Court as it has no latitude. FURTHER, ANY FCC ACTION TO DIMINISH THE MUST CARRY LAW WILL SEVERELY IMPEDE THE DIGITAL TV ROLL OUT AND GO AGAINST THE DIGITAL TV MANDATE OF CONGRESS.

Paxson submits that the existing must carry rules require cable systems to carry the 6 MHz of analog or digital spectrum of all local commercial television stations (subject to channel capacity, signal strength and copyright limitations). Television stations must have the right to select either their primary analog or digital signal for cable carriage and, as cable capacity expands, television stations can take full advantage of their must carry rights to seek cable carriage for multi-channel programming under and within the existing rules of the must carry law.

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To: The Commission

**COMMENTS  
OF  
PAXSON COMMUNICATIONS CORPORATION**

Paxson Communications Corporation ("Paxson") hereby submits its Comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>1/</sup> Paxson urges the Commission to move quickly and decisively in announcing that digital broadcast television signals are already entitled to mandatory carriage pursuant to Section 614 of the Communications Act of 1934, as amended (the "Act"),<sup>2/</sup> and in establishing the technical standards and transitional policies that will govern such carriage during the changeover from analog television to digital television broadcasting. Before commenting on the Commission's specific

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<sup>1/</sup> *Notice of Proposed Rulemaking*, CS Docket No. 98-120, FCC 98-153 (released July 10, 1998) ("*Notice*"). In an *Order* released on August 27, 1998 (DA 98-1719) the Commission extended until October 13, 1998, the deadline for the filing of Comments in this proceeding.

<sup>2/</sup> 47 U.S.C. § 534 (1997).

proposals and documenting Paxson's immense interest in this proceeding, it is important to set the framework for this Commission rulemaking.

### THE LAW

**MUST CARRY IS AND REMAINS THE LAW OF THE LAND!** Congress passed the must carry law, the Supreme Court upheld that law and the Commission must fully and faithfully abide by the law. The Cable Television Consumer Protection and Competition Act of 1992<sup>3/</sup> ("1992 Cable Act") imposed must carry obligations on cable systems requiring them to carry all local commercial television stations in their market and **Congress specifically imposed this requirement for both existing analog and future digital television.** Section 614(b)(4)(B) of the 1992 Cable Act clearly articulated this mandate:

(B) **ADVANCED TELEVISION.** 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.<sup>4/</sup>

The Conference Committee Report on the 1992 Cable Act recognized that in the digital world the Commission would have to conduct a proceeding to **"establish technical standards for cable carriage of such broadcast signals,"** but Congress

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<sup>3/</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>4/</sup> 47 U.S.C. § 534(b) (4) (B) (emphasis added).

**did not intend that the Commission would debate basic carriage requirements**  
**now issue any rules other than technical:**

The issue of "advanced television" is addressed in subsection (b)(4)(B). The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.<sup>5/</sup>

The United States Supreme Court addressed the multiple challenges to the must carry rules and rejected them in *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174 (1997). The Supreme Court concluded that:

[The] challenges to must carry reflect little more than disagreement over the level of protection broadcast stations are to be afforded and how protection is to be attained. We cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination. Those requirements were met in this case, and in these circumstances the First Amendment requires nothing more. The judgment of the District Court is affirmed.<sup>6/</sup>

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<sup>5/</sup> H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 94 (1992). The Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56 (1996)) outlined the Commission's obligations in creating a digital broadcasting system and noted that ancillary or supplementary services (*i.e.*, non-broadcast services) offered by television stations would not be eligible for must carry. The 1996 Act did not amend or revise the 1992 Cable Act's imposition of must carry and did not change television stations' basic must carry rights.

<sup>6/</sup> 117 S.Ct. at 1203 ("*Turner II*").

In reaching its decision that the must carry rules are constitutional, the

Supreme Court found that:

- Without must carry, cable systems would choose vertically integrated programmers rather than carry local broadcast signals and Congress developed a record demonstrating that **broadcast stations would be at serious risk without must carry.**
- Congress' conclusion was reasonable and supported by a substantial record.
- **Must carry serves a substantial governmental interest because it assures that local broadcasters will retain cable carriage and access to their audiences and advertising revenues.**
- The use of A-B switches, leased access programming or subsidies for financially weak stations would not be an adequate substitute for must carry.<sup>7/</sup>

Justice Breyer in his concurring opinion was even more emphatic in concluding that the must carry rules furthered the important governmental interests of "(1) preserving the benefits of free, over-the-air local broadcast television," and "(2) promoting the widespread dissemination of information from a multiplicity of sources."<sup>8/</sup> Justice Breyer was fully in agreement with the majority opinion of the Court that without must carry "cable systems would likely carry significantly fewer over-the-air stations,...., that station revenues would therefore decline,...., and that the quality of over-the-air programming on such stations would almost inevitably suffer..."<sup>9/</sup> The same important governmental interests will be furthered substantially

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<sup>7/</sup> *Turner II*, 117 S. Ct. at 1184-93, 1195, 1198-99, 1201 (emphasis added).

<sup>8/</sup> *Id.* at 1204.

<sup>9/</sup> *Id.* at 1205.

by mandatory carriage of digital television signals. FURTHER, ANY FCC ACTION TO DIMINISH THE MUST CARRY LAW WILL SEVERELY IMPEDE THE DIGITAL TV ROLL OUT AND GO AGAINST THE DIGITAL TV MANDATE OF CONGRESS.

### **THE TELEVISION MARKETPLACE**

Paxson owns and operates the largest broadcasting television station group in the United States. Paxson currently owns 50 full power television stations and has over 20 non-owned affiliates carrying Paxson's current network television programming entitled **PAXTV**. Upon completion of pending acquisitions, construction projects and other transactions, Paxson will have 95 owned, operated and affiliated television stations including television stations in all of the top 20 television markets and 44 of the top 50 television markets reaching nearly 76 million television households or approximately 76% of the television households in the country. In ownership Paxson is at 33.6% (UHF discount) of all U.S. television households. Over the past 24 months, Paxson has constructed 17 new full power television stations and substantially upgraded the technical facilities of an additional 20 stations. In addition, Paxson has 12 additional new television construction permits to build. The vast majority of these stations are UHF stations that Paxson has infused with capital and improved technical facilities and family oriented programming devoid of excessive violence, explicit sex and foul language.

Paxson's ownership of these stations has enabled Paxson to launch a new television network that offers viewers new choices in over-the-air television programming and will lead to increased competition among the broadcast networks.

On August 31, 1998, Paxson launched its new broadcast television network, **PAXTV**. **PAXTV** is the nation's seventh broadcast network, providing a unique selection of family-friendly programming unduplicated by the other free over-the-air broadcast television and/or cable networks. The majority of **PAXTV** programming consists of one-hour drama, situation comedy, talk and information programs and movies, and will be family-oriented, with an emphasis on family values. **PAXTV** is the first network to package programs together with a family focus on an exclusive basis. **PAXTV's** programming will not be duplicated on other television or cable networks or by any other video program providers.

Among the leading programs that will be featured on **PAXTV** are *Touched By An Angel*; *Promised Land*; *Dr. Quinn Medicine Woman*; *Diagnosis Murder*; *Highway to Heaven*; and *Life Goes On*. Additional programs to be aired on the network include *I'll Fly Away*; *Dave's World*; *Christy*; *The Father Dowling Mystery Series*; *Love Boat*; and *Seventh Heaven*. **PAXTV** has 20 hours of original fare each week, including the programs *Little Men*, *The New Flipper*, *Neon Rider*, *It's a Miracle*, *Great Day*, *Women's Day* and six hours per week of educational children's programming. This level of original programming far exceeds that launched by other emerging networks, and indeed, it has taken some networks years to offer such an extensive amount of original programming to their affiliates.<sup>10/</sup>

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<sup>10/</sup> The Fox network launched in 1986 with just 5 hours of programming per week. See, "WBFF Affiliates with Fox," ADWEEK, July 21, 1986. Fox provided 8 to 10 hours of programming to its affiliates each week during its second season, see Thomas Moore, "Citizen Murdoch Presses for More," FORTUNE, July 6, 1987, at 90; "Minnow versus Whales," FORBES, November 30, 1987, at 52; but still only 9 hours

The success of **PAXTV** will depend, however, to a large extent, on the ability of the **PAXTV's** UHF affiliates, which are technically and economically disadvantaged because of their UHF signals, to obtain and maintain cable carriage in the digital world. In short, Congress and the Commission have been cognizant of the technical disparity between UHF and VHF stations and have recognized that UHF stations have benefitted greatly from the must carry rights guaranteed by the 1992 Cable Act. Without must carry, many UHF television stations would not have survived because they would have been denied access to the cable systems serving their markets. The importance of must carry for these stations will not be diminished by the digital conversion. **Mandatory cable carriage of these stations has been critical to their improved economic status in recent years and mandatory cable carriage of digital signals will be equally critical to the continued economic viability and success of the UHF stations** (See attached Statement of Lowell W. Paxson). Furthermore, acknowledging the FCC's statutory mandate to propagate a higher use of this spectrum it must be noted that since the 1992 must carry law was enacted over 80 additional television stations have gone on the air. Without must carry, they would not have come into existence.

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per week by 1990 -- four years after its launch, *see Fox Broadcasting Company*, 5 FCC Rcd 3211, ¶ 9 (1990). When Paramount and Warner Brothers launched their net networks in January 1995, UPN offered 4 hours of original weekly programming while The WB provided just two hours of such programming. *See* David Tobenkin, "New Players Get Ready to Roll," BROADCASTING & CABLE, January 2, 1995 at 30-32. Today, Fox furnishes approximately 15-1/2 hours of prime time programming per week, UPN provides about 6 hours and The WB supplies roughly 9 hours. *See* "Peoples Choice: July 20-26, 1998" BROADCASTING & CABLE, August 3, 1998, at 33 (identifying broadcast network prime time ratings according to Nielsen).

The transition to digital television will not eliminate the UHF handicap. In comparing power levels assigned to VHF analog stations operating on UHF digital channels with those assigned to UHF analog stations operating on UHF digital channels, it is clear that the UHF/VHF technical disparity will continue, a situation the FCC recently created. The six illustrative examples below demonstrate that the DTV power levels assigned to certain of Paxson's UHF stations and those assigned to VHF stations that will operate on digital UHF channels in the same markets will place Paxson's stations at a clear disadvantage. The disparities in power level confirm that most UHF stations, even in a digital world, will continue to suffer from technical signal deficiencies. (New York, NY — Paxson's DTV power 37% of competing UHF station's power; Los Angeles, CA — Paxson's DTV power 70.5% of competing UHF station's power; Philadelphia, PA — Paxson's DTV power 95% of competing UHF station's power; Washington, DC — Paxson's DTV power 93% of competing UHF station's power; Dallas, TX — Paxson's DTV power 89% of competing UHF station's power; and Seattle, WA — Paxson's DTV power 95% of competing UHF station's power.)

The implementation of digital television will not result in the "equalization" of UHF and VHF coverage areas. Nor, will it come to pass if digital must carry is tampered with. First, until the digital transition is completed, it will be impossible for the Commission to determine whether UHF and VHF analog stations operating on a digital channel will have the same coverage. Although it is true that the majority of stations, whether currently operating on UHF or VHF channels, will operate in the

UHF band, until stations are operating with their authorized DTV facilities and this new technology is implemented fully, neither the Commission nor the industry is in a position to evaluate UHF and VHF station coverage.

Second, as evidenced by the power levels listed above, the Commission's digital rules are not designed to eliminate the technical disparity between UHF and VHF television stations. Instead, the Commission's digital allotment scheme is based primarily on replication of existing analog service and continued promulgation of the disparity.<sup>11/</sup>

We continue to believe that our service replication proposal, with some modifications, is the appropriate approach for implementation of DTV. We believe that providing DTV allotments that replicate the service areas of existing stations offers important benefits for both viewers and broadcasters. This approach will ensure that broadcasters have the ability to reach the audiences that they now serve and that viewers have access to the stations that they can now receive over-the-air.<sup>12/</sup>

The Commission has recognized that replication of existing UHF station service areas will not equalize VHF and UHF coverage areas. On reconsideration of the *Sixth DTV Report and Order*, the Commission itself acknowledged, and we quote, "THE DIFFICULTIES THAT UHF STATIONS MAY FACE UNDER THE CURRENT SERVICE REPLICATION PLAN . . . IN COMPETING WITH THE HIGHER-POWERED

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<sup>11/</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 14588, 14605, ¶ 29 (1997) ("*Sixth DTV Report and Order*"), on reconsideration, *Memorandum Opinion and Order on Reconsideration of The Sixth Report and Order*, MM Docket No. 87-268, 13 FCC Rcd 7418 (1998) ("*Sixth DTV Reconsideration*"), appeal pending.

<sup>12/</sup> *Sixth DTV Report and Order*, 12 FCC Rcd at 14605, ¶ 29 (emphasis added).

DIGITAL SERVICE OF EXISTING VHF STATIONS."<sup>13/</sup> The Commission concluded that additional measures were necessary to reduce the disparities "inherent in the current service replication process."<sup>14/</sup> Accordingly, the Commission modified its digital rules to permit UHF stations to maximize their digital coverage and service through power increases and use of beam tilting techniques.<sup>15/</sup>

There is no guarantee, however, while digital is still in the early stages, that all UHF stations will be able to take advantage of these opportunities or that in increasing power or using beam tilting techniques, the result will be a maximization of UHF service that is equivalent to VHF station coverage. Thus, until UHF digital stations' coverage can be fully assessed based on real-world experience, there is no basis for the Commission to conclude that the UHF "handicap" has disappeared or that mandatory cable carriage is unnecessary for their continued economic survival. In fact, the FCC was never asked to address these questions.

Congress, in passing the 1992 Cable Act, intended to benefit the many UHF stations that faced an uncertain future without must carry. The Supreme Court recognized and accepted this as furthering a significant governmental interest. The scores of UHF stations benefitting from must carry now form the basis for the new television networks such as WB, UPN and **PAXTV** that are providing new competition and vitality to broadcast television, and, accordingly, the need for mandatory cable

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<sup>13/</sup> *Sixth DTV Reconsideration*, 13 FCC Rcd at 7450, ¶ 79 (emphasis added).

<sup>14/</sup> *Id.*

<sup>15/</sup> *Id.* at ¶¶ 79-85.

carriage is even more important than it was in 1992. Additionally, for digital TV to obtain a foothold and be embraced by the American consumer, digital must carry is vital and critical.

**I. THE COMMISSION HAS A LIMITED ROLE IN THIS RULEMAKING.**

**A. The Act Requires Mandatory Carriage of Digital Television Signals.**

Congress directed the Commission to initiate this instant proceeding, to quote, "ESTABLISH ANY CHANGES IN THE SIGNAL CARRIAGE REQUIREMENTS OF CABLE TELEVISION SYSTEMS NECESSARY TO ENSURE CABLE CARRIAGE OF [ADVANCED TELEVISION] BROADCAST SIGNALS OF LOCAL COMMERCIAL TELEVISION STATIONS."<sup>16/</sup> In enacting Section 614 of the Act, Congress required cable operators to carry the signals of local commercial broadcast television stations. Congress believed that mandatory carriage was necessary to advance important government interests of promoting the continued availability of free, over-the-air local broadcast television<sup>17/</sup> and ensuring the widespread dissemination of information from a multiplicity of sources.<sup>18/</sup> The Supreme Court upheld the constitutionality of the must carry provisions, finding that Section 614 suitably advanced these important interests.<sup>19/</sup>

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<sup>16/</sup> 47 U.S.C. § 534(b)(4)(B) (emphasis added).

<sup>17/</sup> 1992 Cable Act, §§ 2(a)(10),(12).

<sup>18/</sup> *Id.*, § 2(a)(6).

<sup>19/</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 US 622 (1994) ("*Turner I*") (determining that intermediate scrutiny applied); *Turner Broadcasting System, Inc. v. FCC*, 117 S.Ct. 1174 (1997) ("*Turner II*") (upholding must-carry provisions under

In 1997, the FCC promulgated rules assigning broadcast spectrum to existing television broadcasters for the purpose of transmitting a digital television signal. Those new rules require each licensee to construct a new digital station that would serve an area comparable to the analog station's present coverage using an additional 6 MHz of spectrum.<sup>20/</sup> The Commission seeks comment on the broadcast DTV signal carriage responsibilities of cable television operators and presumes a "broad authority to define the scope of a cable operator's signal carriage requirements" during the DTV transition period.<sup>21/</sup> The FCC does not have the right nor mandate to undertake this proceeding. Paxson recognizes the difficulty the Commission faces in attempting to facilitate an effective transition to the digital age and urges the Commission to reaffirm the must carry rules in the digital era. Furthermore, the Commission should not presume discretion beyond that Congress prescribed. Whatever is meant by "broad authority," based upon the issues presented for comment, the Commission appears to contemplate discretion where it has none.

Most importantly, Congress granted the Commission no authority to exclude the DTV signals of local television broadcast stations from the mandatory must carry carriage requirements. In fact, the statute is clear that Congress was aware of advanced television when it adopted the must carry provisions and still declined to

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intermediate scrutiny).

<sup>20/</sup> 47 C.F.R. §§ 73.622-624.

<sup>21/</sup> *Notice* at ¶13.

distinguish between broadcasters' analog or digital signals in requiring mandatory carriage. Congress stated that the Commission shall "ESTABLISH ANY CHANGES IN THE SIGNAL CARRIAGE REQUIREMENTS . . . TO ENSURE CABLE CARRIAGE OF [ADVANCED TELEVISION] BROADCAST SIGNALS."<sup>22/</sup> For purposes of statutory construction, when the intent of Congress is clear, "that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress."<sup>23/</sup> Likewise, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose."<sup>24/</sup> Congress explicitly directed the Commission to make technical changes in requirements to ensure DTV must carry. The Commission has the authority to make such changes, but it does not have the authority to deny DTV stations mandatory carriage rights.

If Congress intended to exclude DTV signals from mandatory carriage, it would have done so explicitly as it did with ancillary and supplementary services instead of directing the Commission "to ensure cable carriage of [DTV] signals" (note plurality). Section 336 of the Act provides that "no ancillary or supplementary service shall have any right to carriage under section 614."<sup>25/</sup> This exclusion of ancillary and supplementary service from must carry rights is especially germane given the

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<sup>22/</sup> 47 U.S.C. § 534(b)(4)(B) (emphasis added).

<sup>23/</sup> *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

<sup>24/</sup> *Park n' Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

<sup>25/</sup> 47 U.S.C. § 336(b)(3).

expanded DTV capabilities for providing such services.<sup>26/</sup> Yet, while Congress excluded ancillary and supplementary services from mandatory carriage, no such must carry exclusion exists for DTV. Accordingly, the Commission lacks authority to exclude DTV multi-channel signals of local broadcast stations from the mandatory carriage requirements of Section 614.

In the *Notice*, the Commission cites two instances in the legislative history where reference is made to DTV must carry that apparently is relied upon to assert “broad authority” in defining a cable operator’s obligations. Paxson believes that the Commission cannot reasonably derive such an expansive interpretation of authority from legislative history voiced subsequent to the passage of the relevant statute. In the first instance cited, Congress, when referring to the exclusion of ancillary and supplementary services from must carry rights, noted that it did not intend to “confer must carry status on advanced television or other video services offered on designated frequencies,” but clarifies that the “issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act.”<sup>27/</sup> Accordingly, to understand what Congress intended by this language, one need only examine that section of the Act. There, Congress indicates that the Commission is “TO ENSURE CABLE CARRIAGE OF [ADVANCED TELEVISION] BROADCAST

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<sup>26/</sup> Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, 12820-12823 (1997) (“*Fifth DTV Report and Order*”).

<sup>27/</sup> S. Conf. Rep. No. 104-230, at 161 (1996).

SIGNALS.”<sup>28/</sup> The legislative history is intended to amplify the language of the statute, but where the legislative history explicitly refers to the statute for meaning, little room is left for the expansive interpretation presumed by the Commission. This kind of expansion attitude will surely generate negative reaction from Congress as well as needless and costly lawsuits.

In the Commission’s second reference, Congress, this time in the context of defining the conclusion of the DTV transition period, stated that “conferees recognize that the Commission has not yet addressed the ‘must carry’ obligations with respect to digital television service signals, and the conferees are leaving that decision for the Commission to make at some point in the future.”<sup>29/</sup> As a matter of statutory construction, legislative language is interpreted generally on the assumption that the legislature was aware of existing statutes.<sup>30/</sup> In light of Section 614(b)(4)(B) of the Act, this legislative history adds no new gloss on and by no means expands the Commission’s authority but simply recognizes that Congress directed the Commission to initiate this instant proceeding at some point in the future. The Commission cannot reasonably conclude that these two pieces of legislative history published subsequent to the passage of the must carry provisions provides the “broad authority” the Commission presumes. As the Supreme Court stated, “We are normally hesitant to attach much weight to comments made after the passage of legislation. In view of

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<sup>28/</sup> 47 U.S.C. § 534(b)(4)(B) (emphasis added).

<sup>29/</sup> H.R. Conf. Rep. No. 105-217, at 577 (1997).

<sup>30/</sup> A. SUTHERLAND, STATUTORY CONSTRUCTION § 45.12, at 62 (5th ed. 1995).

the contradictory nature of these cited statements, we give them no weight at all."<sup>31/</sup>

The FCC shouldn't either.

**B. The Findings of Congress and the Supreme Court Support Mandatory Carriage of Digital Television Signals.**

There is no policy justification that would warrant deviating from the DTV must carry requirement. The findings of Congress, as twice scrutinized and expounded by the Supreme Court, indicate that must carry requirements are even more pertinent in the DTV transition. As Congress noted in the Cable Act and the Supreme Court stated explicitly in *Turner II*, "'protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest."<sup>32/</sup> "[B]roadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population"<sup>33/</sup> and there is a corresponding "governmental purpose of the highest order" in ensuring access to a multiplicity of sources.<sup>34/</sup>

Congress believed that the mandatory carriage rules were necessary to prevent "a reduction in the number of media voices available to consumers"<sup>35/</sup> and

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<sup>31/</sup> *County of Washington v. Gunther*, 452 U.S. 161, 176 n.16 (1981) (citation omitted).

<sup>32/</sup> *Turner II*, 117 S.Ct. at 1186 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)); 1992 Cable Act, § 2(a)(12).

<sup>33/</sup> *Turner II*, 117 S.Ct. at 1186 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

<sup>34/</sup> *Id.*

<sup>35/</sup> 1992 Cable Act, § 2(a)(4).

found that the cable industry posed a threat to broadcast television.<sup>36/</sup> Evidence indicated that the increasing horizontal concentration and vertical integration provided cable systems with both the incentive and ability to drop carriage of local broadcast stations to favor affiliated cable programmers less likely to compete with them for audience and advertisers.<sup>37/</sup> In light of cable operators' programming control and their increasing market penetration, Congress predicted that the "economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."<sup>38/</sup>

The implementation of digital television raises the same concerns about economic failure and discriminatory treatment that initially prompted Congress to enact the mandatory carriage provisions. DTV was implemented to preserve a free, universal broadcasting service and promote the full benefit of the new technology to the public.<sup>39/</sup> Yet, the mandated implementation of digital television has increased precisely the risk of economic failure of local stations that is addressed by the must carry rules. The Commission has recognized the economic challenges faced by broadcasters and has, through the DTV rulemakings, attempted to mitigate the

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<sup>36/</sup> *Turner II*, 117 S.Ct. at 1191.

<sup>37/</sup> *Id.*

<sup>38/</sup> 1992 Cable Act, § 2(a)(16).

<sup>39/</sup> *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry*, 10 FCC Rcd 10540, 10541 (1995).

burden of the DTV roll-out.<sup>40/</sup> Nonetheless, broadcasters will incur significant capital costs in constructing their DTV stations and have no assurances of any commensurate return on that investment.<sup>41/</sup> Indeed, with respect to DTV, FCC Chairman William Kennard has said "trusting in the marketplace means giving businesses the opportunity to fail."<sup>42/</sup> Commissioner Powell called the current DTV transition "a potential train wreck."<sup>43/</sup> Under the implementation of digital television, cable operators have less further to go than ever to threaten the economic viability of local broadcast television stations. The FCC has the Federal mandate to assist DTV. Must carry is the most important ingredient to DTV success.

Nor does DTV eliminate cable operators' incentive to discriminate against local broadcast programming. To the contrary, cable operators' technological bottleneck control provides new opportunities to harm local broadcasters through discriminatory treatment by their carriage of the higher-quality DTV formats of affiliated cable networks and the capture of audiences from local broadcasters with lower-quality NTSC pictures. Congress, cognizant of such discriminatory power, already

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<sup>40/</sup> *Fifth DTV Report and Order*, 12 FCC Rcd at 12844-47.

<sup>41/</sup> The most recent estimates, as noted by Sinclair Broadcasting, indicate a DTV conversion cost of between \$5-\$9 million per station. COMMUNICATIONS DAILY, Sept. 18, 1998, at 12.

<sup>42/</sup> Harry A. Jessell, *DTV or Bust, says Kennard*, BROADCASTING & CABLE, Sept. 21, 1998, at 22.

<sup>43/</sup> Bill McConnell, *Powell Raises Red Flag over DTV Switch*, BROADCASTING & CABLE, Sept. 14, 1998, at 14.

addressed this concern by prohibiting the degradation of local broadcast signals.<sup>44/</sup> Some broadcasters are convinced that high-quality HDTV programming will increase their viewership.<sup>45/</sup> Cable operators possess the same opportunity to increase viewership for cable networks through their carriage of DTV quality signals. Unfortunately, if carriage of DTV signals is not mandated, cable operators could deny carriage to local DTV multi-channel stations in favor of cable networks, thereby diverting revenue streams away from local broadcasters.

The obvious fact is that cable operators can again threaten the economic viability of local broadcasters and reduce the multiplicity of media and programming sources. Congress, however, has already protected households from such loss of television service by recognizing that the same concerns about discriminatory treatment and economic failure initially prompting the must carry provisions would be present for both analog and digital television. Congress did not distinguish between the two formats in enacting the must carry provisions — and neither can the Commission.

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<sup>44/</sup> 47 U.S.C. § 534(b)(4)(A).

<sup>45/</sup> CBS believes that HDTV programming will appeal to the largest segment of the population. Glen Dickson, *Networks Have Different Views of DTV*, BROADCASTING & CABLE, May 12, 1997, at 52. When Capitol Broadcasting's James Goodman describes DTV, he says, "Look at this. Look at this quality, look at these colors, listen to this sound. This is going to be great; our ratings are going to go up." *High on HDTV*, BROADCASTING & CABLE, Sept. 29, 1997, at 38.

**C. Congress Accounted for the Burden Placed upon Cable Systems by Limiting Mandatory Carriage to One-Third Capacity.**

To survive judicial review, the mandatory carriage provisions must not burden substantially more speech than necessary.<sup>46/</sup> Congress determined that the mandatory carriage burden for cable operators could be no greater than one-third of a system's capacity, and the Supreme Court agreed that this level of burden was appropriate.<sup>47/</sup> While the Commission has the authority in this proceeding to make changes to the carriage requirements, it must recognize that Congress already has accounted for must carry's burden on cable operators. The Commission risks judicial invalidation of any changes promulgated if it deviates from the balance struck by Congress and approved by the Supreme Court. Unless and until Congress alters the one-third limit and determines that the implementation of digital television requires a change to that limit, the Commission has no discretion to reach a contrary result.

Moreover, whatever burden that would exist as a result of the DTV roll-out will be temporary as analog channels will be reclaimed no later than the close of the DTV transition. Likewise, as the Commission recognizes, there is nothing to indicate that the one-third capacity limit is inapplicable to digital signals.<sup>48/</sup> Cable operators are not required to devote more than one-third of their existing capacity for mandatory carriage purposes, and because Congress did not exclude DTV signals from mandatory carriage, it accordingly did not exclude broadcasters' DTV multi-channel

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<sup>46/</sup> *United States v. O'Brien*, 391 U.S. 367 (1968).

<sup>47/</sup> 47 U.S.C. § 534(b)(1)(B); *Turner II*, 117 S.Ct. at 1199.

<sup>48/</sup> *Notice* at ¶51.

signals from being attributed to the one-third capacity limit. Local broadcasters' digital transmissions may not be carried in excess of the one-third channel capacity limit (absent agreements to the contrary). As with any other provision in Section 614 of the Act, the Commission is not permitted to go beyond the plain language of Congress simply because of the technical implementation of digital television.

**II. IF CABLE CAPACITY IS EXHAUSTED, ALL BROADCASTERS SHOULD BE PERMITTED TO SELECT CARRIAGE OF EITHER THE ANALOG OR DIGITAL SIGNAL.**

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Section 614(b)(1)(B) of the Act requires cable operators to devote no more than "one-third of the aggregate number of usable activated channels"<sup>49/</sup> for local commercial broadcast signal carriage purposes. Congress provided that once that capacity is filled, cable operators have discretion in selecting which stations should be carried on its cable systems. The discretion is not absolute, however, but reasonably constrained by the provisions of Section 614, which requires a cable operator to carry the "primary video" of a broadcast signal.<sup>50/</sup> Because Congress did not distinguish between analog and digital signals — thus presuming mandatory carriage of DTV signals — the Commission is not authorized to interpret the "primary video" provision as excluding digital signals from must carry requirements. However, in conjunction with the Commission's authorization to "establish any changes in the signal carriage requirements" and tackle the tough technical transitional issues "to ensure cable

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<sup>49/</sup> 47 U.S.C. § 534(b)(1)(B).

<sup>50/</sup> 47 U.S.C. § 534(b)(3)(A).