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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)	CS Docket No. 98-120
of Digital Television Broadcast Stations)	
)	
Amendments to Part 76)	
of the Commission's Rules)	

**COMMENTS OF HOME BOX OFFICE AND
TURNER BROADCASTING SYSTEM, INC.**

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Home Box Office ("HBO") and Turner Broadcasting System, Inc. ("TBS"), by their attorneys and pursuant to Section 1.415 of the Commission's rules (47 C.F.R. § 1.415), hereby submit these comments in response to the Notice of Proposed Rulemaking ("NPRM") released in the above-captioned proceeding on July 10, 1998.¹ The NPRM solicits views on the responsibilities of cable television operators to retransmit the second channels of local television broadcasters that will become operational over a period of the next several years as broadcasters transition their operations from an analog to a digital television ("DTV") service. The NPRM also seeks information on certain DTV technical compatibility issues.

I. SUMMARY OF POSITION

The Commission has articulated seven possible options for defining cable operators' DTV signal carriage obligations during the transition from analog to digital over-the-air television broadcasting. Those options range from the

¹ FCC 98-153, released July 10, 1998.

“immediate carriage proposal” (a requirement that cable systems carry both the analog and the digital signals of local broadcasters from the inception of DTV service on the additional channels) to the “no must carry proposal” (no requirement for cable carriage of DTV signals during the transition period). HBO/TBS submit that the only legally sustainable and appropriate public policy option is the “no must carry proposal.”

The statutory basis on which the Commission grounds this NPRM does not mandate or permit dual (analog/digital) signal carriage. Nowhere in the language and legislative history of Sections 614(b)(4)(B) and 336 of the Communications Act of 1934, as amended (the “Act”) is there reflected a congressional intent to impose such a requirement. In fact the statutes and legislative histories would permit digital must carry, if at all, only after the transition to DTV is complete. Even after the transition, the legislative record reflects nothing other than congressional neutrality on the DTV must carry subject.

In contrast to the record developed by Congress prior to 1992 in support of analog must carry rules, there is absolutely no factual predicate for finding sufficient governmental interests to justify intrusion on cable operators’ First Amendment rights and impingement on programmers’ First Amendment rights through DTV transitional must carry. When Congress passed the current must carry statute in 1992, the future path to development of DTV broadcasting was far from certain, so it is not surprising that Congress declined to legislate on the subject. The flexibility that the Commission since has awarded broadcasters in deploying DTV technology completely undermines any predictions of dire economic

consequences to broadcasters, and loss of service to the public, resulting from an absence of DTV must carry. Finally, in the intervening years since 1992, there have been significant changes in the video distribution industry, and in the technology of the industry, that erode the foundations on which Congress relied to justify imposing must carry in the analog environment. Accordingly, any DTV must carry rules promulgated by the Commission pursuant to the NPRM necessarily would fail to pass constitutional muster under the analysis used by the Supreme Court to sustain the 1992 must carry provisions.

Aside from the legal issues, the imposition of DTV must carry during the transition period would not be sound public policy. Broadcasters are in no different position from non-broadcast programmers in their desire to develop new digital programming services and distribute them to consumers. There is no policy justification for giving broadcasters preferential rights with respect to the distribution of their new digital services over cable.

With respect to digital technical compatibility, HBO/TBS are of the view that the affected industries (broadcasting, cable, consumer electronics manufacturers, etc.) are moving rapidly toward resolving outstanding issues. Recent encouragement by Chairman Kennard has been helpful in moving the voluntary process forward, and further government involvement will not be necessary to achieve a final consensus on the material compatibility concerns.

II. INTERESTS OF HBO/TBS

HBO and TBS are controlled by Time Warner Inc. Since the 1970s, both HBO and TBS have been engaged in providing television programming services, initially for distribution over cable television systems, and today for distribution over a wide variety of multichannel video program distribution ("MVPD") facilities (cable, wireless cable, direct broadcast satellites ("DBS"), fixed satellite service satellites ("FSS"), satellite master antenna television ("SMATV"), etc.) Today, HBO provides multiple channels of two premium programming services, HBO and Cinemax. TBS provides multiple channels of the following advertiser supported programming services: CNN, Headline News, TNT, TBS Superstation, Cartoon Network, Turner Classic Movies, CNNfn, CNN International, CNN en Espanol and CNN/SI.

In 1992, HBO became the first network in the United States to offer full-time digital transmission of its television programming. Today, HBO provides 20 standard definition digital feeds of its various services. Initially, the digital feeds were transmitted by satellite to cable system headends where they were decoded and retransmitted down the cable plant in an analog format. Beginning in 1997, many of HBO's cable affiliates began distribution of HBO's digital feeds over their cable systems in a digital format, directly to subscriber digital set-top decoders, which, in turn, deliver an analog output to the subscribers' television sets.²

² Although HBO and TBS have numerous analog and digital feeds, it is not accurate to suggest that they will "convert" all of their analog feeds to digital. Indeed, HBO/TBS do not foresee abandoning analog transmission of their services for years to come.

In 1996 TBS began digital feeds of CNNfn, CNN/SI and CNN International. In 1997 digital feeds of CNN en Espanol and Turner Classic Movies were established, and in 1998 TNT and the Cartoon Network's West Coast feeds were launched in digital formats.

In 1994, both HBO and TBS programming began to be distributed digitally by direct-to-home ("DTH") satellite service operators, both DBS and medium power FSS. These signals are transmitted directly from the satellites to consumers' dishes and digital integrated receiver/decoders.

All of the HBO/TBS digital services to date have been standard definition television ("SDTV"). Beginning in early 1999, HBO will offer an east and west coast version of its HBO service in high definition television ("HDTV") utilizing the 1080 interlace format. TBS intends to be a leader among advertiser-supported satellite networks in the provision of HDTV programming as the demand develops. Construction is underway on Turner Studios which will be the largest all-digital television production facility on the East Coast. Original movies and cartoons for the TBS services are shot on film, which is converted easily to HDTV, and a number of documentary programs already have been shot in HDTV.

A number of HBO and TBS cable television and satellite affiliates have indicated their intent to carry HBO's and TBS's HDTV services. For example, HBO DBS distributor USSB announced recently that it would lease additional

transponders and begin to transmit HBO's HDTV service next year to USSB's nationwide subscriber base.³

In order to secure carriage of their digital and/or HDTV feeds on cable systems and other MVPD platforms, HBO/TBS must negotiate with the distributors, many of which have severe limitations on the channel capacity they have to devote to DTV. For this reason, HBO/TBS are opposed to Commission rules that would afford other programmers (i.e., broadcasters) a government-granted priority with respect to the carriage of their digital services. Not only would such rules infringe upon the distributors' First Amendment rights to select the digital services of their choice, the rules would impair HBO's/TBS' First Amendment rights by, in many cases, denying them the opportunity to obtain distribution of their digital services because of the broadcasters' priority over scarce channel capacity. In the digital domain, where all program services are starting from a similar position, there should be no government policies that favor the distribution of one service's digital feeds over any others.

HBO/TBS also are concerned with technical compatibility issues arising out of the deployment of DTV technology. Because there are many different DTV formats that have been authorized by the Commission, it is essential that the equipment used by distributors and sold or leased to subscribers be capable of processing all available formats. HBO/TBS, therefore, are interested in any Commission proposals regarding features and capabilities of DTV equipment.

³ Communications Daily, Vol. 18, No. 165, August 26, 1998 at 7.

III. SECTION 614(b)(4)(B) OF THE ACT DOES NOT MANDATE OR PERMIT EXTENSION OF ANALOG MUST CARRY RULES TO SEPARATE DIGITAL SIGNALS DURING THE TRANSITION PERIOD

In its NPRM, the Commission tentatively concludes that Section 614(b)(4)(B) of the Act grants it broad authority to define the scope of a cable operator's signal carriage requirements during the period of change from analog to digital broadcasting. NPRM at ¶13. HBO/TBS do not agree that the Commission's authority under the statute is so broad. In fact, the statute and its legislative history specifically refute the claims of some parties that simultaneous carriage of both analog and digital signals during the transition period is mandatory or even permitted.

An examination of the plain language and the legislative history of Section 614(b)(4)(B) makes clear that Congress had no interest in dictating or authorizing carriage requirements for a new technology which, at the time the statute was passed, was still in embryonic form. Entitled "Signal Quality," Section 614(b)(4) first directs the Commission to establish signal quality standards for carriage of analog television signals. Then, Section 614(b)(4)(B) states: "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 signal carriage requirements of cable television systems necessary to ensure cable carriage of broadcast signals of local commercial television stations which have

been changed to conform with such modified standards.”⁴ The House Report accompanying this text explains its purpose as follows:

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 standards.

H.R. Rep No. 102-628, 102d Cong., 2d Sess. at 94 (1992) (“House Report”).

Similarly, the Senate Report directs the Commission, after DTV standards are adopted, to “conduct a proceeding to make any changes in signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of new Section 614.” S. Rep. No. 102-92, 102d Cong., 1st Sess. at 85 (1991)(“Senate Report”).⁵

The language of the statute and the House and Senate Reports is unambiguous. Section 614(b)(4)(B) permits, but does not require, the Commission to establish technical standards for the carriage of DTV broadcast signals⁶ to be

⁴ 47 U.S.C. § 614(b)(4)(B).

⁵ The Conference Report likewise makes reference to changes to accommodate “modified standards.” See H.R. Rep. No. 102-862, 102d Cong., 2d Sess. at 67 (1992).

⁶ “[T]he Committee realizes that differences in quality are expected among the different types of signals (i.e., digital v. analog) processed and carried on a cable system” House Report at 94.

applied after any transition or "change" to DTV is complete. The language does not permit an interpretation that the Commission is authorized to impose must carry during the transition period or even that Congress was pre-disposed to DTV must carry after the transition is over.

The lack of congressionally mandated or authorized dual analog and digital signal carriage requirements is further emphasized in Section 336 of the Act, adopted in 1996. That section states that "ancillary or supplemental service offered over DTV channels shall not have any right to carriage under Section 614 or 615."⁷ Further, the legislative history of Section 336 affirms that Congress had never expressed a view that DTV signal carriage should be required. Referring to Section 336, the Conference Report states that there was no intent to "confer must carry status on advanced television or other video services offered on designated frequencies."⁸

Thus, contrary to assertions made previously by some parties in the various DTV proceedings, nothing in Section 614(b)(4)(B) or any other section of the Act supports mandatory carriage of both analog and digital television broadcast signals during the DTV transition period. Instead, the Commission has been granted discretion under that section to take actions to deal with continued technical compatibility between broadcast signals and the cable systems after the transition to broadcast DTV is completed.

⁷ 47 U.S.C. §336.

⁸ Telecommunications Act of 1996, Conference Report, 104th Cong., 2d Sess., Report 104-230 at 171 (1996).

IV. NEITHER CONGRESS NOR THE COMMISSION COULD IMPOSE DIGITAL MUST CARRY REQUIREMENTS UNDER THE CONSTITUTIONAL TESTS OF TURNER I & II

Even if the language and history of Section 614(b)(4)(B) could be interpreted to permit the application of must carry regulation to digital signals during the DTV transition period, adoption of such rules is not a course of action that is open to the Commission. The analysis of the current analog must carry rules conducted by the Supreme Court in Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) ("Turner I"), and Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174 (1997) ("Turner II"), makes plain that the extension of must carry to digital signals during the transition period would not survive constitutional scrutiny.

A. Turner I and Turner II Are Grounded On Specific Factual Details

Section 614 owes its continuing constitutionality to a very specific set of factual findings which were the focus of the Supreme Court's inquiry in Turner I and Turner II. In Turner I the Court first reviewed the origin and history of the must carry requirement. Congress had passed Section 614 based on its finding that the physical characteristics of cable transmission, and structural aspects of the cable industry, were endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress found that over 60 percent of households with television sets subscribed to cable and that for these households cable had replaced over the air broadcast as the primary source of video programming. These findings were based

on evidence that most cable subscribers did not or could not maintain antennas to receive broadcast television service, did not have input selector switches to convert from cable to antenna reception, or could not otherwise receive broadcast service. Accordingly, Congress concluded that cable operators could harm their broadcast competitors. Based on the foregoing, the Supreme Court found that Congress had passed Section 614 in order to serve three governmental interests: 1) the preservation of the benefits of free over the air local broadcasting; 2) the provision of the widespread dissemination of information from a multiplicity of sources; and 3) the promotion of fair competition in the market for television programming.

The Turner I Court next determined that Section 614's content-neutral applicability warranted an intermediate level of scrutiny as articulated in United States v. O'Brien, 311 US 367 (1968). Under that standard, legislation would be upheld if found to advance important government interests unrelated to the suppression of free speech while not burdening substantially more speech than necessary to further those interests. The Court held that each of the interests articulated by Congress was sufficiently important to warrant legislation. However, with respect to the crucial question of whether the government interests in fact would be advanced by the legislation in question, the Court concluded that there was insufficient material on the record. Accordingly, it remanded the case for further factual development in the courts below.

In Turner II, the Supreme Court had before it an augmented record and found a basis to support Congress' conclusion that circumstances justified enactment of the must carry provisions. The Court found specific support for

Congress' conclusion that cable operators had considerable and growing influence over local video programming, and thus exercised "control over most (if not all) of the television programming that is channeled into a subscriber's home...[and could] thus silence the voice of competing speakers with a mere flick of the switch." Turner II, 117 S. Ct. at 1190 (citing Turner I, 512 U.S. at 656). The Court noted further evidence that it believed indicated that the structure of the cable industry could result in local broadcast stations being dropped from systems or repositioned to less-viewed channels. Finally, the Court found that significant evidence indicated the vast majority of cable operators had not been affected in a significant manner by must carry. Because the burden imposed by must carry was found "congruent" to the benefits it afforded, the Court in Turner II concluded that analog must carry was narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American television households without cable, and therefore passed constitutional muster.

In neither Turner I nor Turner II did the Supreme Court take up the question of whether analog must carry regulations could be applied to digital signal carriage as well, especially if those regulations required dual signal carriage during a lengthy transition period. However, the changing nature of broadcasting brought on by the development of digital technology leaves no doubt that the delicate fact-intensive balance between government interest and regulatory burden which sustained the Court's holdings in the Turner cases has been upset permanently.

**B. Government Interests Found To Be Advanced
By Analog Must Carry Regulations Are Not
Served By Extension Of Must Carry To Digital**

The primary government interest articulated in Turner I & II was the preservation of free over-the-air broadcasting.⁹ In defending analog must carry, the government argued that without such protection local television stations would be dropped by cable operators and that, if dropped, they would “deteriorate to a substantial degree or fail altogether” due to their inability to compete with cable systems for audiences and advertising revenue.¹⁰ The government further argued that cable operators had a strong economic incentive to reduce the number of media voices in the community by dropping carriage of local television signals.¹¹

1. Digital Must Carry Unnecessary to Preserve Local Broadcasting

Whatever the validity of the concerns regarding the future of analog broadcasting more than six years ago, the scenario feared by Congress and the Commission simply cannot exist in the context of the transition to digital service. As a preliminary matter, the current analog must carry rules presumably will remain in place throughout the digital transition period. Not a single broadcast station currently carried on a cable system by virtue of such rules will be dropped involuntarily. Moreover, during the early years of the transition, broadcasters, in all likelihood will use their DTV channels for new services, not to replicate their

⁹ Turner I, 512 U.S. at 664.

¹⁰ Id.

¹¹ Id. at 656. See also, Turner II, 117 S. Ct. at 1190.

existing analog programming. In response to broadcasters' arguments, the Commission declined to require simulcasting of programming on analog and digital channels during the early years of the transition period. Simulcasting is not required to commence until the sixth year of the transition. Even then, only 50% simulcasting is required, going to 100% in year eight, in order to prevent consumers from "suffer[ing] the loss of a current program service only offered on analog channels."¹² Accordingly, extension of must-carry requirements to new digital signals during the transition period is not required in order to preserve the existing broadcast services.

More importantly for the long term, however, digital technology and the Commission's grant of free rein to broadcasters to offer a myriad of services over their digital channels have eliminated the fundamental economic rationale behind promulgation of the original must carry requirements. In assessing in the early 1990's the harm that broadcast stations might incur in the absence of must carry protection, Congress assumed a basic economic model of television broadcasting consisting of a single video channel supported by advertisers in order to remain free to viewers.¹³ Congress reasoned that, without must carry, television stations would be dropped from cable systems, their viewing audiences would decline precipitously,

¹² In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 12809, 12833 (1997) ("DTV Fifth Report and Order") (emphasis added).

¹³ See, e.g., Senate Report at 59.

their revenues from advertising would plummet and they eventually would go out of business, resulting in the loss of free over-the-air service to the public.

The economic model assumed by Congress does not apply in the digital context. Although the Commission originally envisioned digital broadcasting consisting of a single advertiser-supported HDTV signal transmitted by each broadcast station,¹⁴ the rapid and unexpected advances in digital compression technology which have occurred in the past three or four years have completely changed the equation. Recognizing this, the Commission, since 1995, has sought to maximize the flexibility broadcasters will have to utilize their digital spectrum for multiple video, audio and data services, both advertiser and subscription based. As the Commission now recognizes, digital technology will permit broadcasters to transmit three, four, five or more digital program streams simultaneously. In addition,

[t]he [DTV] standard allows for the broadcast of literally dozens of CD-quality audio signals. It permits the rapid delivery of large amounts of data; an entire edition of the local newspaper could be sent, for example, in less than two seconds. Other material, whether it be telephone directories, sports information, stock market updates, information requested concerning certain products featured in commercials, computer software distribution, interactive education materials or virtually any other type of information access can also be provided. It allows broadcasters to send video, voice and data simultaneously and to provide a range of services dynamically, switching easily and quickly from one type of service to another.

¹⁴ See, e.g., In the Matter of Advanced Television Systems and Their Impact upon the Emerging Television Broadcast Service, First Report & Order, 5 FCC Rcd 5627, 5628 (1990).

For example, a broadcaster could transmit a news program consisting of four separate, simultaneous SDTV program streams for local news, national news, weather and sports; then transmit an HDTV commercial with embedded data about the product; then transmit a motion picture in a HDTV format simultaneously with unrelated data.

In the Matter of Advanced Television Systems and Their Impact upon the Emerging Television Broadcast Service, Fourth Report & Order, 11 FCC Rcd 17771, 17774 (1996).

The Commission has acknowledged that “[p]ermitting broadcasters ... to develop additional revenue streams from innovative services [...] will help broadcast television to remain a strong presence in the video programming market [and] will, in turn, help support a free programming service.”¹⁵

In another pending proceeding, the Commission currently is in the process of determining how to assess fees on the revenue streams which will be generated by broadcasters in providing these ancillary and supplementary services.¹⁶ In that proceeding, the Commission once again has stated its recognition of the “benefit of permitting broadcasters the opportunity to develop additional revenue streams from innovative digital services.”¹⁷ In order to encourage broadcasters to develop multiple services and revenue streams, the Commission has stated that its fee

¹⁵ Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, ___ FCC Rcd ____, ____, 11 CR 605, 612 (1998).

¹⁶ Notice of Proposed Rulemaking, MM Docket No. 97-247, FCC 97-414 (1997).

¹⁷ Id. at ¶4.

collection models should not become a barrier to broadcasters' using the DTV capacity to provide multiple services.¹⁸

Already, some major broadcasting entities are moving to take advantage of the flexibility and encouragement provided by the Commission to expand their planned service offerings and their sources of revenue. According to David Smith, president of Sinclair Broadcasting, Inc., which controls more than 60 television stations, "We view multicasting . . . as the beginning of a long-term opportunity for over-the-air broadcasting to become a multiple-income stream enterprise."¹⁹ LIN Television Corporation also has stated its intentions to look for DTV revenue from data, subscription and access fees.²⁰ This sentiment has been echoed recently in many of the comments filed in response to the Commission's inquiry regarding the appropriate fee collection model to be applied to revenues generated by the provision of auxiliary services.²¹ Thus, the actions of both private parties and the

18 Id. at ¶10.

19 "ABC, Sinclair To Use Extra Digital Spectrum To Multiplex," Media Daily, No. 5, Vol. 4, August 18, 1997. See also, "Is Television's Future In This Man's Hands?" The New York Times, Vol. CXLVIII, No. 51,300, October 4, 1998, Section 3 at 1.

20 Communications Daily, Vol. 18, No. 181, September 18, 1998 at 12.

21 See, e.g., Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., MM Docket No. 97-247, at 14 (May 4, 1998) ("The potential range of ancillary services cannot be known at the dawn of digital television service, and were the Commission to set varying levels of fees depending on the nature of the ancillary service offered by broadcasters, it could easily result in discouraging new services that the Commission might conclude are highly valuable to the public."); Comments of Cox Broadcasting, et al., at 5 (May 4, 1998) ("As broadcast licensees are building out DTV, the Commission should adopt a fee program which encourages the greatest possible degree of technological innovation and experimentation with the broadest range of DTV ancillary services.")

government underline an important new factor which must be considered in reexamining the government interest in mandating cable carriage of broadcast signals. The enormous potential for multiple revenue streams generated through multiple digitally compressed over-the-air channels and ancillary services changes the economics of broadcasting substantially. These changes belie the prediction that failure by cable systems to carry a single advertiser-supported digital signal would cause the deterioration and/or failure of a broadcast station and the loss of service to the public -- the linchpin of the Supreme Court's constitutional basis for upholding analog must carry.

2. Digital Must Carry Unnecessary for Broadcasters To Reach Consumers

In addition to undermining the model of a single broadcast signal supported by advertising, digital technology is one of several elements contributing to the obsolescence of another fundamental assumption of Congress and the Turner Courts, namely, the status of cable as a programming gatekeeper. One of the foundations of the Turner decisions was a finding that cable represented the only effective means by which broadcast signals could reach many viewer households. Turner II, 117 S. Ct. at 1190. Thus, cable was viewed as a gatekeeper, which could "exercise control over most (if not all) of the television programming that is channeled into a subscriber's home....[and] can thus silence the voice of competing speakers with a mere flick of the switch." Turner I, 312 U.S. at 656. Cable operators also were seen as having motives to deny carriage to local broadcast signals in favor of cable-affiliated programming services. Turner II, 117 S. Ct. at 1190.

a. Alternative distribution systems are gaining subscriber share

Whatever the significance Congress, the Court and the Commission placed on the data before them eight or ten years ago regarding cable's ability to preclude viewers from receiving broadcast signals and its motives to do so, such findings no longer are valid. As demonstrated in the Commission's annual assessments, the world of multichannel video programming competition is in rapid transition.²² Once virtually alone in the multichannel video distribution field, the cable industry now is faced with significant and rapidly increasing competition from a variety of rival video distribution services such as DBS, OVS and wireless cable, to name a few.²³

The figures regarding the growth of these media are telling. According to the Commission's reports, while cable's share of the MVPD households in 1991 (prior to passage of the analog must carry requirements) was near 97%, that figure has fallen steadily over the subsequent six years, reaching a level of 87% as of June, 1997.²⁴ At the same time, the Commission estimated that DTH service (including

²² See, e.g., Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming (Fourth Annual Report), 13 FCC Rcd 1034 (1998).

²³ Congress recognized the potential for alternative MVPDs increasingly to become competitors to cable, a fact that the Commission's annual reports consistently have documented. See Senate Report at 17.

²⁴ See Fourth Annual Report at ¶11. Cable's decline has been steady, with its share of the MVPD households for the years 1992 through 1996 calculated as 96%, 95%, 93%, 91% and 89%, respectively. See Fourth Annual Report at Appendix E, Table E-1. See also, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming (Second Annual Report), 11 FCC Rcd 2060, 2180 (1996) at Appendix G.

DBS and C-band home satellite dish ("HSD") service) grew from 1.4% to nearly 10% of the multichannel video programming households with approximately 9 million subscribers.²⁵ In the Fourth Annual Report, DirecTV and PRIMESTAR were identified among the ten largest providers of multichannel video programming services.²⁶ DirecTV recently reached 4 million subscribers, and reports that 75 percent of its new customers come from cable-passed areas.²⁷ Between 1996 and 1997 alone, SMATV service grew 10.7% over its previously reported subscribership, and wireless cable, while losing some subscribers in 1996, continued to hold 1.5% of MVPD households, with promise of far greater potential growth due to the industry's early embrace of digital transmission technology.²⁸

For 1998, the trend continues. For example, SBCA reports that the increase in gross subscribership to DTH is up 28.36% over the same reporting period from

25 Id. It should be noted that DBS had no share of MVPD subscribers until 1993, when it captured a mere .12%. By 1997, that figure had risen to 6.85%.

26 Id. It also is worth noting that congressional fears that cable operators would use their position exclusively for the provision of their own programming services (and in the process drop local stations) also have lessened. In 1994, of the 106 satellite-delivered cable programming services, 53% were vertically integrated (i.e., were owned at least in part by a cable system operator.) That figure fell to 51% in 1995, 46% in 1996 and 40% in 1997. During this same period, the number of satellite delivered program services has risen from 106 to 172. An additional 72 program service providers unaffiliated with cable operators report their intention to launch their services within the next year. Fourth Annual Report, 13 FCC Rcd at 1122-24.

27 "DirecTV Picks Up 4 Millionth Sub," Multichannel News, Vol. 19, No. 38, September 21, 1998 at 8.

28 Fourth Annual Report at Appendix E, Table E-1.

1997, and estimates that DTH subscriber numbers will surpass 10 million by the end of this year.²⁹

b. Alternative distribution systems are delivering local broadcast stations

Not only are alternative MVPD's increasing their subscriber shares, but each of these competing delivery vehicles discussed above has the potential either to be an independent source for the delivery of local broadcast programming or to encourage the development of better over-the-air reception technology to complement their own MVPD platforms. A good example of this trend is exemplified by various DBS operators.

Due to capacity limitations associated with satellite video delivery and copyright law restrictions, DBS operators initially were unable to tailor their video program packages in order to incorporate local broadcast signal retransmissions into numerous geographical areas. In order to overcome this obstacle, DBS operators have begun to develop various technical and legal solutions. One DBS operator, EchoStar, has proposed a "local-into-local" system of retransmitting certain local broadcast signals by satellite back into their local service areas and offering the satellite-delivered local signals as part of a larger DBS subscription service package. EchoStar has devoted substantial satellite capacity to local signal retransmissions and has been working actively in Congress to achieve modifications

²⁹ Comments of Satellite Broadcasting and Communications Association in re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming (Fifth Annual Report), CS Docket 98-102 (July 30, 1998).

to the copyright laws to authorize such local signal retransmission.³⁰ Other DBS operators are actively promoting dual reception antennas capable of receiving both satellite feeds of premium and advertiser supported national networks and over-the-air signals of local television stations. For instance, DirecTV now offers at least four different combinations of satellite and UHF/VHF antennas, each tailored to match the particular geographic circumstances of a subscriber.³¹

In yet another example of the growing use of over-the-air antennas, the Consumer Electronics Manufacturers Association ("CEMA") and various DBS participants are working together to make it easier for DBS subscribers to receive local broadcast stations off the air. Specifically, CEMA has designed maps, to be received in electronics retail stores this fall, that will specify the types of off-air antennas that consumers would need, depending on where they live within a designated area.³²

30 See Testimony of Charles W. Ergen, CEO, EchoStar Communications Corporation, Before the Senate Commerce Committee on the Subject of Competition to Cable, July 27, 1998.

31 See "YES YOU CAN! Enjoy Local Channel and DIRECTV TOO!" at www.directv.com/misc/yesyoucan3.html. An independent marketer of DirecTV services, Bell Atlantic, also is offering a combination satellite/over-the-air reception system: "With one call to Bell Atlantic, a truck rolls, bringing not only the DBS hardware - which is available for sale or lease - but also an off-air antenna for local broadcast signals, which aren't available on DirecTV." "DirecTV Telco Partners Dial 'M' for Marketing," Multichannel News, Vol. 19, No. 34, August 24, 1998 at 51.

32 "Counting Down to DTV," Broadcasting and Cable, Vol. 128, No. 30, July 20, 1998 at 23. With the upcoming introduction of HDTV by some broadcasters, DirecTV is proposing to combine efforts with local stations to offer a package of digital satellite signals from DirecTV and local TV signals from the broadcasters. "DirecTV Stumps For HDTV Plan," Satellite Business News, Vol. 10, No. 14, July 15, 1998 at 1.

Other efforts are underway to enhance DBS by incorporating local signals into consumer viewing packages. For example, Northpoint Technology currently is testing an experimental terrestrial system which would employ spectrum in the 12 GHz band to transmit local programming into an antenna mounted on the back of a conventional DBS dish.³³ Although Northpoint's proposal faces a number of significant technical hurdles, its efforts are representative of the energy and resources that currently are at work transforming the way in which over-the-air broadcast programming is delivered to consumers.

c. Technology is improving over-the-air reception capability

The Commission also must not underestimate the improving effect of digital technology on the character of over-the-air transmission itself. One of the major drawbacks of an analog signal is its tendency to fade as it radiates out from its transmission point. Thus, the further away a receiver, the more likely that a weakened signal will result in a fuzzy or static-filled picture. This phenomenon results in an inefficiency of delivery which, even within a station's primary coverage contour, can make over-the-air reception undesirable or impossible, and forces consumer reliance on cable for reception of local program signals.

Digital technology promises to improve the efficiency of over-the-air signal delivery. According to predictions, the nature of the digital signal will eliminate the

³³ Northpoint Technology, Petition for Rulemaking to Modify Section 101.147(p) of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band By Digital Broadcast Satellite Licensees and Their Affiliates, RM No. 9245.