

problem of fading or distortion.³⁴ If a digital signal is of a given acceptability, audio and visual characteristics will be excellent. If the digital signal falls below such an acceptable limit, there will be no audio or video. The Commission has designed its table of DTV channel allotments to ensure that an acceptable digital signal will replicate each television station's current analog coverage contours as closely as possible.³⁵ In some cases the digital coverage area will be even greater than the analog coverage area of a given station.³⁶ The policy of replicating coverage contours, along with the robust nature of the digital signal, will allow for clear over-the-air reception right out to the edge of a station's coverage contour.³⁷ The result

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- 34 See Sid Khanna, "A Brief Overview of Digital Television, Including High Definition Television," Cohen, Dippell and Everest, P.C. (March, 1997). "[T]he service replication allotment approach we are using and the superior performance characteristics of the ATSC DTV system have allowed us to provide for DTV coverage that is equal or superior in coverage to today's NTSC service." In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order, 12 FCC Rcd 14588, 14629 (1997) ("DTV Sixth Report and Order").
- 35 "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 audience they now serve and that viewers have access to stations that they can now receive over-the-air." DTV Sixth Report and Order, 12 FCC Rcd at 14605.
- 36 "We therefore will permit stations to request an increase in their operating power and/or height of antenna from that specified in the DTV Table . . . up to that needed to provide the same geographic coverage as the largest station within their market." Id. at 14606.
- 37 The Advanced TV Technology Center ("ATTC") recently has announced the successful testing of on-channel repeaters which are designed to relay DTV signals to areas otherwise screened by intervening terrain, thereby enhancing the audience reach of DTV even further. ATTC believes employment of such repeaters will "make DTV available to more viewers, allow stations to reduce power of some main transmitters, [and] conserve DTV spectrum." Communications Daily, Vol. 18, No. 172, September 4, 1998 at 2.

will be a greater efficiency in digital over-the-air signal delivery, allowing more viewers to receive broadcast signals directly and alleviating dependence on cable retransmission.³⁸

The past few years also have seen the removal of other technical and regulatory obstacles to reception of broadcast signals by consumers which existed at the time of the Turner analyses. First, as noted by the Commission, the ability to switch among different sources of signal delivery through the use of A/B switch devices has been greatly improved.³⁹ In establishing the current must-carry regime in 1992, Congress determined that, as an alternative means of delivering both cable and over-the-air signals to the same viewer, A/B switches were too complex and confusing. Senate Report at 45. Nonetheless, members of the industry have recognized the advantages that such a device can provide to the consumer, in terms of programming flexibility. Consequently, and independent of any regulatory oversight, incorporation of A/B switch devices into television sets and other devices

³⁸ The fact that consumers may have disconnected or abandoned over-the-air reception antennas when they subscribed to cable will not be a major impediment to the deployment of antennas for digital reception. To obtain digital services, consumers will, of necessity, have to purchase or lease new equipment (digital television receivers, set top converters, etc.). As the Commission has observed, the “viability of digital broadcast television will require millions of Americans to purchase digital television equipment.” DTV Fifth Report and Order, 12 FCC Rcd at 12811. Given the aggressive marketing of over-the-air antennas that is now being implemented, the addition of an antenna to a consumer’s otherwise necessary digital equipment transaction will be a natural “sale” for consumer electronics retailers.

³⁹ NPRM at ¶87.

with remote control, now allows a viewer to switch effortlessly between over-the-air reception and other video sources by pressing a button on his remote control. Such devices, for example, are an integral part of the effort of DBS operators to provide dual satellite and local over-the-air signals in direct competition with cable.⁴⁰ At least one cable operator also has been testing a system which would allow for seamless movement from digital satellite to analog cable viewing.⁴¹

The Commission's recent actions regarding the preemption of local zoning and private restrictions on the placement and installation of exterior over-the-air antennas further reduce the need for consumers to rely on cable systems for reception of local broadcast signals.⁴² By effectively removing from local authorities the power to curtail consumer antenna placement and use, the Commission has given the consumer the ability to take advantage of improved antenna technology and/or placement for reception of over-the-air, wireless and satellite programming delivery. Combined with the other factors described above, these technical and regulatory advances are making even more obsolete the notion of cable as a bottleneck provider of television services.

⁴⁰ See note 31, *supra*. See also, "Vocal about Local: At SBCA, DBS Execs Focus On Off-Air Signals." Multichannel News, Vol. 18, No. 13, March 31, 1997 at 1, "Approval or Not, PrimeStar's O'Brien Forges Ahead." Multichannel News, Vol. 18, No. 49, December 8, 1997 at 56.

⁴¹ See "TSAT's 'Cable Plus' Passes Test." Multichannel News, Vol. 18, No. 20, May 19, 1997 at 45.

⁴² 47 C.F.R. Section 1.4000. See Report & Order, Preemption of Local Zoning Regulation of Satellite Earth Stations, 3 CR 1308 (1996).

In short, the world has changed tremendously since the analog must carry regulations were implemented. Broadcasters have a vast new array of options for delivery of their programming to viewers. The evidence is plain that the factual assumptions and findings underlying the analog must carry regulations simply are no longer applicable or relevant and accordingly cannot be extended to DTV deployment more than six years later. Thus, the Commission has no basis for grafting such regulations on to digital carriage.

C. Digital Must Carry Requirements Would Impose Substantial Hardship On Cable Systems

In Turner II, the Supreme Court determined that the hardship imposed on the cable industry by analog must carry would be “modest.” This finding was based in large part on evidence in the record that close to 90% of cable systems then operating would be able to add mandated local broadcast signals without disruption due to the availability of unused channel capacity. Further, the number of local analog stations not already voluntarily carried by cable systems (primarily independent and specialty stations) was relatively small at that time.

In contrast, application of must carry to digital signals during the transition period would have an enormous (and detrimental) impact on cable systems. First, such application would double the number of television stations eligible for must carry, since each station currently eligible for analog must carry also would be entitled to carriage of a separate digital signal. Second, despite the rise in average channel capacity, 81.1% of cable systems serving 41.6% of cable subscribers still

have available 53 or fewer channels of programming.⁴³ Even if, as proposed by the Commission, must carry requirements remained limited to one third of total capacity, the result in many cases would still be the forced removal of a large number of cable networks already selected by cable operators and enjoyed by their subscribers.⁴⁴ Thus, the burden placed on cable operators (to say nothing of cable networks and subscriber audiences) would be far greater than the “modest” impact of analog must carry approved by the Court in Turner II.

D. Methods To Secure Consumer Reception of DTV Broadcast Signals That Are Less Intrusive on Cable Operators' and Programmers' First Amendment Rights Are Available

In the absence of any ability to project that broadcasters will suffer any realistic harm due to a lack of must carry regulation for digital signals during the transition period, and in view of the demonstrated harm to cable operators and non-broadcast programmers that would result from the imposition of must carry rules, the Commission is compelled to conclude that its “no must carry” option is the only legally viable one. In any event, even if the Commission were to identify some legitimate governmental interest that would be promoted by a transitional DTV must carry rule, the evidence demonstrates that other methods are available to achieve the objective with less intrusion on First Amendment rights.

⁴³ Fourth Annual Report at Appendix B, Tables B-2 and B-3.

⁴⁴ Rep. Maxine Waters, the head of the Congressional Black Caucus, recently expressed concern that “cable operators that do not have the channel capacity to accommodate digital TV signals would drop cable networks that ‘cater to audiences in the minority community.’” “Black Caucus Head Issues Must-Carry Alarm,” Multichannel News, Vol. 19, No. 38, September 21, 1998 at 40.

For example, as discussed above, a number of regulatory and technical developments are in place to ensure that consumers, with or without cable, will have better access to digital over-the-air broadcast signals than was evident at the time the 1992 analog must carry requirement was established. The Commission rules eliminating restrictions on the installation and use of over-the-air antennas, coupled with the commitment in the broadcast DTV channel allocation rules to ensure that broadcasters can transmit high quality digital signals throughout their current analog service areas, go far to ensure consumers will have ready over-the-air access to broadcasters' DTV signals. Moreover, the technical improvements in antennas, the increased marketing efforts being devoted to over-the-air reception capabilities and the improvements in A/B switch technology make over-the-air reception an even more viable and realistic option to consumers wishing to receive DTV broadcast signals. Simply put, if there is an identifiable government interest in ensuring the availability of DTV broadcast signals to the public, the technology and the regulatory structure already exist to accomplish the objective without burdening the First Amendment rights of cable operators and programming networks through the imposition of transitional DTV must carry rules.

E. Imposition of DTV Transitional Must Carry Would Be Inappropriate Public Policy

The Commission has recognized, at least in the context of broadcasting, that

[w]ith the introduction of DTV technology, we are now on the threshold of major changes in broadcast television. This new technology will open the door to dramatic changes in the nature of broadcast television, allowing broadcasters to offer high definition television service, with major improvements in picture quality, compact-disc

quality audio signals, simultaneous multiple program services (“multicasting”), and data services.

* * *

These new capabilities will allow broadcasters to offer immediate and significant improvements in the services they provide to the public and provide them the flexibility to alter their mix of services or add new services in response to viewer demand and future technical advances.

* * *

In addition the expandable service capabilities provided by the new DTV system will enhance the ability of broadcasters to compete with other video services such as cable television, direct broadcast satellite service and others.⁴⁵

This “new era” in television that has been proclaimed by the Commission is not limited to broadcasting. As noted above, programmers such as HBO/TBS are offering digital network distribution, and cable operators and DBS systems are transmitting digital signals to their subscribers. Thus, broadcasters are not the only segment of the television industry experiencing the risks and the potential rewards of digital television.

The Commission already has gone a long way toward eliminating broadcasters’ risks and enhancing the likelihood that broadcasters’ deployment of digital technology will succeed. By rule, the Commission has (1) provided every television broadcast station in the country with exclusive use, free of charge, of a second channel to transition to digital television;⁴⁶ (2) assured broadcasters of

45 Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, ___ FCC Rcd ____, ____, 11 CR 634, 638 (1998).

46 In contrast, cable, DBS and other television distribution systems must procure their own transmission capacity for digital. For example, HBO/TBS

service areas equivalent to or better than their existing analog service areas; and (3) permitted broadcasters to offer a myriad of services, both free-to-air and subscription based. These government-granted rights will permit broadcasters to “offer immediate and significant improvements” in broadcasters’ services and “enhance the ability of broadcasters to compete” with cable and other MVPDs.

Aside from the legal implications of mandating DTV transitional must carry, from a policy perspective, it would be inappropriate for the government to award broadcasters even more competitive advantages in the digital transition. HBO/TBS and other programmers must negotiate to secure the ability to provide their digital and HDTV programming services to consumers. Thus, HBO/TBS and others must convince cable operators, DBS providers and other MVPDs to devote scarce channel capacity to the digital services they offer. Broadcasters should be in no better position. The race to employ digital technology and to offer new services to the public will only be accelerated if those who would provide the services believe that they have competitive opportunities that are somewhat comparable to the opportunities of others. To award broadcasters a government priority to secure distribution of their digital services over cable would upset the digital television competitive landscape just as digital technology and services emerge. The result

Continued from previous page

already have been required to obtain and/or dedicate three (3) satellite transponders to initiate their SDTV digital services. This transmission capacity is far from free to HBO/TBS. The planned HDTV services of HBO/TBS may require additional transponder capacity.

would be unwarranted government intrusion into an emerging new arena to the detriment of competition and the public.⁴⁷

V. DIGITAL COMPATIBILITY ISSUES

The Commission seeks comment regarding standards and rules affecting a number of issues related to the overall compatibility and security of digital transmission systems, set top boxes and receivers.

As the Commission notes, some existing digital set top units may not be capable of processing all DTV formats. It seeks comment regarding what rules may be necessary to ensure that all DTV formats can be processed by or passed through cable digital set top units. HBO and TBS believe that it is not necessary for government to impose standards. Currently, all affected industries are working on a standard interface that would ensure that digital signals in all formats could be passed through to digital television sets and processed and displayed there. This effort recently has been encouraged by Chairman Kennard.⁴⁸ The resulting industry cooperation should lead to a voluntary solution without regulatory oversight.

As the video industry enters the digital age, copy protection will be a vital component necessary in all set top units. Because of the nature of digital

⁴⁷ In the DTV Fifth Report and Order, the Commission stated that “[d]igital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital.” 12 FCC Rcd at 12812. HBO/TBS seek no more than a comparable opportunity.

⁴⁸ “Prodded By Kennard, CEMA, Cable Near ‘Fire-Wire’ Spec,” Multichannel News, Vol. 19, No. 35, August 31, 1998 at 47.

transmission, a copy of a video program may be produced which rivals the quality of the original, being virtually indistinguishable in terms of visual and audio clarity. The parties who would suffer the most from pirated digital signals are program owners. HBO/TBS believe these owners will demand sufficient copy protection from their licensees in order to guard against this piracy potential. In the event that sufficient protection is not available through all distribution system set tops, program owners will likely curtail licensing of some of their products.⁴⁹

The potential piracy problem is a legitimate security concern. Nevertheless, HBO/TBS do not believe that regulatory oversight is necessary. Powerful market forces already are at work to arrive at a satisfactory means of implementing adequate copy protection without additional government oversight.⁵⁰

With respect to receiver standards, HBO and TBS believe that such standards should be established through the ongoing consumer electronics compatibility proceeding rather than in the instant docket. While HBO and TBS believe that CableLabs/NCTA should take the lead in defining the key elements of "cable-ready" digital television receivers, such standards can be agreed to between cable and consumer electronics industry representatives through the ongoing process in ET Docket No. 93-7. Additional examination of these matters in this proceeding is not required.

⁴⁹ See, e.g., "PPV Encryption: A Wait-and-See Game," Multichannel News, Vol. 19, No. 19, May 11, 1998 at 62.

⁵⁰ See Warren's Cable Regulation Monitor, Vol. 6, No. 38, September 28, 1998.

VI. CONCLUSION

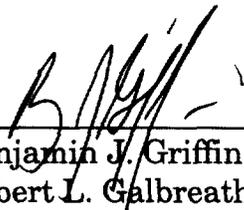
Imposition of must carry requirements on digital television broadcast signals during the transition period would not withstand statutory or constitutional scrutiny. Therefore, the only FCC must carry proposal that could be implemented legally, and that is most consistent with the public interest, is the proposal not to impose DTV must carry requirements.

While there are many issues surrounding the technical aspects of digital signal carriage by cable systems, the common goal of all parties to this proceeding is to ensure a smooth and rapid introduction of digital service. Thus, the Commission should leave the vast majority of these technical issues to resolution among members of the broadcast, cable and consumer electronics industries, and should refrain at this point from employing additional regulatory oversight.

Respectfully submitted,

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October 13, 1998