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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**COMMENTS OF
DISCOVERY COMMUNICATIONS, INC.**

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SUMMARY

Discovery Communications, Inc. ("DCI"), one of the nation's premier cable programmers, is entirely dependent on cable systems and other MVPDs with limited channel capacity for distribution. As a result, it struggles for "shelf space" on cable systems in a fiercely competitive marketplace.

DCI strongly opposes digital must carry during the transition period. Imposition of digital must carry would greatly reduce the amount of (already scarce) channel capacity and would give broadcasters an unjustified and unfair carriage advantage. Digital must carry would have other harmful consequences, including jeopardizing the economic viability of system upgrades and DTV launches by cable networks.

While the must carry law for analog broadcast signals barely survived constitutional challenges, several tenuous legal findings from the *Turner* cases indicate that new must carry requirements for digital broadcast signals would not be sustained. First, Congressional deference is not applicable to digital must carry. While it may have been permissible for Congress to pass a *statute* imposing analog must carry, it is an entirely different matter for the Commission to impose *additional* requirements *by regulatory fiat*.

Second, the previously articulated justifications for analog must carry do not apply in the digital context. The Commission's proffered justification for digital must carry – facilitating the transition to digital broadcasting – would not survive constitutional scrutiny. This technological objective is not a "substantial governmental interest" and does not justify the subordination of First Amendment rights.

Third, the impact of new digital must carry obligations would create an enormous burden on the cable industry — far exceeding the impact of analog must carry. Channel-locked systems would be forced to drop numerous valuable cable services to make room for either a blank screen or redundant digital broadcast signals available to only a few subscribers. Cable networks, especially emerging networks, would find it nearly impossible to secure additional carriage or even to maintain current distribution, and program diversity would suffer as a result.

Fourth, the current state of A/B switch and antenna technology removes any constitutionally-permissible justification for digital must carry rules. Consumer use of a remote control A/B switch and off-air antenna will not pose a significant practical problem in the digital era.

Finally, cable is not a digital bottleneck. The cable industry, including DCI, is at the forefront of the transition to digital television. For the foreseeable future, the limited availability and high cost of digital television sets will be the primary factor restraining consumers' reception of DTV signals.

In addition to constitutional considerations, statutory constraints preclude the Commission from promulgating digital must carry rules. Section 624(f) of the Communications Act prohibits the Commission from enacting digital must carry requirements during the transition period absent *express* authority from Congress. None exists. Section 624(b)(4)(B) only directs the Commission to initiate a proceeding to establish "any changes in the signal carriage requirements" of cable systems to ensure carriage of broadcast signals "which have been changed to conform" with advanced standards. Both legislative history and

common sense confirm that digital must carry is to be imposed only *after* the change from analog to digital is completed. Moreover, the existing "non-duplication" provisions of the Act argue against the promulgation of digital must carry rules during the transition period.

For several important public interest reasons, Commission action would be grossly premature at this time. First, the Commission has no record upon which it can reasonably justify digital must carry rules. Second, DTV is in its infancy, and the countless complexities and uncertainties present make the imposition of rules unwise. Third, broadcasters and cable operators should be afforded the opportunity to negotiate for carriage of DTV signals before the Commission intervenes. Fourth, because network affiliates, which are well positioned to negotiate for carriage, will be the first digital broadcasters, an immediate regulatory intrusion is unnecessary.

For these reasons, DCI urges the Commission to forbear from imposing any digital must carry obligations during the transition period in which television broadcasters continue to provide analog signals.

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Discovery Communications, Inc. ("DCI" or "the Company") files these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released July 10, 1998 in the captioned proceeding.

DCI is one of the nation's premier cable programmers – with a celebrated collection of established and emerging, analog and digital services (the "Discovery Networks") designed to educate and inform. DCI has no broadcast affiliates and is, therefore, entirely dependent on cable and other multichannel video programming distributors ("MVPDs") to deliver the Discovery Networks to the nation's television households. These MVPDs operate with limited channel capacity. As a result, DCI would be adversely affected by any regulation that artificially distorts cable carriage decisions and makes it even more difficult for DCI to gain access to television households.¹

¹While DCI uses the term "cable network(s)" in these comments for convenience, it emphasizes that the Discovery Networks (like other cable networks) are carried on a host of alternative MVPDs, including DTH satellite systems (both DBS and C-band), as well as OVS, SMATV and MMDS systems.

DCI strongly opposes any additional government-awarded carriage advantage for its broadcast television competitors. Broadcasters already enjoy analog must carry rights, and have available the alternative means of reaching television households directly through their over-the-air transmissions – an option not available to DCI. Accordingly, DCI urges the Commission to forbear from imposing any digital must carry obligations during the "transition" period while television broadcasters continue to provide an analog signal.

I. DCI AND THE VIEWING PUBLIC WOULD BE HARMED BY THE IMPOSITION OF DIGITAL MUST CARRY RULES

A. DCI Has A Wide Array Of Video Networks In Need Of Cable Carriage

Since it launched Discovery Channel in 1985, DCI has become a leader in the provision of high-quality educational and informational programming. Indeed, DCI is now the largest originator of documentary programming in the world. DCI's programming has attracted widespread popular and critical acclaim. In the 1997 and 1998 Equitrend Survey, consumers ranked Discovery Channel *first* in quality among all media brands. A recent survey found that viewers rated Discovery Channel *first* in perceived value of service, quality of programming, and importance to their cable enjoyment. The Company's other networks

have earned similar praise.² Just last month, the Company received seven Emmy awards from the National Academy of Television Arts and Sciences.³

DCI's high-quality programming has attracted an ever-expanding television audience. DCI now owns and operates a total of ten domestic cable networks. The Company's flagship network, Discovery Channel, has attained near universal penetration among MVPD households, reaching approximately 75 million domestic subscribers. This figure represents approximately 75% of the 99.4 million television households. It is now the second most widely-distributed cable network, and it is among the top ten cable networks in overall ratings.

DCI's second most widely distributed network is The Learning Channel ("TLC"). TLC has doubled its subscribership in the last four years, and is now offered to 67 million subscribers nationwide. This figure represents 87% of the 77 million MVPD households and 67% of all television households.

Two years ago, DCI launched its third network, Animal Planet. This new service leads all cable networks in distribution growth. It already has 43 million subscribers,

²The 1998 Equitrend Surveys identified The Learning Channel ("TLC") as the second highest television brand and the third highest media brand. TLC was identified in a 1997 Beta Research Subscriber Study as among the top five cable networks in terms of perceived value, quality of programming, and viewer importance. Animal Planet was ranked second among mid-sized networks in quality of programming, and fourth in terms of viewer importance.

³DCI has received numerous additional awards. Recent examples include: five 1998 Beacon Awards from the Cable Television Public Affairs Association for public affairs projects, programs and initiatives, six CableACE awards in 1997, and four Genesis Awards in 1998 for achievements that help to build awareness of animal issues.

representing more than half (56%) of all MVPD households and 43% of all television households.

Just one year ago, DCI acquired a 70% interest in the Travel Channel. This network is available to 18.7 million subscribers. This is approximately 24% of all MVPD households, and 19% of all television households.

DCI also recently launched six niche programming networks specifically targeted for digital carriage. These channels, offered on a compressed digital feed to maximize efficiency, include: Discovery Kids Channel, Discovery Science Channel, Discovery Home & Leisure Channel, Discovery Civilization Channel, Discovery Wings Channel and Discovery Health Channel. DCI believes this programming ultimately will help drive consumer demand for digital product. At this point, however, the most widely-distributed of DCI's digital networks are available to only approximately 700,000 homes, or less than 1% of all MVPD households.⁴

As a leading video programmer, DCI will play an important role in the HDTV revolution. DCI currently intends to begin providing HDTV service at some time in 1999. In voluntarily undertaking this early launch, DCI hopes to secure space in cable operators' initial HDTV line-ups. DCI also wants to ensure that cable networks generally, and DCI in particular, provide HDTV telecasts that will interest consumers and motivate purchases of HDTV sets.

⁴Several of these networks, specifically Discovery Civilization Channel, Discovery Health Channel and Discovery Wings Channel have markedly lower distribution, and are currently available to fewer than 100,000 subscribers, or 0.1% of all MVPD households.

B. DCI Struggles For 'Shelf Space'

While DCI's growth has been impressive, it has not come easily. As noted above, DCI is entirely dependent on MVPDs with limited channel capacity to reach the nation's television households. This carriage constraint shapes every aspect of DCI's development. Indeed, the Company's business plans for developing existing and new networks are dictated almost entirely by this fundamental channel carriage framework.⁵

The channel shortage DCI faces today is manifest by the fact that TLC, Animal Planet and Travel Channel (for all their popularity) still are not available to tens of millions of MVPD households. Despite its best efforts, DCI has been unable to secure anything approaching universal distribution for these networks.

Confronted with the channel shortage reality, DCI recently determined that additional analog services were unlikely to secure necessary carriage. DCI concluded that, under current circumstances, it made more sense to launch its six new niche services on a compressed digital (rather than analog) basis, notwithstanding the relatively small number of digital converters currently in the field.⁶ Although this approach necessarily limits the initial distribution of these niche services, DCI hopes that it ultimately will gain access to an expanded number of television households as digital delivery expands. The saturated analog universe effectively left DCI with no other alternative.⁷

⁵See Attachment A, Declaration of William Goodwyn, Senior Vice President, Affiliate Sales and Marketing for DCI ("Goodwyn Declaration").

⁶DCI notes that programming costs ordinarily would preclude offering high-quality services to such a small television audience. DCI is able to do so only because it already has purchased an extensive program library in connection with its established networks.

⁷See Attachment A (Goodwyn Declaration).

Although DCI is determined to launch an HDTV service in the coming year,⁸ it recognizes that securing carriage for this HDTV telecast will be extremely difficult. The HDTV telecast will compete with every other programming service for limited shelf space. This uphill struggle obviously will be made nearly impossible if DCI's broadcast competitors are given automatic digital carriage rights.⁹

DCI devotes substantial resources on an on-going basis to maximizing carriage of the Discovery Networks on domestic cable systems and thereby gaining access to the nation's television households. While the Company relies first and foremost on the appeal of its high-quality programming, even the Discovery Networks require extensive and sustained marketing efforts to secure maximum cable carriage. A formidable in-house marketing group at DCI works closely with cable operators on a national and local level to maintain and expand the carriage of the Discovery Networks. DCI staff track the channel line-up and upgrade plans for virtually every cable system across the country to identify opportunities for additional carriage. Such channel capacity diligence is essential in a fiercely competitive marketplace where the number of potential cable programming services far exceeds available channel capacity.¹⁰

⁸*Id.*

⁹DCI submits that its fight for "shelf space" is particularly revealing because the Company enjoys the alleged advantage of being vertically integrated with Liberty Media, Cox Communications, and Newhouse Communications.

¹⁰*See* Attachment A (Goodwyn Declaration).

II. DIGITAL MUST CARRY — THE UNINTENDED ADVERSE CONSEQUENCES

A. Additional Carriage Regulation Would Impede Cable Upgrades

The difficulty in securing distribution for a cable network is obviously most intense in systems with lower capacity. The problem does not automatically disappear, however, when a cable system adds capacity as a result of a rebuild or digital deployment. Practical considerations continue to limit the total capacity devoted in such cases to non-premium video programming (such as the Discovery Networks). Indeed, cable operators with upgraded systems must seek to maximize their "revenue per megahertz" to justify the upgrade costs. If the additional capacity is not put to a use that markedly increases the amount customers are willing to pay, the operator will never recapture its upgrade costs. In DCI's experience, the practical necessity to maximize upgrade capacity revenue has limited the amount of capacity cable operators are willing to devote to non-premium video services.¹¹

Cable operators recognize that they face consumer resistance to paying significantly higher rates for non-premium video packages, even if new and attractive programming services are added to the expanded package. This resistance obviously grows dramatically if the additional services are less appealing or redundant. Accordingly, if cable operators are forced to devote upgrade capacity to services (such as digital broadcasts) that will not drive consumer demand or markedly increase system revenue, they may refrain from making the upgrade altogether. As a result, upgrades that would have provided consumers

¹¹See Attachment A (Goodwyn Declaration).

with more choice and provided additional carriage opportunities for at least some programmers could be delayed or lost forever.¹²

The Commission should understand that only a relatively small part of the video capacity gained through either a system rebuild or digital deployment is devoted to non-premium services. Such upgrades are fueled in large part by the desire to offer consumers premium and pay-per-view programming on a "near video-on-demand" basis. A broad allocation to this usage is essential if the offering is to meet the threshold levels of choice and frequency needed to attract consumers. DCI believes that a Commission-mandated intrusion into the cable industry's "near video-on-demand" allocation through digital must carry could delay system upgrades throughout the cable industry.

In fact, regulatory intrusion at this point would have adverse consequences far beyond the video marketplace. In recent cases where an operator has upgraded to a "state-of-the-art" 750 MHz system, it typically reserves substantial bandwidth for non-video services, such as telephony or Internet access. Given the Commission's fundamental interest in promoting such technological and competitive advancements, the Commission should also recognize that digital must carry requirements will undercut the financial model for advanced services upgrades.

¹²It should be noted that certain operators of smaller, more rural systems have already determined that upgrades do not make economic sense. In August 1998, Anderson Eliason Cable Group, Galaxy Telecom, L.P. and Classic Cable, with a combined total of 470,000 subscribers, joined forces with DirecTv, Inc. to offer expanded channels to their subscribers via satellite, rather than through the local cable plant. Jim Barthold, *DirecTv Inks Deal with Small Cable Ops*, Cable World, Aug. 17, 1998, p. 1.

DCI urges the Commission to avoid disrupting the marketplace by mandating preferential treatment for digital broadcasters during the current transition period. Such carriage regulation will have unintended consequences that imperil the very objectives the Commission seeks to attain. If cable operators are precluded from deploying expanded capacity in an optimal fashion, they are likely to slow plans for valuable — but expensive — upgrades. As a result, the Commission may limit the video offerings available to the nation's cable customers, slow digital deployment, and set back Internet and telephony offerings. By threatening to reduce an operator's potential "revenues per megahertz," the Commission may unintentionally exacerbate the current capacity shortage.

This market reality is well illustrated by DirecTV's current 225 channel line-up.¹³ DirecTV devotes only about 40% of its channels to conventional non-premium services and skews its line-up heavily to pay-per-view and multiplexed premium channels.¹⁴ DirecTV currently does not carry DCI's Travel Channel nor any of DCI's six new digital niche services.¹⁵

B. Additional Carriage Regulations Would Impede HDTV

Although the Commission's interest in mandating cable carriage of digital broadcasts is unquestionably premised on a desire to promote HDTV, DCI believes that digital must carry might have the exact opposite effect. By mandating a **redundant** delivery

¹³See Attachment B.

¹⁴For this analysis, DCI is counting DirecTV's 30 sports channels as conventional non-premium video services. In fact, many of these relatively expensive services have traditionally been offered by cable systems on a premium basis.

¹⁵See Attachment A (Goodwyn Declaration).

of digital broadcasts, the Commission would necessarily reduce the number of cable channels available for the delivery of digital *cable* networks. This would decrease the aggregate supply of HDTV programming and retard, rather than accelerate, the emergence of HDTV.

It is widely recognized that HDTV today forces a classic "chicken and egg" problem. Consumers will be reluctant to purchase expensive HDTV sets as long as there is only a very small amount of HDTV programming available, and programmers will be reluctant to provide more HDTV telecasts as long as there are only a handful of consumers capable of viewing those telecasts.

DCI submits that the best way to maximize HDTV programming is to have broadcast networks rely primarily on their off-air allocation to deliver HDTV telecasts and have cable networks rely primarily on cable systems to deliver HDTV telecasts.¹⁶ This approach will minimize redundant delivery and maximize the total pool of HDTV telecasts. It will increase the likelihood that a consumer will conclude that there is a sufficient amount of HDTV programming available to warrant purchase of an expensive HDTV set. In short, the Commission has it wrong. If it wants to promote HDTV, it should consider giving preferential carriage rights to HDTV *cablecasters*, rather than to HDTV broadcasters. Such an approach would recognize that cable networks – unlike their broadcast counterparts – are entirely dependent on cable systems (and other MVPDs) to distribute their programming.

¹⁶As noted above, DCI intends to launch a HDTV version of Discovery Channel in 1999. The likelihood of additional networks quickly launching HDTV versions will decrease if all available cable capacity is co-opted by broadcast competitors.

III. DIGITAL MUST CARRY IS UNCONSTITUTIONAL

A. Digital Must Carry Obligations Imposed By The Commission Would Violate The First Amendment And Would Not Survive Judicial Review

1. The Analog Must Carry Law Barely Survived Constitutional Challenge

Must carry rules for analog broadcast signals have had, at best, a dubious legal history. In the 1980s, the Court of Appeals for the D.C. Circuit struck down two different versions of FCC-imposed must carry rules on First Amendment grounds.¹⁷ The Congressionally-imposed must carry law for analog broadcast signals, 47 U.S.C. § 534, survived more recent constitutional challenges, but only by the narrowest of possible margins. The constitutional challenge to Congress' analog must carry rules reached the Supreme Court in 1994,¹⁸ was remanded to the lower court for additional fact-finding, and returned again for Supreme Court review in 1997.¹⁹ In upholding the contested rules, the *Turner II* Court found that Congress' interests in preserving over-the-air television, promoting widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the television programming marketplace were important governmental interests. *Turner II*, 117 S. Ct. at 1186. It also found sufficient evidence supported Congress' determination that significant numbers of broadcast stations would be refused carriage on cable systems absent must carry requirements, and that broadcast stations denied carriage would be at serious risk

¹⁷*Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) ("*Quincy Cable*"); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) ("*Century Communications*").

¹⁸*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622; 114 S. Ct. 2445 (1994) ("*Turner I*").

¹⁹*Turner Broadcasting System, Inc. v. FCC*, 580 U.S. 180; 117 S. Ct. 1174 (1997) ("*Turner II*").

of financial difficulty. *Turner II*, 117 S. Ct. at 1196. On that basis, the Court concluded that must carry rules served the governmental interests in a direct and effective way (117 S. Ct. at 1197), and did not burden substantially more speech than was necessary to further those interests. *Turner II*, 117 S. Ct. at 1198-1199.

The narrow margin of victory for the government in both *Turner I* and *Turner II* demonstrates the tenuous constitutional nature of must carry rules for analog broadcast signals. In *Turner I*, the Court was closely-divided and highly fragmented, with only a plurality of Justices joining the Court's opinion and with four Justices issuing separate opinions. Likewise, *Turner II* was decided by a 5-4 margin. Only three other Justices joined the Court's opinion, while Justice Breyer filed an opinion concurring in part. Justice O'Connor, joined by three Justices, dissented strenuously.

Although DCI disagrees with the outcome of the *Turner* cases, it will not reargue those cases here. However, several key points from the *Turner* cases indicate that any new must carry requirements for digital broadcast signals would not be sustained by the Court.

2. The Supreme Court Has Repeatedly Recognized That Must Carry Raises Serious First Amendment Concerns

On numerous occasions, the Supreme Court has expressly recognized that must carry rules infringe on the protected speech rights of both cable networks and cable operators.

In *Turner II*, Justice Kennedy explained:

The must carry provisions have the potential to interfere with protected speech in two ways. First, the provisions restrain cable operators' editorial discretion in creating programming packages by "reduc[ing] the number of channels offered over which [they] exercise unfettered

control." *Turner [I]*, 512 U.S. at 637, 114 S. Ct., at 2456. Second, the rules "render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Ibid.*

Turner II, 117 S. Ct. 1198.

Justice Breyer, in his concurring opinion in *Turner II*, further elaborated on the First Amendment implications of mandatory carriage of broadcast signals, stating:

[must carry] extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. This "price" amounts to a "suppression of speech."

Turner II, 117 S. Ct. at 1204 (citations omitted).

In her dissent in *Turner I*, Justice O'Connor (joined by Justices Scalia, Ginsburg and Thomas) expressed the full gravity of First Amendment harms imposed on cable operators and cable networks by the analog must carry provisions:

The 1992 Cable Act implicates the First Amendment rights of two classes of speakers. First, it tells cable operators which programmers they must carry, and keeps cable operators from carrying others that they might prefer. Though cable operators do not actually originate most of the programming they show, the Court correctly holds that they are, for First Amendment purposes, speakers. Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place.

Second, the Act deprives a certain class of video programmers—those who operate cable channels rather than broadcast stations—of access to over one-third of an

entire medium. Cable programmers may compete only for those channels that are not set aside by the must-carry provisions. A cable programmer that might otherwise have been carried may well be denied access in favor of a broadcaster that is less appealing to the viewers but is favored by the must-carry rules. It is as if the government ordered all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers. . . . **[C]able programmers and operators stand in the same position under the First Amendment as do the more traditional media.**

Turner I, 114 S. Ct. at 2475-2465 (citations omitted) (emphasis added).

While it may have been (barely) constitutionally permissible for *Congress* to pass a *statute* imposing must carry obligations for analog broadcast signals, it is an entirely different matter for the Commission to impose *additional* must carry requirements for digital broadcast signals *by regulatory fiat* for far less compelling regulatory purposes. In short, the Commission cannot ignore the serious constitutional implications of additional must carry requirements.

3. Congressional Deference Is Not Applicable To Digital Must Carry

In both *Turner* cases, the Supreme Court deferred to Congressional judgment. The Court repeatedly emphasized that in its constitutional review of the analog must carry statute, "the courts must accord substantial deference to the predictive judgments of Congress."²⁰ While there was little doubt about the level of must carry rights Congress

²⁰*Turner I*, 114 S. Ct. at 2471; *Turner II*, 117 S. Ct. at 1189; *see also, Turner II*, 117 S. Ct. at 1189 ("Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."); *Turner II*, 117 S. Ct. at 1203 ("We cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual finding supported by evidence that is

desired for analog broadcast signals, Section 614(b)(4)(B)²¹ provides no similar mandate for digital broadcast signals. Indeed, the legislative history of the Telecommunications Act of 1996 expressly states that Congress did not intend to "confer must carry status on advanced television" as the "issue is to be the subject to a Commission proceeding under Section 614(b)(4)(B)." H. REP. NO. 104-458, at 161 (1996).

As discussed in Section IV below, the Commission has no authority under the Communications Act to impose additional must carry obligations for DTV during the transition period because the language of Section 614(b)(4)(B) indicates that must carry applies only *after* the transition change is completed. Even under the most liberal reading of the statute, the most that can be said is that Congress deferred this issue to the Commission. The Supreme Court stated that its review of the Congressionally-imposed must carry regime in the *Turner* cases was measured "by a standard more deferential than we accord to judgments of an administrative agency." *Turner II*, 117 S. Ct. at 1189. Thus, additional must carry obligations for DTV signals created by the Commission would be subject to a substantially less-deferential standard of review by the Court. Given the exceedingly narrow margin by which the analog must carry law was upheld, this fact alone would likely change the outcome.

Indeed, because the Commission — not Congress — would impose any additional must carry rules for digital broadcast signals, the more analogous cases are not the *Turner* cases, but rather *Quincy Cable* and *Century Communications*. In both cases, the D.C.

substantial for a legislative determination").

²¹47 U.S.C. § 534(b)(4)(B).

Circuit struck down Commission-imposed must carry rules as violative of the First Amendment.

4. **Analog Must Carry Justifications Do Not Apply In The Digital Context**

In *Turner II*, the Court emphasized that the predominant federal justification for must carry requirements is "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems." *Turner II*, 117 S. Ct. at 1186 (citing *Turner I*, 114 S. Ct. at 2470). This rationale cannot justify the imposition on cable operators of additional must carry obligations for digital broadcast signals. Simply put, the loss of *regular* television broadcasting service is not even at issue in this proceeding — broadcasters will retain their full analog must carry rights if the Commission chooses not to impose additional must carry requirements on cable operators during the digital transition period.

The second government interest identified in *Turner* to justify analog must carry was promoting the "widespread dissemination of information from a multiplicity of sources." *Turner II*, 117 S. Ct. at 1186. This rationale does not apply in the context of digital must carry. Assuming *arguendo* that weaker broadcast stations need mandatory access to cable households to survive, it does not follow that they need access for *both* their digital and analog signals. Moreover, the Commission has recognized that a digital must carry requirement imposed during the transition period could require cable operators "to carry double the amount of television stations, that will eventually carry identical content, while having to drop various and varied cable programming services." NPRM at ¶ 39. Thus, not

only would digital must carry fail to promote the widespread dissemination of information from a multiplicity of sources, such rules would actually *impede* the achievement of this goal.

The third *Turner* justification for the analog must carry rules was promotion of fair competition in the market for television programming. *Turner II*, 117 S. Ct. at 1186. Broadcasters already have a powerful tool to "promote fair competition" — analog must carry. New digital must carry rights afforded to broadcasters cannot be justified to support a "fair competition" goal. Two concurrent sets of must carry rights would place far too great a burden on cable networks, operators and consumers for the benefit of a few favored speakers. In any event, there is no record to justify digital must carry rules on "fair competition" grounds. The record from the *Turner* cases is inapplicable, and there certainly can be no history of anticompetitive practices by cable operators with respect to digital broadcast signals because a mere handful of broadcasters have only just begun transmitting digital signals.

5. The Commission's Proffered Justifications For Digital Must Carry Rules Would Not Survive Constitutional Scrutiny

In the NPRM, the Commission abandoned the three previous justifications for analog must carry rules and identified alternative "statutory goals" upon which it may attempt to justify the creation of digital must carry rules.²² These include:

- (1) the successful introduction of digital broadcast television and the subsequent recovery of the vacated broadcast spectrum (NPRM at ¶ 1);
- (2) retention of the strength and competitiveness of broadcast television (*Id.*);

²²Perhaps tellingly, the NPRM does not cite the specific statute from which these goals are derived.

- (3) the desire to "provide assurance [to broadcasters] that investment in digital technology and programming will be fully realized" (NPRM at ¶ 41) and
- (4) the desire to assure digital broadcasters that they will reach the audience they are licensed to serve. *Id.*

These objectives can actually be condensed into one possible justification for extending dual analog and digital must carry rights: to facilitate the transition to digital broadcasting. But this technological objective does not justify additional subordination of either cable programming networks' or operators' First Amendment rights. The Commission's desire to transition broadcast television to a digital format cannot constitutionally rationalize a rule that would force cable operators to carry two (or possibly more) signals from each broadcast licensee and would relegate cable networks to third class First Amendment speakers.

As an initial matter, the Commission lacks any record from Congress or any historical basis to assume that digital must carry is needed. As the D.C. Circuit stated in *Quincy Cable*: "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." 768 F. 2d at 1454.

The intrusion associated with digital must carry cannot be justified solely on conjectural harm to broadcasters. Yet, because digital broadcasting has just commenced, an "abstract assertion" is all that is possible at this time. As the Commission recognized in the NPRM, virtually every question about digital broadcasting remains open: technical issues,

consumer acceptance and workable business models.²³ Thus, analysis of any need to impose mandatory carriage of DTV signals during the transition period is much like reading tea leaves and provides no basis upon which a reviewing court could uphold such requirements.

Moreover, it is highly unlikely that the Commission's desire to facilitate a transition to digital broadcasting would be deemed a "substantial governmental interest" by a reviewing court. As Justice O'Connor explained in *Turner II*: "the must carry provisions have never been justified as a means of enhancing broadcast television." *Turner II*, 117 S. Ct. at 1214. Similarly, the Court in *Turner II* stated: "[m]ust-carry is intended not to guarantee the financial health of all broadcasters . . ." *Turner II*, 117 S. Ct. at 1202. Yet, the Commission's stated desire to "assure" broadcasters about the transition to digital appears intended to do exactly that.

²³*See, e.g.*, NPRM at ¶ 18 ("how the multiple technical systems [broadcast transmission, cable transmission and television receivers] will function in a digital environment remains to be seen. We note that the various technical elements involved in digital broadcast signal carriage are constantly in flux as technology advances."); ¶ 25 ("Significant issues arise as to how set top boxes will interact with the distribution of both digital cable and digital broadcast signals.") (noting that Open Cable initiative is still pending); ¶ 28 ("development of [interface] standard may not be proceeding as expeditiously as previously thought"); ¶ 29 ("It is difficult at this point in time to determine the technical abilities of the different digital set top boxes already distributed and in production, and how different cable operators will engage set top boxes in their business plans."); ¶ 31 ("Whether [DTV receivers] will be capable of receiving QAM transmissions, and be built with a standard interface such as IEEE 1394, is less certain."); ¶ 58 (indicating that it is not yet clear how much bandwidth is required to transmit HDTV signal).