

6. **Digital Must Carry Would Impose An Enormous Burden On Cable Programmers, Cable Operators And Consumers — One That Is Far Greater Than The Burden Created By Analog Must Carry**

In *Turner II*, the Court analyzed the impact of analog must carry rules and found that

the vast majority of cable operators have not been affected in a significant manner by must carry.

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It is undisputed that broadcast channels gained carriage on 5,880 channels as a result of must carry. While broadcast stations occupy another 30,006 cable channels nationwide, this carriage does not represent a significant First Amendment harm to either system operators or cable programmers because those stations were carried voluntarily before 1992, and . . . the vast majority of those channels would continue to be carried in the absence of any legal obligation to do so.

*Turner II*, 117 S. Ct. at 1198. As an initial matter, DCI disagrees with the Court's view that the compelled carriage of nearly 6,000 broadcast stations does not represent a "significant" intrusion upon the First Amendment rights of cable programmers and operators. Nonetheless, there can be no doubt that the impact of new digital must carry obligations, on top of existing analog must carry rules, would create an *enormous* burden on the cable industry — far exceeding the impact of the analog must carry rules.

As the *Turner II* Court found, the vast majority of analog broadcast signals were carried long before broadcasters had any must carry rights. *Turner II*, 117 S. Ct. at 1198-1199. This is not the case for digital broadcast signals. Any imposition of digital must carry during the transition period will result in a corresponding reduction in available cable channel capacity. As the Commission has recognized, two-thirds of the nation's cable

television systems are channel-locked.<sup>24</sup> As a result, channel-locked systems will be forced to drop numerous valuable cable programming services to make room for redundant digital broadcast signals.<sup>25</sup> In other words, "[t]his 'double dose' of must carry would surely result in cable networks being dropped in many places and would once again relegate cable networks to second-class citizenship."<sup>26</sup>

Given its current battles to secure cable carriage, DCI can state with absolute certainty that the imposition of must carry would have devastating consequences. While DCI's flagship Discovery Channel may suffer a less severe loss of distribution, the carriage of a HDTV Discovery service would be imperiled, and all of DCI's remaining networks – both analog and digital – would find it nearly impossible to secure additional carriage or even maintain their current carriage.

The loss of new and diverse cable programming sources would be particularly tragic because, for the foreseeable future, the overwhelming majority of television households will not even be able to view the redundant digital signal. Cable subscribers would have valuable, diverse programming such as TLC, Animal Plant, or Discovery Health Network

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<sup>24</sup>See NPRM at ¶ 45.

<sup>25</sup>The Commission acknowledges that to the extent that it imposes a digital must carry requirement, cable operators could be required to carry "double the amount of television stations, that will eventually carry identical content while having to drop various and varied cable programming services where channel capacity is limited." NPRM at ¶ 39. *See also*, NPRM at ¶ 41 ("significant channel line-up disruptions may occur as cable operators, whose systems are channel-locked would have to drop existing cable programming services to accommodate the carriage of digital television signals."); NPRM at ¶ 46 ("a requirement to immediately commence carriage of all digital broadcast television stations when they come on-the-air would possibly be highly disruptive to cable subscribers, . . .").

<sup>26</sup>*Statement of NCTA President Decker Anstrom on FCC Digital Must Carry Notice*, NCTA Press Release, Jul. 9, 1998.

replaced by a *blank screen*<sup>27</sup> or a second screen of the broadcast station's analog programming. The resulting consumer uproar will be deafening, and understandably so. Only those few cable subscribers willing to spend up to \$10,000 for a new HDTV set would benefit in any way.<sup>28</sup> Their reward: the ability to view digital broadcasts "that will eventually carry identical content" of the analog stations they already receive. NPRM at ¶ 39. There can be no doubt that it would be a tremendous waste of scarce cable channel capacity to replace these diverse program sources with redundant digital programming or a blank screen – especially when subscribers can receive this digital programming off-air. Programming diversity should not be sacrificed in the name of promoting digital technology, particularly when it is unclear whether digital technology needs, or would benefit from, this regulatory intrusion.

**7. The Commission Must Consider The Disastrous Consequences That Would Result From Digital Must Carry For Cable Programmers And Cable Subscribers**

While the Commission has expressed its desire to "provide assurance [to broadcasters] that investment in digital technology and programming will be fully realized" (NPRM at ¶ 41), DCI asks that the Commission also carefully consider the corresponding

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<sup>27</sup>Testimony of Joseph J. Collins, Chairman and CEO of Time Warner Cable before the United States Senate Committee on Commerce, Science and Transportation, Jul. 8, 1998; NPRM at ¶ 25, n. 77 (while digital set top box will pass through DTV signal, without a digital receiver and without any translation to an analog format, the picture would display static).

<sup>28</sup>In this regard, DCI notes that the adverse consequences of this wasted channel capacity and lost cable programming will be disproportionately felt by lower- and middle-income groups, who cannot afford to purchase expensive DTV sets.

costs to cable networks and cable subscribers.<sup>29</sup> The NPRM contains virtually *no* discussion about the ability of emerging cable networks to obtain additional carriage — and remain commercially viable — in the future if digital must carry is imposed.

Similarly, the Commission makes only passing reference in the NPRM to the impact of digital must carry rules on program diversity, yet diversity will certainly suffer if cable programming is replaced by a blank screen or redundant broadcast signals. Congress has long sought to promote diverse and high-quality television programming,<sup>30</sup> which is increasingly being delivered by cable networks. The Commission has also sought to guard against the potential chilling effect of regulation on the development of new cable programming services.<sup>31</sup>

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<sup>29</sup>While at ¶ 1 of NPRM, the Commission acknowledged a desire to minimize the disruption and costs to subscribers, cable operators and cable programmers, the remaining text essentially ignores the impact of digital must carry on cable networks.

<sup>30</sup>For example, one of the purposes that Congress enacted Title VI was to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4). Similarly, in adopting the 1992 Cable Act amendments, Congress reiterated its policy objective to ". . . promote the availability to the public of a *diversity* of views and information through cable television and other video distribution media." 1992 Cable Act Section 2(b)(1), 106 Stat. at 1463 (emphasis added). Finally, in adopting the horizontal ownership limitations in Section 633, Congress directed the Commission not to impose "limitations that will impair the development of diverse and high quality programming." 47 U.S.C. § 533(f)(2).

<sup>31</sup>*See, e.g., Implementation of Section 305 of the Telecommunications Act of 1996*, MM Docket No. 95-176, Report and Order 13 FCC Rcd. 3272 at ¶ 154 (1997); Order on Reconsideration, FCC 98-236 at ¶ 44, 54. In 1997, the Commission provided for a four-year exemption for new networks from its closed captioning rules, and in August 1998, on reconsideration, expanded this exemption to encompass networks launched in 1994 through 1997. 47 C.F.R. § 79.1(d)(9). Similarly, in 1994, the Commission recognized the unintended negative impact of its initial rate regulations on the development of diverse programming services. *See Waiver of the Commission's Rules Regulating Rates for Cable Services*, 11 FCC Rcd. 1179 (1995); *Sixth Order on Reconsideration (Rate Regulation)*, 10 FCC Rcd. 1226 (1994) at ¶ 22.

The efforts of Congress and the Commission have met with great success: there are now over 250 national and regional cable networks competing for carriage, and at least 57 new services are preparing for launch.<sup>32</sup> These numbers have increased dramatically over the past decade. Moreover, as cable network programming improves, and more diverse, high-quality networks gain carriage, the public is increasingly choosing *cable* programming. In August 1998, ratings for basic cable networks surpassed those of the six broadcast networks.<sup>33</sup> Clearly, the public places great value on cable programming, and the Commission should carefully consider the disastrous consequences that would befall cable networks if it grants new digital must carry rights to thousands of broadcasters during the transition period.

The NPRM contains no discussion whatsoever about the impact on incentives to launch new programming networks. DCI views this omission as particularly troublesome. DCI, like other cable programmers, makes its decisions to launch new programming services based in large part on its estimate of the network's ability to obtain sufficient distribution. Any rule that would reduce extant channel capacity, especially one that could have an enormous impact like digital must carry, will certainly cause DCI and other cable programmers to reconsider plans to launch new networks, and will undoubtedly cause many plans to be scrapped altogether. In fact, Discovery may be forced to shut down the six

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<sup>32</sup>National Cable Television Association, *Cable Television Developments* (Spring 1998) p. 27-125 and 126-42.

<sup>33</sup>For example, during the week of August 10 to 16, cable achieved a 25.0 Nielson rating, compared with a combined 23.5 rating for the six broadcast networks. Linda Moss, *Cable Shatters Primetime Ratings Records*, *Multichannel News*, p. 1.

recently-launched niche programming networks specifically targeted for digital carriage.

Broadcasters should receive no further preferential treatment, and cable programmers should suffer no further adverse consequences of those government imposed preferences. Chairman Kennard recently posed the following questions:

[a]s cable operators create local programming, particularly news and public affairs shows, and with almost three quarters of Americans actually paying to receive those channels, what remains that makes broadcasters unique? And is this uniqueness significantly tangible, demonstrable, and assured to justify requiring cable carriage?<sup>34</sup>

It is DCI's belief that the American viewing public has made these questions rhetorical.

**8. A/B Switches Are A Viable Alternative To Compulsory Digital Broadcast Carriage**

Input selector switches, commonly known as "A/B switches," permit television viewers to switch between cable and broadcast inputs to their television set, thereby allowing cable subscribers to watch broadcast programs not carried on cable. In the NPRM, the Commission asked "whether improvements in A/B switch technology and its availability undercut the need for mandatory digital broadcast signal carriage, if the justification for such a rule is to preserve free over the air broadcast television." NPRM at ¶ 88. The answer to this question is an unequivocal "yes." Indeed, the current state of A/B switch technology completely removes any constitutionally-permissible justification for digital must carry rules.

In *Turner II*, the Supreme Court deferred to Congress' 1992 judgment that an A/B switch was not a viable alternative to compulsory cable carriage. The Court cited

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<sup>34</sup>Remarks of Chairman Kennard to the International Radio and Television Society, Sept. 15, 1998 (emphasis in original) ("*Kennard IRTS Speech*").

"substantial evidence of technological shortcomings" with these devices. *Turner II*, 117 S. Ct. at 1200-1201. However, Justice O'Connor correctly noted that Congress' "findings" about A/B switches were drawn from old sources — sources that are now more than *12* years old. *Turner II*, 117 S. Ct. at 1213. In the world of technology and communications, 12 years is an eternity.

Deploying an A/B switch no longer poses a significant practical problem. Judge Williams of the D.C. District Court recognized this fact in 1995 for analog television sets, stating: "[t]he record shows that most cable-ready TV receivers now on the market have built-in input selector switches operable by remote control." *Turner Broadcasting v. FCC*, 910 F. Supp. 734, 786 (D.D.C. 1995) (Williams dissenting). The Commission itself recognized in the NPRM that much has changed since 1986: "a switch mechanism is now incorporated into many [analog] television receivers (as well as into videotape recorders and DBS receivers) and new digital television receivers may have multiple input possibilities *fully selectable from remote control devices*." NPRM at ¶ 88 (emphasis added).<sup>35</sup> The Commission is absolutely correct: digital television sets will undoubtedly incorporate A/B switches that operate by remote control.

While the government claimed in the *Turner* case that an A/B switch is "inconvenient for the plain and simple reason that [viewers] 'had to get up' to use it,"<sup>36</sup> now that A/B switches can be operated on DTV sets using a remote control, even this weak

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<sup>35</sup>See also NPRM at ¶ 16 ("[A/B] switches . . . may now be built into television receivers and can be easily controlled from a TV remote control device.").

<sup>36</sup>F. Supp. at 786 (William Dissent) (citing Government Reply at 41).

rationalization is not available. Sony's recently launched HDTV set, for example, is "designed to display free over-the-air digital broadcasts when connected to an optional, external antenna."<sup>37</sup> In light of these technological advancements, any Commission finding that A/B switches are not a viable alternative to mandatory carriage of digital broadcast signals would not withstand judicial scrutiny under the First Amendment.

In the analog world, it might have been feared that cable customers would not go to the bother of using A/B switches to view the limited number of less-popular local broadcast stations not carried on the cable system. By contrast, early purchasers of digital television sets are spending thousands of dollars for the express purpose of receiving DTV telecasts. Common sense suggests that these subscribers will aggressively seek out whatever DTV programming is available. Obviously, relying on an A/B switch and an antenna will not discourage these consumers.

The reality is that television viewers who wish to receive digital broadcast signals will make efforts to receive them — whether or not they are on cable. For foreseeable future, those households that can view digital broadcast signals (*i.e.*, those that have purchased a new digital television set) will be "early adapters," for whom using an A/B switch and maintaining an off-air antenna should not pose a problem, especially since these devices can be operated by remote control.

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<sup>37</sup>*Sony Launches Industry's First Direct-View HDTV Set as Portal to Digital Future*, <<http://www.sel.sony.com/SEL/corpcomm/news/consumer/74.html>>. Similarly, Panasonic's recently-announced TU-DST50 DTV Decoder Set Top Box features the IEEE 1394 digital interface and an RF antenna input, and is operable via Panasonic's "Director Home Theater Remote." <<http://www.prodcat.panasonic.com/shop/product.asp?sku=TU-DST50>>.

Moreover, it is inconceivable that purchasers of new DTV sets — who will spend up to \$10,000 for these devices — will be unable to afford an extra few hundred dollars to purchase a new antenna to receive these signals off-air. As District Court Judge Williams recognized:

consumers will use A/B switches whenever then want to — *i.e.*, whenever they are aware of a non-carried station that is worth a few dollars' capital investment and the occasional flick of a switch. . . . Neither [A/B] switch nor antenna is so mysterious, costly or unworkable as to be beyond the means of a private citizen who values access to a program at the price of a diminutive capital investment and the ongoing cost of pushing the switch when necessary.

910 F. Supp. at 787 (Williams dissenting).

Today, 22 million television households that do not subscribe to cable television or an alternative MVPD service use antennas to receive over-the-air broadcasts.<sup>38</sup> Indeed, the Commission acknowledges that it is "likely that antennas will play a significant role in the reception of DTV." NPRM at ¶ 89. And nearly 10 million subscribers of direct-to-home satellite service (DBS and C-band) find A/B switches and off-air antennas a viable means to receive local broadcast stations. DirecTV explains to potential customers that "[a] new generation of off-air antennas [that] can seamlessly deliver high-quality signals from free local TV broadcaster directly to your DSS system with just a push of your remote."<sup>39</sup> An

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<sup>38</sup>There are approximately 99 million television households and 77 million subscribers to MVPD services (cable, DBS, C-band, MMDS, SMATV and OVS).

<sup>39</sup>"YES YOU CAN! Enjoy Local Channels and DIRECTV® Too!," <http://www.directv.com/misc/yesyoucan3.html>.

engineering executive for U.S. Satellite Broadcasting recently described the use of terrestrial over-the-air antennas as an "immediate, cheap and easy solution."<sup>40</sup>

Initial tests indicate that DTV signals may be readily received over-the-air using antennas.<sup>41</sup> Assuming that is the case and that remote-controlled A/B switches will be built into new DTV sets, it cannot be seriously argued that cable is a bottleneck for DTV. On the other hand, if off-air DTV reception is so poor that cable reception is essential, broadcasters should give back the valuable digital spectrum and compete for cable channel capacity like other cable programmers that cannot be received off-air. It is not the obligation of the Commission or the cable industry to promote broadcast viewership beyond the off-air market.

Finally, digital must carry rules would have the unfortunate consequence of reducing broadcasters' incentives to invest in improved transmitters and broadcast technology. If a broadcaster is assured of reaching the bulk of local television households through cable, it will lack the financial incentive to maximize over-the-air delivery. As Judge Williams recognized: "as forced [cable] carriage would reduce a station's potential audience to be reached over-the-air, it would *pari passu* reduce the station's incentive to invest in enhancement of its over-the-air signal (say, by buttressing its transmitter)." 910 F. Supp. at 788 (Williams Dissenting). In short, the advancements in A/B switch and antenna technology

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<sup>40</sup>*DBS Future Said to Depend on Local TV Signals*, Communications Daily, Sept. 24, 1998, p. 6 (quote of Ray Conover, Senior V.P. - Engineering for U.S.S.B.).

<sup>41</sup>*See* Communications Daily, Jul. 31, 1998, p. 9 ("tests by WGN-TV Chicago showed 96.4% overall success rate in receiving DTV signal").

provide another powerful reason why digital must carry rules are both unnecessary and unconstitutional.

9. **Cable Is Not A Digital Bottleneck**

Chairman Kennard recently described the transition to DTV as "inevitable," and stated: "[d]igital is the future of TV."<sup>42</sup> DCI agrees in both respects. It views the transition to digital video as a watershed moment for the entire video programming industry — including cable programmers — and one that will immeasurably enhance consumers' enjoyment of television. DCI has already made substantial investments in digital technology. It has already launched six niche networks targeted for digital delivery and plans to launch an HDTV service at some time in 1999.

Despite broadcasters' attempts to portray cable operators as digital "gatekeepers" or "bottlenecks," the facts demonstrate that cable is at the forefront of the transition to digital television. In the past two years alone, cable operators have invested more than \$12 billion to upgrade their systems to provide customers with digital television capabilities.<sup>43</sup> There will be an estimated 500,000 subscribers to cable's digital services in 1998, and this number is expected to grow to 2.7 million subscribers in 1999.<sup>44</sup>

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 — not carriage on cable. For example, Sony, a leading manufacturer of television sets, projects

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<sup>42</sup>*Kennard IRTS Speech.*

<sup>43</sup>NCTA President Decker Anstrom, *Open Mike: Cable's Digital Efforts*, Broadcasting & Cable, Sept. 7, 1998, p. 71.

<sup>44</sup>Paul Kagan Associates, Inc., *Cable TV Technology*, Jan. 31, 1998, p. 4.

that it will sell fewer than 10,000 units of its new DTV set in the first year.<sup>45</sup> DCI fails to see the public benefit in limiting the programming offered to 75 million cable customers for the benefit of a relatively small number of affluent individuals who purchase digital television sets. Such a policy would be particularly objectionable because those DTV customers would have the ability to secure DTV broadcasts using an A/B switch and an off-air antenna. When all is said and done, digital must carry might not only penalize those who do not purchase digital sets, it might also penalize those who do. As explained above, the imposition of digital must carry during the transition period would likely inhibit the development of HDTV versions of *cable* networks.

Cable operators have powerful economic incentives to deliver digital programming in response to customer demand, and they will surely respond to those incentives in an appropriate fashion. Retransmission consent and private negotiation will be the vehicle by which the overwhelming majority of broadcasters will obtain cable carriage for their digital signals, as the Commission has recognized.<sup>46</sup> Cable operators are now engaged in detailed discussions with broadcasters in the top ten markets — discussions that all parties describe as constructive and promising.<sup>47</sup> MediaOne, for example, reports that about half of

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<sup>45</sup>Glen Dickson, *Sony Unveils DTV Set Strategy*, *Broadcasting & Cable*, Sept. 21, 1998, p. 85.

<sup>46</sup>See NPRM at ¶ 33 ("if the general retransmission consent pattern is repeated, the digital television stations scheduled to begin broadcasting in November 1998, May 1999 and November 1999, are most likely to exercise retransmission consent for the third election cycle currently schedule to commence on January 1, 2000, even if there were digital must carry requirements in place.").

<sup>47</sup>For example, TCI President and CEO Leo Hindery stated that "broadcasters and the cable industry are very close to some common understanding that will bridge the gap." Leslie Ellis and Ted Hearn, *Peace in our Time? TCI's Hindery Hints at HDTV Harmony*, *Multichannel*

its retransmission agreements already include digital carriage specifications.<sup>48</sup> As the Commission currently lacks a record of the cable industry unduly impeding digital broadcasters access to television households, imposing a new regulatory regime is clearly unwarranted.

#### **IV. THE MUST CARRY STATUTE PRECLUDES DIGITAL MUST CARRY UNTIL THE CONVERSION FROM ANALOG IS COMPLETE**

##### **A. Must Carry Extends To Digital Broadcasters Only After The Technological Change is Completed**

Section 614(b)(4)(B) states of the Communications Act 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 the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television *which have been changed* to conform with such modified standards.

47 U.S.C. § 534(b)(4)(B) (emphasis added). The Act directs the Commission to initiate a proceeding only for the limited purposes of refining the must carry rules to accommodate broadcast signals "which have been changed" to the new advanced standards. This language is clearly designed to ensure that the must carry regime makes sense *after* broadcast stations convert to the new standard. During the transition period, no broadcaster will have completed its "change" to digital; they will continue their analog transition and simultaneously *add* a

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News, Jul. 27, 1998, p. 1. Similarly, another TCI executive was quoted as saying: "we're definitely moving ahead," while a CBS executive stated: "It looks like things are going to work out." *Id.*, p. 52.

<sup>48</sup>CableFax Daily, Oct. 7, 1998, p. 1.

digital transmission. The statutory language cannot be reconciled with a dual must carry regime — one that extends must carry rights to digital broadcasts *prior* to the broadcaster completing its "change[ ] to conform with . . . [the digital] standards." Thus, must carry can apply only to digital signals *after* the transition to digital has been completed. Broadcasters are not entitled under the law to carriage of *both* their existing analog signal and their new digital signal(s) in the meantime.

The legislative history of this section is sparse, but highly instructive. The Conference Report states: "the conferees do not intend [Section 614(b)(4)(B)] to confer must carry status on advanced television or other video services offered on designated frequencies. Under the 1992 Cable Act, that issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act." H. REP. NO. 104-458, at 161 (1996). Taking Congress at its word, as the Commission must, it is clear that it did not intend to confer automatic must carry status on DTV signals.

Moreover, Section 624(f) of the Communications Act provides that "[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title." 47 U.S.C. § 544(f)(1). In other words, Section 624(f) prohibits the Commission from enacting digital must carry requirements during the transition period absent an *express* authority from Congress in Title VI. None exists. The Commission specifically limited the Commission's 614 authority to broadcasters' signals that "have been changed" to the new advanced format.

Common sense also suggests that Congress would have dealt more explicitly with the issue of digital must carry if it meant to impose an entirely new second layer of must

carry obligations on the cable industry. Unlike the analog must carry statute, Congress made only a very obtuse reference to must carry for advanced television signals in Section 614(b)(4)(B), and expressly stated elsewhere that it "did not intend to confer must carry rights" on those signals.

**B. Congress Did Not Impose Duplicative Carriage Requirements**

Congress' enactment of the "non-duplication" provisions of the Communications Act in 1992, and failure to modify these provisions in the Telecommunications Act of 1996 are instructive, for they reveal an antipathy for mandating duplicative carriage obligations. Section 614(b)(5) provides:

a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network.

47 U.S.C. § 534(b)(5). In other words, a cable operator is not required to carry either (1) a signal that "substantially duplicates" another signal, or (2) two affiliates of the same broadcast network. These provisions demonstrate a clear Congressional directive to avoid mandatory redundant carriage. The House Report on the 1992 Cable Act explained that "[i]f there are duplicate qualified signals, the cable operator is not obligated to carry more than once since carriage of duplicate signals would do nothing to increase the diversity of local voices."<sup>49</sup>

There can be little doubt that two broadcast signals transmitting the same content "substantially duplicate" each other, even if one signal is in an analog format and the

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<sup>49</sup>H. REP. NO. 102-268, at 66 (1992).

other is digital.<sup>50</sup> Congress recognized that such duplication would needlessly waste scarce cable channel capacity. Similarly, the Commission, in adopting the current nonduplication rules in 1989 (47 C.F.R. § 76.92), noted its concern that the rules "operate to foster competition among the various program providers and *promote a greater diversity of programming* for viewers."<sup>51</sup>

In addition to banning duplicative carriage requirements, the analog must carry statute minimizes the burden on market choices by eliminating the need for cable operators to carry redundant analog signals. Congress also determined that cable operators need not carry broadcasters' "ancillary and supplementary service[s]."<sup>52</sup> Similarly, 614(b)(3) requires only that a cable operator carry the broadcaster's "*primary video*, accompanying audio, and line 21 closed captioning transmission."<sup>53</sup> Yet, new must carry rules for DTV signals during the transition period would create *dual* digital and analog must carry rights in flat contradiction to the directive of Congress to avoid mandatory carriage of duplicative signals, secondary and supplementary services, and non-primary video signals. Congress' enactment of, and failure to modify, these provisions thus lends strong support for the proposition that it did not intend the Commission to promulgate digital must carry rules during the transition, which would

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<sup>50</sup>The Commission apparently recognizes this when it states that digital broadcasts "will eventually carry identical content" of analog broadcast signals. NPRM at ¶ 39.

<sup>51</sup>*Cablevision Systems Corp.*, 11 FCC Rcd. 14934 (1996) at ¶ 34.

<sup>52</sup>Section 336 of the Act provides that "no ancillary or supplementary service shall have any right to carriage under section 614 or 615." 47 U.S.C. § 336(a)(2).

<sup>53</sup>47 U.S.C. § 534(b)(3) (emphasis added).

effectively require cable operators to squander valuable channel capacity, and reduce program diversity.

**V. THE COMMISSION SHOULD DEFER CONSIDERATION OF DIGITAL MUST CARRY RULES**

Even if the Commission believes it could enact digital must carry rules during the transition that do not violate the First Amendment, and that it has the statutory authority to do so, it should nonetheless defer consideration of this issue for several important reasons.

First, as discussed above, the Commission has no record upon which it can reasonably justify the imposition of digital must carry rules. Conjectural harm to digital broadcasters certainly provides no basis. The myriad of open questions about digital broadcasting (*e.g.*, technical issues, consumer acceptance, etc.) makes it impossible for the Commission to promulgate rules having any demonstrable factual support in the record.

Second, digital television is in its very infancy. As Chairman Kennard recently stated: "the pace of the transition [to digital TV] will be set by the private sector. [The government] should not set up the industry for failure by creating false expectation or, worse, micromanaging what [industry] should do with this promising technology."<sup>54</sup> Chairman Kennard also noted that the transition to DTV will be "complicated" and will require the collective contributions of the broadcast, cable, consumer electronics, computer and entertainment industries.<sup>55</sup> Given the tremendous complexities and uncertainties involved, government intervention at this early stage is inappropriate and unnecessary. As discussed

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<sup>54</sup>*Kennard IRTS Speech.*

<sup>55</sup>*Id.*

above, digital must carry rules might well run counter to the goal of realizing the promise of DTV by impeding the development of HDTV cable programming.

Third, as discussed above, carriage agreements are now being actively negotiated between broadcasters and cable operators. By all accounts, this process is making good progress. These negotiations include not only the "big four" broadcast networks, but upstart networks as well. For example, Paxson Communications Chairman Lowell Paxson has stated that he has had preliminary discussions with cable operators about carriage of his DTV stations.<sup>56</sup> Government intervention will not advance this process: the Commission should let market forces — not government fiat — establish the terms by which digital broadcast signals will be carried over cable systems. Rather, the specter of possible must carry mandates is far more likely to *impede* this highly constructive and efficient process.

Fourth, network affiliates will be the first digital broadcasters, and these entities are well positioned to negotiate for carriage, as they generally opted for retransmission consent, rather than must carry, in analog context.<sup>57</sup> In the NPRM, the Commission acknowledged that "stations not affiliated with the four major networks and commercial television station in smaller markets are those broadcasters most likely to exercise the must carry option, but a number of stations will not commence digital operations until the year 2002." NPRM at ¶ 33. In other words, digital must carry addresses a potential problem that

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<sup>56</sup>Harry A. Jessell, *Paxson Pushes DTV Partnership*, *Broadcasting & Cable*, Sept. 21, 1998, p. 18.

<sup>57</sup>As noted above, MediaOne reports that half of its retransmission consent agreements address digital carriage. *CableFax Daily*, Oct. 7, 1998, p. 1.

may or may not occur for another *four years*. In light of this timetable, Commission action now or in the immediate future would be grossly premature.

### **CONCLUSION**

DCI has demonstrated the existence of robust competition for channel carriage and its own commitment to meet that challenge. Some broadcasters obviously would like to be insulated from the need to compete for carriage on cable systems and prefer the security blanket of a government-imposed right to carriage. While such a desire is natural, the motive is transparent. As Chairman Kennard wisely stressed: "[i]t's government's job to see when arguments are distorted by the prism of self-interest." DCI is already investing millions of dollars in digital television technology — with no government-created right to carriage on cable systems. There is no principled reason why broadcasters should be immune from these same business risks. Imposing such artificial protection during this transaction period would violate the must carry statute and would fail First Amendment scrutiny.

The NPRM states that the Commission "want[s] an efficient and orderly structure that implements the law in a manner that, to the extent possible, permits market forces and private agreements to resolve issues and also respects the First Amendment rights

of all participants as established by court precedent." NPRM at ¶ 1. Consistent with that goal, DCI submits that the Commission should forbear at this time from adopting digital must carry rules during the transition period.

Respectfully submitted,

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*Its Attorneys*

October 13, 1998

# **Attachment A**

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## **DECLARATION OF WILLIAM GOODWYN**

I, William Goodwyn, declare under penalty of perjury that the information presented herein is true and accurate to the best of my knowledge, information and belief:

I am employed as Senior Vice President, Affiliate Sales and Marketing for Discovery Communications, Inc. ("DCI"). In that capacity, I am responsible for directing the affiliate sales and marketing efforts for each of the Discovery Networks including: Discovery Channel, The Learning Channel, Animal Planet, Travel Channel, Discovery Kids Channel, Discovery Science Channel, Discovery Home & Leisure Channel, Discovery Civilization Channel, Discovery Wings Channel, and Discovery Health Channel.

If DCI distributed its programming directly to television households, our marketing efforts would focus exclusively on those households. However, because DCI presently relies on cable systems for more than 90% of the distribution of its product, our success or failure is determined by our ability to obtain cable carriage. Accordingly, DCI's marketing efforts are directed at cable operators (and, to a much lesser extent, other MVPDs such as DTH satellite), as well as television households.

Cable systems across the country have limited channel capacity, and the demand for cable carriage has consistently exceeded the available channel supply. As a result, most cable networks reach only a portion of the nation's total cable subscribers. This fact drives every aspect of DCI's business plans and shapes our marketing policies and practices.

The various Discovery Networks have widely divergent cable carriage. DCI's flagship service, the Discovery Channel, which launched in 1985, has reached near universal MVPD distribution with more than 75 million domestic subscribers. In contrast, several of DCI's newer digital niche networks have yet to secure 100,000 subscribers.

DCI and other cable programmers compete fiercely for cable carriage. DCI is constantly working to ensure that none of the Discovery Networks lose a distribution opportunity to a competing programming service.

Approximately 60 DCI Affiliate Sales and Marketing employees deal directly with cable operators in an on-going effort to gain and maintain cable carriage. On a national level, my staff works with large MSOs to secure favorable distribution commitments. On a local level, we work extensively with system personnel to ensure the widest possible distribution for the Discovery Networks. In that regard, we track the channel carriage and upgrade plans of virtually every cable system across the country. DCI's marketing field staff are continually defending the Discovery Networks' existing cable channel carriage and advocating expanded distribution.

Over the last several years, DCI has evaluated how it could best broaden its video delivery. We realized that it would be extraordinarily difficult for DCI to gain additional analog capacity for its niche services (*i.e.* Discovery Kids Channel, Discovery Science Channel, Discovery Home & Leisure Channel, Discovery Civilization Channel, Discovery Wings Channel, and Discovery Health Channel.) Accordingly, we concluded that the best opportunity available was to develop these niche services as part of a bandwidth-efficient digital tier. DCI recognized that the limited deployment of digital equipment meant that these niche services would have a very limited audience for the near future. Nevertheless, given the saturated analog universe, our most promising opportunity was to invest in the growth of digital service.

The emergence of digital compression has by no means solved the carriage problem for the Discovery Networks. Indeed, DCI has encountered difficulty securing carriage for its new niche services even on those cable systems which have launched digital tiers. Because of the limited number of channels devoted to digital delivery, these systems typically carry only three of DCI's six digital offerings. Moreover, DCI risks losing analog carriage as systems delete analog channels for digital capacity. The comparatively channel-rich Media General cable system in Fairfax County Virginia, for example, recently announced that DCI's Travel Channel would be among the analog channels deleted to make room for a new digital offering.

While cable operators are continually expanding their carriage capacity, the number of competing cable networks is also increasing. I do not anticipate the struggle for cable carriage to abate in the foreseeable future, even as average system capacity and digital capability increases.

In working with cable operators who are currently either considering or completing a significant plant upgrade, it is clear to me that they are concerned with deploying the upgrade in a manner most likely to maximize their "revenue per megahertz" in order to recoup their upgrade investment. A significant allocation is generally reserved for telephony and internet development, and a very large allocation is reserved for premium and pay-per-view channels so as to provide customers with "near video on demand." At this time, operators appear to hold the opinion that there is a comparatively limited demand for additional "non-premium" services like the new Discovery Networks. Accordingly, systems with vastly expanded channel capacity are devoting a comparatively small amount of this new capacity to conventional, non-premium programming tiers.

DCI's experience with DirecTV reveals the difficulty in securing additional channel capacity for non-premium services, even where a vast number of channels are offered by the MVPD. Although DirecTV markets an expansive 225 channel line-up, only about 40% of the channels are devoted to conventional non-premium video services. DirecTV does not carry DCI's Travel Channel. Nor does it carry any of DCI's six niche services. DirecTV maintains it does not have sufficient space for these services.

I believe that the imposition of digital must carry at the same time that cable operators must continue to carry analog must carry signals would severely disrupt the marketplace for the Discovery Networks. The resulting dramatic loss in cable channel capacity would prompt DCI to reconsider and possibly drop its existing six digital services and its planned HDTV launch.

I have reviewed the attached Comments and believe all the facts set forth therein regarding DCI to be true and accurate.

  
William Goodwyn

October 13, 1998

# **Attachment B**

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