

Given its frequently stated interest in avoiding regulatory impediments to innovation, the Commission should refrain from prescribing must-carry obligations in the near-term to allow ongoing industry efforts to complete the work of resolving technical issues critical to cable carriage of DTV and the success of DTV generally. The Commission is well aware of the great strides that are being made by various industry segments in terms of overcoming the technical and business hurdles that must be cleared before achievable must-carry obligations can be implemented.<sup>36</sup> It would be unrealistic to assume that regulatory deadlines can be set for completing these efforts. The better course is to allow technological developments to drive policy decisions, rather than vice versa.

Fortunately, there is no imminent need to prescribe deadlines for the resolution of open technical issues or to adopt must-carry obligations for carriage of DTV signals in the top 30 markets. Commercial stations affiliated with the four networks operating in those markets will almost certainly elect retransmission consent,<sup>37</sup> rather than must-carry, as the vehicle through which to achieve cable carriage of their DTV signals.

The Commission has noted that an estimated 80% of all commercial television broadcasters elected retransmission consent, rather than must-carry, during the 1993-96 cycle, and it has predicted that, if a similar pattern continues,

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<sup>36</sup> See Letter from William E. Kennard, Chairman, FCC, to Decker Anstrom, NCTA, and Gary Shapiro, CEMA (August 13, 1998); Letter from Gary Shapiro to William E. Kennard (September 10, 1998).

<sup>37</sup> 47 U.S.C. § 325(b)(1), (b)(3); NPRM at ¶¶ 4-5.

it is possible that many of the transitional issues involved in this proceeding will be resolved through retransmission consent negotiations . . . . [T]he 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 scheduled to commence on January 1, 2000, *even if* there were digital must carry requirements in place.<sup>38]</sup>

Thus, digital must-carry rules should not become relevant before May 1, 2002, when independent stations in the top 30 markets and all other commercial DTV stations in markets 31-212 are required to initiate DTV service.<sup>39</sup>

As the Commission has already observed,<sup>40</sup> deferring the consideration of must-carry rules "has certain advantages," including allowing broadcasters and cable operators to work cooperatively -- outside of the regulatory arena -- to resolve digital must-carry problems. Such voluntary efforts are presently underway and should be allowed to continue unimpeded by government intervention, unless and until the parties reach a stalemate -- a possibility that does not appear likely at this time. Must-carry arrangements reached by broad industry consensus rather than imposed by regulatory action will be far less likely to be entangled in lengthy administrative and judicial challenges<sup>41</sup> and therefore are more likely to produce the desired end result more expeditiously.

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<sup>38</sup> NPRM at ¶¶ 32-33 (emphasis added).

<sup>39</sup> *Advanced Television Systems, supra*, note 21, Fifth Report and Order, 12 FCC Rcd at 12841, ¶ 76; NPRM at ¶ 10.

<sup>40</sup> NPRM at ¶ 49.

<sup>41</sup> In the NPRM, the Commission acknowledged the risk that dilatory litigation could result if it does not craft the must-carry rules carefully. NPRM at ¶ 15.

IV. IN THE EVENT THAT THE COMMISSION ADOPTS MUST-CARRY RULES, THOSE RULES SHOULD BE MINIMAL AND SHOULD NOT DISCOURAGE THE INTRODUCTION OF INNOVATIVE NEW SERVICES.

If the Commission adopts must-carry rules despite the technical infeasibility of those rules, it should craft the rules to encompass carriage of the video, audio, and data components of a program to the extent they form an integrated consumer experience, in order to promote the introduction and deployment of new, innovative digital services that utilize DTV bandwidth. Section 336(b)(3) of the Communications Act<sup>42</sup> exempts "ancillary or supplementary services" from the must-carry requirements of Sections 614 and 615. Thus, the Commission must carefully distinguish between ancillary or supplementary services and program enhancements -- including data, that are integrated with the video and audio components to create a unified, though perhaps variegated, consumer experience. While the former may be statutorily exempted from a must-carry regime, the latter should not be. The public should not be denied the opportunity to access new, innovative programming.

On the other hand, given the nascency of both the technology and the market, it would be premature to prescribe anything more than the most fundamental signal quality requirements at this time. Imposition of specific signal quality carriage requirements, *e.g.*, mandating carriage of particular video formats, would cause all cable operators to incur unnecessary and significant costs without justification in the form of demonstrated audience demand.

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<sup>42</sup> 47 U.S.C. § 336(b)(3).

Moreover, the statutory authority for the Commission to prescribe video format carriage requirements for cable operators appears tenuous.<sup>43</sup>

And while assessments of *analog* signal quality are relatively straightforward, *digital* signals -- with their vastly increased complexity, variation, and potential enhancements and applications -- present far more difficult challenges. No signal quality requirements should be adopted before objective, meaningful criteria and mechanisms for measuring DTV signal quality have been identified and accepted by the affected industries -- a task which has not yet been completed and is certain to be time-consuming and somewhat contentious. Public statements by the major networks and demonstrations of the predominant video formats -- 480p, 720p, and 1080i -- have failed to yield a consensus as to which video format is most desirable. But as abundant record evidence in MM Dkt. No. 87-268 demonstrates, the mere number of scan lines or pixels has nothing to do with picture quality. A 720-line progressive-scan HDTV picture has

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<sup>43</sup> No explicit statutory authority exists for the Commission to prescribe carriage of a particular video format. Indeed, such a prescription would exceed the Commission's corresponding authority under Section 614(b)(4)(A), 47 U.S.C. § 534(b)(4)(A), with respect to carriage of analog signals. That Section permits the Commission only to adopt analog signal quality rules requiring that, "to the extent technically feasible, . . . the quality of signal processing and carriage . . . will be no less than that provided by the system for any other type of signal." Any signal quality rules that do not account for technical feasibility and give the cable operator some (though perhaps circumscribed) discretion over carriage will expand the authority conferred by Section 614(b)(4)(A) with no express indication of Congressional intent to expand that authority in the digital environment.

in fact been demonstrated to be superior in quality to a 1080-line interlaced picture.<sup>44</sup>

In particular, because the carriage of different video formats requires different amounts of cable system capacity, the Commission should expressly permit cable operators to cross-convert the video formats of DTV signals as they deem appropriate to conserve bandwidth on their systems – so long as they do not discriminate against broadcast programming. To deny cable operators the ability to make such limited alterations to the DTV signals they are required to carry could raise constitutional takings issues and spawn administrative and appellate challenges with questionable offsetting benefit to consumers and broadcasters.

In short, if the Commission adopts any digital must-carry requirements, it should define the DTV signals that will be encompassed by those requirements to include the video, audio, and data components of any integrated DTV services that comprise a single consumer experience. In addition, it should declare that cable operators may cross-convert the video formats of DTV signals.

#### CONCLUSION

The transition from analog to digital television should be a pragmatic one that is derived from the outstanding technological issues associated with DTV. At this point, many technical issues remain open. Although these issues are complex, industry is making significant progress in resolving them. Microsoft

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<sup>44</sup> See, e.g., Comments of William R. Schreiber in *Advanced Television Systems*, *supra*, note 21, Fifth NPRM (filed June 24, 1996) at 3, 5-6.

believes that the approach that holds the greatest promise for developing and deploying DTV in a manner that best serves consumer interests, both expeditiously and in the long term, is to rely for the time being on ongoing industry cooperation coupled with Commission oversight.

If the Commission postpones consideration of must-carry, hardware prices will have an opportunity to fall. Copy protection issues and other technical problems will be resolved voluntarily. Industry groups will formulate enhanced programming specifications. The Commission will have time to develop the record about the nature of what DTV programming will be. And the cable industry, which has already committed itself voluntarily to carrying broadcasters' DTV signals, will have time to continue to work cooperatively with broadcasters and consumer electronics manufacturers to perfect digital carriage technologies.

Respectfully submitted,

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## Certificate of Service

I, Suzanne Takata certify that true and correct copies of the preceding Comments of Microsoft Corporation in CS Docket CS 98-120 were served this 13<sup>th</sup> day of October, 1998 via electronic mail to the following parties. Those parties marked with an (\*) were served via hand delivery.

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