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

To: The Commission

**COMMENTS OF BELLSOUTH CORPORATION AND
BELLSOUTH INTERACTIVE MEDIA SERVICES, INC.**

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October 13, 1998

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SUMMARY

Notwithstanding the Commission's apparent willingness to resolve DTV carriage issues through the marketplace, the *Notice of Proposed Rulemaking* in this proceeding appears to rest on the basic assumption that the success of DTV is inextricably tied to whether or not cable television systems are required to carry DTV signals. Though BellSouth does not deny that carriage of DTV signals by *incumbent* cable operators may be an important factor in determining the success or failure of DTV, this is not the case with respect to cable *overbuilders* who control only a small percentage of subscribers in local markets.

Moreover, the Commission correctly recognizes that the must-carry provisions of the 1992 Cable Act should be the foundation of any DTV must-carry rules adopted in this proceeding. Those provisions *are directed toward incumbent cable operators, not cable overbuilders who have no ability or incentive to discriminate against local broadcasters*. The imposition of a DTV must-carry requirement on cable overbuilders thus raises serious constitutional concerns, since the Supreme Court's blessing of the 1992 Cable Act's must-carry provisions arises largely from Congress's determination that incumbent cable operators maintain a stranglehold over distribution of video programming in local markets, and thus enjoy market power disproportionate to that of local broadcasters who need cable carriage to survive. The constitutional problem is compounded by the fact that the 1992 Cable Act's must-carry provisions generally are very poorly suited for the digital environment, and that no amount of regulation can overcome the unavoidable technical obstacles that render DTV must-carry unworkable for BellSouth and other cable overbuilders at this time.

Accordingly, BellSouth submits that the Commission's objectives in this proceeding will be best achieved by imposing only a voluntary DTV carriage option on cable overbuilders. This will allow BellSouth and other overbuilders to continue negotiating private DTV carriage agreements, which to date have proven to be an effective mechanism for ensuring an orderly and cost-efficient introduction of DTV to cable subscribers in competitive markets. Equally important — to ensure full and fair competition between cable overbuilders and incumbent cable operators with market power — the Commission must reaffirm that exclusive retransmission consent agreements between local broadcast stations and incumbent cable operators are anticompetitive and thus will continue to be prohibited under the Commission's Rules.

TABLE OF CONTENTS

	Page
SUMMARY	i
I. INTRODUCTION	1
II. THE IMPOSITION OF A DTV MUST-CARRY OBLIGATION ON CABLE OVERBUILDERS RAISES SERIOUS CONSTITUTIONAL CONCERNS	2
A. BellSouth and Other Cable Overbuilders Do Not Have Market Power	3
B. The Congressional Findings In Support Of The 1992 Cable Act's Must- Carry Provisions Do Not Apply to Cable Overbuilders	6
C. The Inapplicability of Congress's Findings Raises Serious Questions As To Whether the Imposition of a DTV Must-Carry Requirement on Cable Overbuilders Passes Muster Under the Supreme Court's Analysis in Turner II	12
III. ADDITIONAL LEGAL AND TECHNICAL CONSIDERATIONS MILI- TATE STRONGLY AGAINST IMPOSITION OF A DTV MUST CARRY REQUIREMENT ON CABLE OVERBUILDERS AT THIS TIME	14
A. Statutory Issues	14
1. Viewability On All Subscriber Television Sets	15
2. Availability On the Basic Tier	15
3. The "One-Third" Limitation	16
4. Substantial Duplication	17
5. Channel Positioning	18
B. Technical Issues	19
1. Set-Top Boxes	19
2. The "Firewire" Solution	20
3. System Retuning	21
4. Electronic Program Guides	22
5. Copy Protection	23
IV. VOLUNTARY AGREEMENTS ARE THE MOST EFFECTIVE MECHA- NISM FOR LAUNCHING CABLE CARRIAGE OF DTV SIGNALS IN AN ORDERLY MANNER	24
V. CONCLUSION	28

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BellSouth Corporation and its subsidiary BellSouth Interactive Media Services, Inc. (hereinafter referred to collectively as "BellSouth") hereby submit their comments with respect to the Commission's *Notice of Proposed Rulemaking* ("NPRM") in the above-captioned proceeding.

I. INTRODUCTION.

As a cable overbuilder offering consumers their first opportunity to choose between competing cable providers in multiple markets throughout the Southeast, BellSouth commends the Commission's efforts to ensure the successful introduction of digital broadcast television ("DTV") in a manner that minimizes disruption and costs to subscribers, cable operators, and cable programmers.¹² The Commission's preference for a market-based approach is consistent

The transition to digital TV is inevitable, *but the pace of the transition will be set by the private sector.* And we in government should not set up the [broadcasting] industry for failure by creating false expectations or, worse, micromanaging what you should do with this promising technology.^{2/}

In a similar vein, Commissioner Powell has noted that both the government and private industry “need a certain level of realistic, candid expectations” about the DTV transition, and that “bad things can happen” if government policy is tied too closely to completion of the transition by the government-mandated deadline of 2006.^{3/} Accordingly, consistent with the Commission’s desire to construct “efficient and orderly” DTV carriage requirements that rely on market forces wherever possible, *without* running afoul the First Amendment,^{4/} BellSouth herein requests that the Commission (1) impose only a voluntary DTV carriage option on cable overbuilders and (2) continue to prohibit exclusive retransmission consent agreements between incumbent cable operators and local broadcast stations.

II. THE IMPOSITION OF A DTV MUST-CARRY OBLIGATION ON CABLE OVERBUILDERS RAISES SERIOUS CONSTITUTIONAL CONCERNS.

The Supreme Court has held that federal statutes should be interpreted in a manner that avoids substantial constitutional questions.^{5/} In accordance with that mandate, the Commission

^{2/} “FCC Chairman Pushes Broadcasters to Forge Their Own Path on HDTV,” *Video Competition Report*, at 7 (Sept. 28, 1998) (emphasis added).

^{3/} *Communications Daily*, at 7 (Sept. 22, 1998) (quoting Commissioner Powell during interview at American Women in Radio & TV convention).

^{4/} *NPRM* at ¶ 1.

^{5/} *United States v. X-Citement Video, Inc.*, 115 S.Ct 464, 467 (1994).

has acknowledged that any DTV must-carry rules adopted in this proceeding “must be consistent with the judicial decisions regarding the constitutional limitations applicable in this area and in particular with the Supreme Court’s holding in *Turner Broadcasting System v. FCC* (“*Turner II*”).”⁶ For the reasons set forth below, BellSouth submits that the imposition of a DTV must-carry requirement on cable overbuilders would upend the delicate balancing of interests that is the touchstone of *Turner II*.

A. BellSouth and Other Cable Overbuilders Do Not Have Market Power.

Congress adopted the must-carry provisions of the 1992 Cable Act to remedy a perceived imbalance between the market power of incumbent cable operators and that of local broadcasters who need cable carriage to survive. Thus, where cable overbuilders are concerned, any analysis of the constitutionality of a DTV must-carry requirement must begin with the simple question of whether cable overbuilders have market power.

As of the date of this writing, BellSouth has obtained franchises to provide cable overbuild service in a total of communities in Alabama, Florida, Georgia, South Carolina and Tennessee. BellSouth has activated service in 10 of those 18 communities: Vestavia Hills, Alabama; St. John’s County, Florida; Chamblee, Lawrenceville, Cherokee County, Dekalb County, Gwinnett County, Duluth and Woodstock, all in Georgia; and Daniel Island, South Carolina. In the 10 communities where BellSouth has activated service, BellSouth’s cable plant passes less than 10% of all potential cable households. Obviously, BellSouth’s market share is

⁶ *NPRM* at ¶ 15, discussing *Turner Broadcasting System v. FCC*, 117 S.Ct. 1174 (1997) (“*Turner II*”).

far smaller than that of the large cable MSOs with which it must compete, and in some cases does not equal the market share currently held by DBS. Though BellSouth is optimistic about its potential to offer competitive cable service in each of its franchise areas, it is beyond dispute that BellSouth's cable overbuilds do not have "market power" under any definition of that term.

The Commission has observed that this is equally true of cable overbuilds as a whole. In its Fourth Annual Report to Congress on the status of competition in markets for the delivery of video programming, the Commission found that as of July 1997, cable franchises have been awarded to overbuilders in 81 communities in 14 states covering 5.43 million homes.⁷¹ By contrast, incumbent cable operators serve an estimated 64.2 million subscribers nationwide, or 68.2% of homes passed.⁸¹ The Commission thus concluded that "[c]ompetitive overbuilding by franchised cable operators remains minimal,"⁹¹ and, more generally, that it is "impossible for [the Commission] to predict the extent to which competition will develop over time and constrain cable systems' exercise of market power."¹⁰¹

It is also well known that cable overbuilders face substantial difficulties in competing head-to-head against incumbent cable operators. For instance, cable overbuilders must contend with "level playing field" statutes which incumbent cable operators push through their state

⁷¹ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1140 (1998) [the "Fourth Annual Report"].

⁸¹ *Id.* at 1058-9.

⁹¹ *Id.* at 1043.

¹⁰¹ *Id.* at 1140.

legislatures and subsequently use as a pretext to block the issuance of competitive franchises.¹¹¹

As noted in the Commission's recent *Report and Order* adopting new inside wiring rules for MVPDs, incumbent cable operators utilize a variety of tactics to keep cable overbuilders and other competitors from obtaining full and fair access to subscribers in multiple dwelling units.¹²¹

Finally, it is a matter of public record that BellSouth and other cable overbuilders do not enjoy

¹¹¹ The effect of "level playing field" statutes on cable overbuilders is by no means speculative: in Dade County, Florida, no fewer than five cable MSOs have joined forces in an unsuccessful attempt to enjoin the local franchising authority from issuing a franchise to BellSouth. *Rifkin/Miami Management Services, Inc., et al. v. Metropolitan Dade County and BellSouth Interactive Media Services, Inc.*, No. 97-1567-CIV-GRAHAM (S.D. Fla. July 13, 1998) (order granting summary judgment); *Rifkin, et al., v. Metropolitan Dade County, et al.*, No. 97-1567-CIV-GRAHAM (S.D. Fla. Sept. 30, 1998) (notice of appeal to the Eleventh Circuit Court of Appeals); *ACP Holding Corp., et al., v. Metropolitan Dade County and BellSouth Interactive Media Services, Inc.*, No. 97-10915 CA 15 (Fla. Cir. Ct. February 9, 1998) (order granting summary judgment); *ACP, et al., v. Metropolitan Dade County, et al.*, No. 97-10915 CA 15 (Fla. Cir. Ct. April 27, 1998) (notice of appeal to the Florida Third District Court of Appeal). See also *New England Cable TV Ass'n v. Department of Pub. Util. Control*, 247 Conn. 95 (1998) (rejecting incumbent cable operator's challenge to SNET's statewide overbuild franchise under level playing field statute); *Cable TV Fund 14-A, Ltd. d/b/a Jones Intercable v. City of Naperville, et al.*, 96-C-5962 (N.D. Ill., May 21, 1997) (allowing Jones Intercable to proceed with a lawsuit against Ameritech New Media under Illinois level playing field statute).

¹²¹ *Telecommunications Services - Inside Wiring/Customer Services Equipment*, 13 FCC Rcd 3659, 3679-80 (1997) ("The record indicates that, where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service, perpetual contracts entered into by the incumbent and previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbents, or that the incumbent's investment in the wiring has not been recouped, and oral understandings regarding the ownership and continued provision of services.").

the same access to programming as the incumbent cable operators with whom they must compete.^{13/}

In sum, though BellSouth and other cable overbuilders have made substantial progress over the past few years, incumbent cable operators still “occupy the dominant position in the MVPD marketplace.”^{14/} This basic economic fact raises serious questions as to whether the Congressional findings in support of must-carry are relevant in the DTV/overbuilder context, and thus whether the imposition of DTV must-carry obligations on cable overbuilders passes muster under the Supreme Court’s analysis in *Turner II*.

B. The Congressional Findings In Support Of The 1992 Cable Act’s Must-Carry Provisions Do Not Apply to Cable Overbuilders.

As noted in the *NPRM*, the Commission’s obligation to initiate this rulemaking arises from the must-carry provisions of the 1992 Cable Act.^{15/} Accordingly, the general framework of those provisions, and their legislative history, is the starting point for determining whether the

^{13/} See, e.g., Comments of BellSouth Corporation, *et al.*, CS Docket No. 98-102, at 6-14 (filed July 31, 1998); Comments of Ameritech New Media, Inc., CS Docket No. 98-102, at 4-10 (filed July 31, 1998).

^{14/} *Fourth Annual Report*, 13 FCC Rcd at 1038.

^{15/} *NPRM* at ¶ 2, discussing Section 614(b)(4)(b) of the 1992 Cable Act (47 U.S.C. § 534(b)(4)(b)) (“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 television stations which have been conformed with such modified standards”).

imposition of a DTV must-carry requirement on cable overbuilders is consistent with the underlying purposes of the statute.^{16/}

After extensive congressional hearings, Congress made a series of detailed statutory findings in support of the must-carry requirement for commercial television stations.^{17/} First, Congress found that “[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate,”^{18/} and that “[t]here is a substantial governmental interest in promoting the continued availability of . . . free television programming, especially for viewers who are unable to afford other means of receiving programming.”^{19/} By the same token, Congress also found that “there has been a marked shift in market share from broadcast television to cable television services,”^{20/} but that “most cable television subscribers have no opportunity to select between competing cable systems,”^{21/} resulting in “*undue market power for the cable operator* as compared to that of consumers and video programmers.”^{22/} Congress further determined that “[c]able television

^{16/} See *NPRM* at ¶ 14. (“[W]e take as our starting point the general framework governing the carriage of television stations currently found in Section 614, 615, and 325 of the Act. Section 614(b)(4)(B), and its legislative history, appears to support this approach as Congress intended that the Commission establish technical standards for the carriage of digital television signals.”).

^{17/} See, e.g., Hearing Before the Subcomm. on Telecomm. and Fin. of the Comm. on Energy and Commerce, House of Representatives, 102d Cong. (1991).

^{18/} Pub. L. No. 102-385, § 2(a)(11).

^{19/} *Id.* § 2(a)(12).

^{20/} *Id.* § 2(a)(13).

^{21/} *Id.* § 2(a)(10).

^{22/} *Id.* § 2(a)(11) (emphasis added).

systems and broadcast television stations increasingly compete for television advertising revenues,^{23/} and that cable systems therefore have “an economic incentive” to deny carriage to local commercial television stations.^{24/} Tying together all of the above, Congress concluded with the following critical finding:

As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.^{25/}

In essence, then, the Congressional findings in support of must-carry can be summarized as follows: (1) incumbent cable operators hold a *de facto* monopoly over distribution of multichannel video programming in local markets; (2) because they compete directly with local broadcasters for advertising dollars, incumbent cable operators have an incentive not to carry local broadcasters; (3) absent a must-carry requirement, local broadcasters will be at risk of losing carriage; and (4) the risk of non-carriage jeopardizes the economic viability of free local broadcast television and the valuable news and public service programming that it provides. As demonstrated below, none of these findings apply to carriage of DTV stations by cable overbuilders.

^{23/} *Id.* § 2(a)(14).

^{24/} *Id.* § 2(a)(15).

^{25/} *Id.* § 2(a)(16).

First and foremost, Congress's findings are premised on the assumption that the incumbent cable operator *faces no competition from a competing multichannel video provider.*^{26/} Obviously, this assumption is false with respect to cable overbuilders like BellSouth who enter the market with no subscribers and must compete head-to-head with incumbent cable operators. Indeed, Congress recognized this in the Balanced Budget Act of 1997, which provides that a broadcaster is not required to return its analog spectrum where it can demonstrate, *inter alia*, that 15% or more of the television households in its market do not subscribe to an MVPD that carries one of the digital television service programming channels of each DTV station in the market.^{27/} Since neither BellSouth nor any other cable overbuilder controls anywhere near 15% of the television households in any television market in the United States, and since cable overbuild service is not even available in most areas of the country, Congress clearly did not believe that the ability of local broadcasters to implement DTV in a timely manner depends upon whether they are carried by cable overbuilders.

Second, while it is true that cable overbuilders compete to some extent with local broadcasters for advertising dollars, their competitive share of those dollars is miniscule and, importantly, they must also compete with *incumbent cable operators* for those same dollars. Indeed, a cable overbuilder with no or few subscribers is at a decided economic *disadvantage* vis-a-vis local broadcasters and incumbent cable operators who already enjoy marketwide

^{26/} *Id.* § 2(a)(2) (“Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.”).

^{27/} 47 U.S.C. § 309(j)(14).

distribution of their product and thus are far more attractive as an advertising medium to national and local advertisers. As a practical matter, cable overbuilders gain no material economic advantage by refusing to carry local broadcast stations, inasmuch as it would diminish the attractiveness of their service and thus limit the growth of their systems, decreasing their value as an advertising medium.^{28/} As discussed in greater detail in Section IV, *infra*, subscriber dissatisfaction over the unavailability of local broadcast programming on the overbuilder's system is something an overbuilder must seek to avoid in its competitive situation.

Further, on the issue of DTV must-carry generally, Congress passed the must-carry provisions of the 1992 Cable Act to ensure the continued availability of free, local over-the-air broadcast service, especially for those unable to afford cable television service. BellSouth submits that, at least at the present time, digital television is "free" in only the loosest sense of the word: given that initial models of digital television receivers will be priced anywhere from \$5,000 to \$10,000, it is difficult to see how a DTV must-carry requirement preserves the availability of local broadcast service for those who cannot even afford cable television service.^{29/}

At a minimum, this strongly suggests that Congressional intent would be better effectuated by postponing any consideration of DTV must-carry requirements until DTV receivers become affordable to a much larger percentage of television viewers in the United States.

^{28/} Moreover, unlike cable multiple system operators ("MSOs"), BellSouth and other overbuilders usually do not hold ownership interests in cable programming services that compete with broadcast network programming for advertising revenue.

^{29/} See, e.g., "First Sony DTV Set Due by Thanksgiving at \$8,999," *Audio Week* (Sept. 21, 1998).

Finally, Congress's findings were tied closely to the fact that local broadcasters are a valuable source of local news and public affairs programming; indeed, the preservation of such programming is the "substantial government interest" which sustains the entire must-carry statute.^{30/} Though the Telecommunications Act of 1996 provides that DTV stations have a general responsibility to "serve the public interest, convenience and necessity,"^{31/} the Commission has yet to define exactly what if any specific public service obligations will be imposed on DTV stations, and to date DTV stations have not established any track record as to how much news and other public service programming they intend to provide over their digital facilities, or when that programming might be available.^{32/} As recently noted by Chairman Kennard:

As cable operators create local programming, particularly news and public affairs shows, and with almost three-quarters of Americans actually paying to receive these channels, what remains that makes broadcasters unique? And is this uniqueness significantly tangible, demonstrable, and assured to justify requiring cable carriage?^{33/}

BellSouth thus submits that the lack of clarity regarding DTV public service obligations runs afoul of Congress's findings in support of must-carry, since the Commission cannot yet establish

^{30/} Pub. L. No. 102-385, § 2(a)(10)-(11).

^{31/} 47 U.S.C. §§ 307(a), 309(a).

^{32/} See *Advanced Television Systems and Their Impact Upon The Existing Television Broadcast Service (Fifth Report and Order)*, 12 FCC Rcd 12809, 12829 (1997) ("We are not resolving this debate [over DTV public service obligations] today. Instead, at an appropriate time, we will issue a Notice to collect and consider all views.").

^{33/} "FCC Chairman Pushes Broadcasters to Forge Their Own Path on HDTV," *Video Competition Report*, at 8 (Sept. 28, 1998).

a connection between mandatory carriage of DTV stations and the continued availability of local, off-air public service programming for those unable or unwilling to subscribe to cable.

C. The Inapplicability of Congress's Findings Raises Serious Questions As To Whether the Imposition of a DTV Must-Carry Requirement on Cable Overbuilders Passes Muster Under the Supreme Court's Analysis in Turner II.

The Supreme Court left little doubt that Congress's findings in support of must-carry were the cornerstone of its decision to reject challenges to the must-carry statute on First Amendment grounds:

Judgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make. . . We cannot displace Congress's judgment respecting content-neutral regulations with our own, *so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination.*^{34/}

Hence, to fully evaluate whether the imposition of a DTV must-carry requirement on cable overbuilders would be consistent with the Supreme Court's decision in *Turner II*, the Commission must consider the extent to which Congress's findings would be viewed as reasonable and substantial *in that context*. If Congress's findings do not justify a DTV must-carry requirement for cable overbuilders, then the imposition of such a requirement raises serious constitutional concerns.

As demonstrated above, Congress's findings do not apply to carriage of DTV stations by cable overbuilders, and thus, at least as far as cable overbuilders are concerned, would fall short of the "reasonable factual findings" necessary to defeat a constitutional challenge under the

^{34/} *Turner II*, 117 S.Ct. at 1203 (emphasis added).

Supreme Court's analysis in *Turner II*. Equally important to the analysis, however, is Justice Breyer's recognition that must-carry "extracts a serious First Amendment price,"^{35/} and that the must-carry provisions of the 1992 Cable Act pass constitutional muster because they are "*narrowly tailored* to preserve a multiplicity of broadcast stations" for those American households without cable.^{36/} In this regard, the Court noted that the actual effects of must-carry on most cable operators were "modest,"^{37/} and that Congress otherwise had taken steps to "confine the breadth and burden of the regulatory scheme."^{38/}

By contrast, and as discussed in Section III(A) *infra*, it will be nearly impossible for the Commission to design a DTV must-carry obligation for cable overbuilders that imposes an equal or lighter First Amendment burden than the analog must-carry provisions upheld in *Turner II*. Here it must be remembered that the must-carry statute currently requires cable operators *with market power* to devote a limited amount of their channel capacity to carriage of nonduplicative local television broadcast signals, many of which they were carrying before passage of the must-carry statute. Conversely, were the Commission to impose a DTV must-carry obligation on

^{35/} *Id.* at 1204.

^{36/} *Id.* at 1199 (emphasis added).

^{37/} *Id.* at 1198 ("Significant evidence indicates that the vast majority of cable operators have not been affected in a significant manner by must-carry. Cable operators have been able to satisfy their must-carry obligations 87 percent of the time using previously unused channel capacity" (citation omitted)).

^{38/} *Id.* at 1199 ("Congress exempted systems of 12 or fewer channels, and limited the must-carry obligation of larger systems to one-third of capacity; allowed cable operators discretion in choosing which competing and qualified signals would be carried; and permitted operators to carry public stations on unused public, educational and governmental channels in some circumstances.") (citations omitted).

cable overbuilders, it in effect would be requiring cable operators who *lack* market power to invest substantial resources toward reconfiguring their systems to facilitate carriage of *duplicative* television programming transmitted by heretofore uncarried digital television stations, for which there is no proven demand in the marketplace. Any Commission action which puts an overbuilder in this situation would be completely at odds with Congress's findings.

In light of the fundamental difference between the circumstances of cable overbuilders and those of incumbent cable operators, and the resulting inapplicability of Congress's findings to cable overbuild service, BellSouth submits that the Commission will enter a constitutional quagmire if it attempts to impose a DTV must-carry obligation on cable overbuilders. For this reason, the Commission should impose only a voluntary DTV carriage option on cable overbuilders at this time.

III. ADDITIONAL LEGAL AND TECHNICAL CONSIDERATIONS MILITATE STRONGLY AGAINST IMPOSITION OF A DTV MUST CARRY REQUIREMENT ON CABLE OVERBUILDERS AT THIS TIME.

A. *Statutory Issues.*

Even if the Commission were to put aside the very significant constitutional issues described above, it cannot escape the fact that the 1992 Cable Act's must-carry provisions are very poorly suited for the digital environment, and thus provide an additional basis for the Commission to impose only a voluntary DTV carriage option for cable overbuilders.

The 1992 Cable Act's must-carry provisions are grounded in the following basic principles: (1) local television signals must be provided to every subscriber and must be viewable

on all television sets that are connected to the cable system; (2) local television signals should be available to all subscribers on a separately available, “basic” tier of service; (3) cable operators should only be required to devote a limited amount of channel capacity to carriage of must-carry stations; (4) cable operators should not be required to carry duplicative local signals; and (5) a local broadcaster is entitled to a channel position on the cable system that is most familiar to its viewers (*i.e.*, its off-air channel or its pre-existing cable channel). As demonstrated below, none of these principles can be sensibly applied to DTV must-carry.

1. Viewability On All Subscriber Television Sets.

Section 614(b)(7) of the 1992 Cable Act provides that all must-carry signals shall be provided to every subscriber of a cable system and *shall be viewable via cable on all television receivers of a subscriber which are connected to the cable system.*^{39/} The Commission has emphasized that the Act “does not give the Commission authority to exempt any class of subscribers from this requirement.”^{40/} Yet that is precisely what the Commission would be doing by requiring cable overbuilders to carry digital television signals that cannot be viewed on a subscriber’s analog television set(s).

2. Availability On the Basic Tier.

Section 623(b)(7) of the Act requires that all cable operators provide their subscribers with a separately available basic service tier containing all must-carry signals, to which

^{39/} 47 U.S.C. § 534(b)(7).

^{40/} *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 — Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2974 (1993) (the “*Must Carry R&O*”).

subscription is required for access to any other tier of service.^{41/} In this regard, the Commission has clarified that where a cable operator chooses to provide subscribers with signals entitled to mandatory carriage through converter boxes supplied by the cable system, those converters must be capable of transmitting all the signals entitled to mandatory carriage on the basic tier of the cable system, not just some of them.^{42/} DTV must-carry is fundamentally inconsistent with this policy to the extent that it requires a cable overbuilder to carry a DTV signal that, as in the case of BellSouth, cannot be passed through or translated through the current set-top box technology without substantial development and expense.

3. *The “One-Third” Limitation.*

Under Section 614(b)(1)(B) of the Act, cable operators generally are required to devote only one-third of their activated channels to carriage of commercial must-carry signals.^{43/} Under Section 614(b)(2), in situations where there are more local commercial television signals than a cable system is required to carry, the cable operator generally has full discretion to choose which of the local commercial television stations it will carry.^{44/} Thus, where a system is “channel locked” but has satisfied its “one-third” must-carry quota, DTV must-carry effectively gives the cable operator the option of adding a local DTV signal that can be received only by

^{41/} 47 U.S.C. § 543(b)(7).

^{42/} See, e.g., *WLIG-TV, Inc.*, DA 93-1365, at ¶ 5 (rel. Nov. 10, 1993).

^{43/} 47 U.S.C. § 534(b)(1)(B).

^{44/} 47 U.S.C. § 534(b)(2). In situations where more than one affiliate of the same broadcast network qualifies for carriage, the cable operator is required to carry the affiliate closest to the cable operator’s principal headend. *Id.*, § 534(b)(2)(B).

some subscribers at the expense of a local analog signal that can be received by all subscribers, a result that is hardly consistent with the broader purposes of must-carry.

4. *Substantial Duplication.*

Fourth, Section 614(b)(5) states that a cable operator is not required to carry the signal of any local commercial television station that “substantially duplicates” the signal of another local commercial television station which also is carried on the cable system.^{45/} Similarly, a cable operator is not required to carry more than one local commercial television station affiliated with a particular broadcast network.^{46/} In adopting these requirements, Congress intended to “preserve the cable operator’s discretion while ensuring access by the public to diverse local signals.”^{47/} However, since the Commission’s DTV transition rules *require* digital broadcasters to simulcast at least 50% of their programming on their analog channels beginning April 1, 2003,^{48/} the Commission cannot impose a DTV must-carry requirement without giving cable operators the option of dropping local analog television channels, or, alternatively, setting aside the Commission’s rule implementing the statute’s restrictions on carriage of duplicative programming.

^{45/} *Id.*, 47 U.S.C. § 534(b)(5).

^{46/} *Id.*

^{47/} H.R. Rep. 102-628, 102d Cong., 2d Sess., at 92 (1992) (the “House Report”).

^{48/} *NPRM* at ¶ 11.

5. *Channel Positioning.*

Finally, Section 614(b)(6) generally requires cable systems to carry local signals on their off-air channels or on the channels on which they were carried prior to passage of the 1992 Cable Act.^{49/} Generally, it is the broadcaster, not the cable system, who is entitled to select which of the channel positioning alternatives will apply. The purpose of Section 614(b)(6) is to prevent cable operators from relocating local signals from channels on which they have established “brand name” recognition to higher numbered channels where they are less likely to be watched.^{50/}

Yet there are many cases where the Commission has paired analog VHF channels with DTV channels in the upper reaches of the UHF band that carry a high channel number assignment. In effect, this means that under the statute a DTV station would be entitled to insist on being carried on its off-air channel, even though that channel is far removed from the station’s analog channel and cannot be received by subscribers who do not have digital television receivers. For example, a broadcaster whose analog channel is 10 but whose DTV channel is 48 would be entitled to carriage on cable channels 10 and 48, respectively, even where a cable overbuilder is already carrying popular cable programming services on both. Simply put, there is nothing in the 1992 Cable Act which suggests that Congress intended to allow local broadcasters to commandeer *two* channels at the expense of popular cable networks that, as in the illustration above, subscribers are accustomed to viewing on channels 10 and 48. After multiplying this effect by as many as five to eight DTV stations in a market, it becomes clear that

^{49/} 47 U.S.C. § 534(b)(6).

^{50/} See, e.g., House Report at 66.

application of the 1992 Cable Act's channel positioning requirements to DTV stations will add to subscriber confusion rather than eliminate it.

The above is just a sample of the innumerable difficulties the Commission will face in attempting to conform the current statutory must-carry scheme to the digital environment. The Commission is thus left with little choice but to design a separate must-carry regime for DTV that attempts to compensate for shortfalls in the existing rules, a process which will be tantamount to a complete rewrite of the Commission's existing must-carry regulations. BellSouth submits that there is no reason for the Commission to invest its limited resources in such an undertaking where, as in the case of cable overbuilders, market forces render such regulations unnecessary.

B. Technical Issues.

In addition to the substantial constitutional and statutory problems identified above, there are a variety of unavoidable technical obstacles which preclude an orderly, cost-effective implementation of DTV must-carry on BellSouth's cable systems at this time.

1. Set-Top Boxes.

None of BellSouth's set-top converter boxes ("STBs") are capable of receiving, processing or displaying a vestigial sideband ("VSB") modulated signal or a high definition television ("HDTV") level Motion Pictures Expert Group ("MPEG") digital video stream. Instead, as is the case with many cable television systems, BellSouth's STBs are configured for quadrature amplitude modulation ("QAM"), which does not facilitate digital video "pass

through” or output. These boxes generally have a useful life of at least seven years, and thus will remain in service during and after the DTV transition period.

2. *The “Firewire” Solution.*

The Commission has suggested that the STB problem might be remedied by adding the IEEE-1394 standard interface or “firewire” to the STB, which would allow high definition signals to be processed and displayed on a digital television receiver even where the STB lacks the necessary processing capability.^{51/} The Commission further notes that a proposed “firewire” standard has been developed and circulated by CableLabs’ “OpenCable” working group.^{52/} As reflected in the correspondence attached hereto as Exhibit 1, *BellSouth has been deliberately excluded from OpenCable.*^{53/} What this means, in effect, is that OpenCable is seeking industry ratification of a firewire standard on which cable’s competitors have had no input whatsoever. Yet once the OpenCable proposal is ratified by the cable MSOs, BellSouth and other overbuilders will have no choice but to comply with it even if it is not compatible with their existing systems. The basic unfairness of this situation (combined with the cable MSOs’ economic incentive to develop technical standards that are unacceptable to their competitors)

^{51/} *NPRM* at ¶ 28.

^{52/} *Id.* n. 80.

^{53/} To date, BellSouth has received nothing from CableLabs in response to the attached correspondence.

demonstrates that the Commission should not assume that “firewire” is a realistic technical “fix” for cable overbuilders.^{54/}

The Commission also should not assume that “firewire” alone will enable the current generation of cable set-top boxes to process digital television signals. For instance, the current MPEG computer chips in BellSouth’s STBs are capable of reading digital television signals in the 704 X 480 standard definition television (“SDTV”) format; they do not read signals transmitted in the higher quality 1920 X 1080 HDTV format. Hence, to accommodate those broadcasters who choose to broadcast in the 1920 X 1080 HDTV format, BellSouth would be required to scrap its existing set-top boxes and acquire new boxes equipped with both the IEEE 1394 interface and upgraded MPEG chips, at an estimated cost of \$450-\$500 per box. This cost does not include the millions of dollars of “stranded inventory” created by changing out older boxes in the field before the end of their useful life. BellSouth submits that the economic burden of these additional costs is hardly outweighed by the marginal benefit of adding, at most, five to eight digital television signals for the relatively small number of BellSouth subscribers who will own digital receivers during the DTV transition period.

3. *System Retuning.*

BellSouth would be faced with equally serious technical, logistical and administrative problems were it required to accommodate a broadcaster who proposes to alter the source or

^{54/} Even if OpenCable were to become truly “open” and incumbent cable operators and their competitors were able to agree on a “firewire” standard in the near term, BellSouth estimates that STBs with the IEEE-1394 interface would not be available until well after the scheduled DTV launch dates for network affiliates in the top 30 television markets.