resounding yes. Consequently, the Commission cannot advocate the multiplicity of programming sources as a substantial interest under *Turner*, and should therefore look to means other than digital must-carry rules -- such as mutually acceptable market arrangements between cable operators and broadcasters -- to effectuate the transition to DTV.

(3) *The Proposed Rules Will Impede Fair Competition in the Television Programming Market*

Digital must-carry rules are fundamentally anticompetitive and do not evoke the same policy concerns as their analog predecessors. As mentioned previously, Congress adopted analog must-carry rules to quell its fear that cable operators would eliminate broadcasters from their systems, leaving broadcasters with no revenue and, therefore, at a competitive disadvantage. The rules were intended to promote fair competition between cable operators and broadcasters.[38] However, as the Commission itself has acknowledged, "the rules place cable programmers 'on an unequal footing' because they 'take[] cable channels out of the marketplace where nonbroadcast program originators might otherwise have been able to negotiate for their use.'"[39]

Adding digital must-carry requirements to the existing analog must-carry requirements during the transition period will further disadvantage programmers by exacerbating existing market concentration. The proposed rules will double the amount of cable programming provided by

---

38. It is important to note that the purpose of these rules was "not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households." *Turner II*, 137 L.Ed.2d at 408.

39. *Memorandum Opinion and Order*, FCC 84-136, April 6, 1984, Joint Appendix to No. 83-2050 at 3, *cited in Quincy Cable TV, Inc*, 768 F.2d at 1446. The Supreme Court has also recognized the detrimental effect the rules have on competition, in that the rules "render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Turner I* at 2456.

incumbent broadcasters, who already control an inordinate amount of the nation's television programs and distribution, despite multiple ownership rules designed to prevent such ownership concentration.[40] Such a regime will completely violate the Commission's bedrock policy objective of "prevent[ing] the concentration of control of the sources of news and opinion."[41] Digital must-carry rules would only exacerbate the effects of this consolidation.[42]

Digital must-carry rules will also make it significantly harder for cable programmers to compete and survive. As previously noted, channel-locked cable systems will be forced to eliminate certain cable programmers in order to meet their DTV must-carry obligations, which will reduce both diversity and competition. And, because such cable programmers have will have vastly

---

40. Furthermore, many broadcasters, including Fox, CBS, ABC, and Tribune, have asked the Commission to lift the national ownership cap that limits television station ownership to reaching 35% of U.S. television homes. In support of their request, the broadcasters claim that they cannot realize the economies of scale that result from increased national ownership. *Broadcasting and Cable*, July 27, 1998, pp. 14-15. One need only look to the radio industry for evidence that, when ownership rules are lifted, massive consolidation and concentration result. The same result will occur if the broadcasters' request is granted <u>and</u> digital must-carry rules are imposed. In fact, the Commission has begun inviting public comment on the effects of proposed radio deals on competition in the industry. *See* "FCC Flags Radio Deals for Further Analysis," *Broadcasting & Cable*, August 24, 1998, p. 18.

41. *TV 9, Inc. v. FCC*, 495 F.2d 929, 28 RR2d 1115, 1119 n. 12 (1973), *cert. denied*, 419 U.S. 986, 42 L.Ed.2d 194, 95 S. Ct. 245 (1974); *see also id.* at 1127 n. 30 (noting goal of "prevent[ing] any undue concentration of economic power contrary to the public interest.").

42. Chairman Kennard has recently discussed the adverse impacts of consolidation in the television industry, explaining: "Even if consolidation brought more resources to the newsroom, isn't there a cost to journalism when more licenses are concentrated in fewer hands?" He went on to ask, "What if four group owners owned every television station in every market in America? Would this have an effect on the quality of news coverage in America? Of course it would. Your own reports tell me that consolidation causes broadcast owners to cut back on serious reporting and replace it with fluff and syndicated news." *See* "FCC Chairman: Enough Consolidation?" in *Broadcasting & Cable*, September 28, 1998, at 10.

diminished means of reaching viewers, cable programmers dropped from cable systems for any significant period of time will likely see their revenues drop so precipitously that they could be forced to cease operations.[43]

Cable programmers who are dropped will have little or no chance of survival if digital must-carry rules are imposed during the entire transition period.[44] Even if the transition is short, dropping a cable programmer could cause that programmer severe financial difficulties, giving broadcasters an even greater competitive edge.[45] Moreover, cable programmers will have limited

---

43. Moreover, even if there is sufficient capacity to accommodate digital carriage without dropping existing programming, there is still no reason to give broadcasters a leg up by guaranteeing them DTV carriage. Mandatory DTV carriage will give broadcasters a competitive advantage and relegate other programmers to second class citizen status: programmers, not ensured carriage by any regulatory scheme, will have to negotiate and compete for carriage of both existing and new programs. Even if there is ample capacity today for digital broadcasts and other programming to peacefully coexist, as new programs are launched, competition for channels will increase and capacity issues will multiply-- yet broadcasters will be immune from having to compete for these channels and from any future channel capacity issues that might arise, with negative consequences for the diversity of other programming sources.

44. Many people believe the transition to digital will take years and years, well past the 2006 goal. Indeed, Richard Wiley, former FCC Chairman and former Chairman of the Advisory Committee on Advanced Television Service, predicts that the return of analog channels by 2006 is impossible, stating: "You heard it here, it's not going to happen." Congress' desire to wait until 85% of a station's audience has access to the digital signal "is bound to delay the process for some time to come," which in Former Chairman Wiley's opinion is "sound policy." He puts the earliest likely analog return date at 2010. *See Communications Daily*, September 18, 1998, p. 12.

45. "No other programmers have free, over-the-air access to all homes in a community. And no other programmers have guaranteed access to even a single channel on cable systems or other multichannel video programming distribution systems. Requiring carriage of a second, digital broadcast signal...would give broadcasters an additional unwarranted competitive advantage over non-broadcast programmers. And it would further interfere with the ability of cable operators to compete effectively in the video marketplace by offering programming

(continued...)

means of launching new programming due to the lack of cable system capacity if digital carriage becomes mandatory.[46]

If the analog must-carry rules were intended to level the playing field, surely the Commission should not adopt digital must-carry rules that provide an additional form of federal subsidy and skew the marketplace irretrievably toward further broadcast consolidation and control over program distribution channels. Digital must-carry will contravene the letter and the spirit of the pro-competitive Telecommunications Act of 1996 and the Cable Act of 1992. The Commission cannot assert an interest in promoting competition to satisfy the *Turner* test and cannot justify the burden on speech that the proposed DTV must-carry rules will impose.

b. Even If the Commission Is Permitted To Assert An Independent Interest, It Cannot Demonstrate An Important Interest That Will Be Served By The Proposed Rules

As explained above, in order to satisfy the First Amendment, the Commission must assert only the objectives of Section 614, not a new objective. Assuming *arguendo* that Section 614 somehow permits the Commission to assert a new interest to justify DTV must-carry rules, the Commission will likely claim an interest in promoting the transition to digital and in achieving the

---

45. (...continued)
that best meets the needs and demands of television viewers." *Reply Comments of Comcast Cable Communications, Inc.* in *Fourth Further Notice of Proposed Rule Making* in MM Docket 87-268, at 10.

46. The possibility of using satellite systems to distribute existing and new programs might offer a modicum of relief, but it remains to be seen whether this will compensate in any significant way for the lack of capacity for programming on cable systems.

return of analog channels from broadcasters.[47] However, the Commission must do more than state that these are important interests: it must also prove "the substantiality of the interest served by the rules."[48]

The Commission's burden, because significant First Amendment rights are at stake, is to establish that the reported harms are real and demonstrate that its proposed rules in fact directly and materially alleviate these harms.[49] The Commission must not only present "a record that convincingly shows" that a problem exists in the transition to digital,[50] but must also show that its new must-carry rules will remedy such problems.

The Commission cannot carry this burden because of the tremendous uncertainty surrounding digital television. It is impossible to show an actual, defined problem, or to show that the proposed rules will solve even a hypothetical problem. At the Open Meeting at which this NPRM was adopted, Commissioner Powell remarked on the "unknowns and unknowables" that plague this proceeding. No one knows yet exactly how the technology will work, what problems it might

---

47. NPRM, ¶ 1. A financial motive underlies the return of analog channels to the Commission. There is something inherently suspect when the government infringes upon First Amendment rights in order to profit monetarily.

48. *Quincy Cable TV, Inc.*, 768 F.2d at 1457. It is widely accepted that the "mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." *Quincy*, 768 F.2d at 1454; *see also Century Communications Corp. v. FCC*, 835 F.2d 292, 299 (D. C. Cir. 1987), *cert. denied*, 486 U.S. 1032, 100 L.Ed.2d 602, 108 S. Ct. 2014 (1988).

49. *Turner I,* 114 S. Ct. at 2470.

50. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829, 98 S. Ct. 111, 54 L.Ed.2d 89 (1977).

cause,[51] when it will be available to consumers,[52] what consumers will want,[53] or how much they will be willing to spend, if anything, to switch to digital television.[54] Uncertainty about the entire

---

51. There are serious questions as to how the technology will be installed and deployed. For example, residents near the Mt. Sutro, California community tower are questioning whether the existing NTSC tower could withstand an earthquake after the 10-ton digital antenna is installed. "DTV Tower Hits Snag in San Francisco," *Broadcasting & Cable*, August 17, 1998, p. 71. Although the City's Board of Appeals has ruled against the residents, litigation seeking injunctive relief is expected. "Sutro Tower Hearing Favors Broadcasters," *Broadcasting & Cable*, August 24, 1998, p. 72. Even if this challenge ultimately proves unsuccessful, it will still cause excessive delay. Similarly, in New York, at least one broadcaster, WNBC(TV), will be unable to meet its digital deployment deadline because of protracted negotiations for a digital tower site. *See* "New York Tower Picture Still Fuzzy," *Broadcasting & Cable*, August 24, 1998, p. 52. Problems erecting new towers will impede the launch of digital television in Detroit and Chicago as well. *See* "Four Area TV Stations to Offer Digital Broadcasts," *Washington Post*, October 7, 1998, p. C11.

52. *See* "Thompson Delays DTV Sets," *Broadcasting & Cable*, August 10, 1998, p.16 ("Thompson, which has about a quarter of the U.S. color TV market, will not have DTV sets ready for consumer purchase this fall because of delays in the development of integrated circuits ...."); *see also*, *Communications Daily*, August 6, 1998, p.6 ("NBC has asked for 2nd extension to file for construction permits for DTV channels for WMAQ-TV Chicago, WTVJ Miami and WNBC NY, citing difficulties in obtaining tower sites.").

53. Recent surveys indicate that only 59% of adults in the U.S. have even <u>heard</u> of digital TV. *Communications Daily*, August 20, 1998, p. 8 (citing INTECO survey). Confusion reigns among those aware of digital TV: 31% think it means more cable channels, 19% believe it involves the Internet, and 9% equate digital TV with HDTV. *Id.* In light of the befuddled state of the consumers who have even heard of digital TV, the Commission should be slow to assume that consumers want a rapid and costly transition.

54. Early reports indicate that customers will have to pay $6000 - $8000 for HDTV equipment. Customers of Panasonic, for example, will have to buy a $6000 HDTV display and a $1700 DTV set-top decoder in order to receive the full benefits of HDTV. *Broadcasting and Cable*, May 25, 1998, p. 56. The set-top decoder can also be paired with less expensive receivers, but not if the customers wants to receive HDTV "in all its glory." *Id.* Furthermore, customers may need to purchase digital VHS recorders, which should sell for under $1000. *Id.* Sony's 34-inch direct-view HDTV set is expected to retail at $8,999. "Sony Unveils DTV Set Strategy," *Broadcasting & Cable*, September 21, 1998, p. 85. It will not have a Firewire, or IEEE 1394, digital interface to link it to a cable set-top box, but will have an HD component that will allow consumers to receive HDTV pictures from cable - if the cable set-

(continued...)

concept and feasibility of digital television permeates this proceeding. In fact, Commissioner Powell summed up this situation aptly, calling it a "potential train wreck."[55]

The Commission acknowledges this uncertainty throughout the NPRM. In discussing the Deferral Proposal, for example, the Commission observes that "[w]aiting to issue regulations . . . has certain advantages,"[56] such as allowing business models and markets to develop, technology to progress, and prices to decrease, and that imposing regulations now will hinder these developments.[57]

Congress likewise appreciated the uncertainties that abound in the transition to digital television when it codified certain exceptions to the 2006 date for the return of spectrum. *Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997)* ("BBA"). The BBA allows a broadcaster to retain its analog channel beyond December 31, 2006 if it demonstrates that: (1) it is

---

54. (...continued)
top box has an HD component output that can decode and demodulate the signal. *Id.*

55. "Powell Raised Red Flag Over DTV Switch," *Broadcasting & Cable*, September 14, 1998, pp. 14- 15 (also observing that "it will be extraordinarily difficult to achieve the ubiquitous customer acceptance that is necessary for success."). Following up on his comments at the American Women in Radio & TV convention, Commissioner Powell also explained: "I know that prices will come down someday, but even then this won't be a product that people buy lightly . . . . We already know the first products have some problems. Even with the early adopters you only get so many bites at the apple. If they spend $10,000 for a DTV set and it doesn't work, it could set DTV back a couple of years . . . . Just because something is gee whiz doesn't mean consumers will embrace it." *Communications Daily*, September 22, 1998, p. 7.

56. NPRM, ¶ 49.

57. Similarly, the NPRM notes the technological uncertainty surrounding the transition. For example, the Commission questions the lack of standards governing the various elements of a digital system, and the obstacles cable companies and television manufacturers face in making cable-compatible digital sets available. NPRM, ¶¶ 17-18, 25-31.

not broadcasting a digital signal; (2) converter technology is not available; or, (3) consumers do not subscribe to a multichannel video programming distributor that carries digital service and do not have the proper technology to receive the digital transmissions.[58] Since Congress understood that the state of the market and the technology may not be sufficiently defined by 2006 to justify the return of spectrum, it cannot have intended for the Commission to impose a definitive regulatory scheme before those uncertainties are resolved.

Given all these variables, it would be unwise to impose rules presupposing certain facts that may turn out to be completely false. In truth, with so much unknown about the digital roll-out, the Commission cannot know what would happen were it to let the transition occur without additional regulation. Absent any ability to predict or define the problems it is trying to solve, the Commission cannot demonstrate that the proposed rules will alleviate these problems, and must not place a mandate on the cable industry that forces cable operators, along with programmers, to shoulder the burden of this transition.

Moreover, any deference that might generally be afforded the Commission in the administrative context will have "little relevance when first amendment freedoms are <u>even incidentally</u> at stake."[59] Therefore, if the new rules are challenged (as they surely will be if adopted), the Commission's judgments will be entitled to less deference than Congress was afforded. If the Commission asserts an interest other than one of those Congress articulated in Section 614, it will

---

58. NPRM, ¶ 12.

59. *Century*, 835 F.2d at 299 (emphasis added).

be harder for the digital must-carry rules to pass constitutional muster.[60] Because digital must-carry regulations will directly affect First Amendment freedoms, the Commission's judgments will receive little deference if challenged.[61]

As shown above, none of the previously asserted government interests are served in this context. It is unlikely that the Commission could adequately justify any new interest that it asserts, especially due to the heightened/substantial burden *Turner* mandates. Thus, since there is no important government interest at stake here, any digital must-carry rules will fail under this prong of the *Turner* test.

c. Even If a Substantial Government Interest Exists, Digital Must-Carry Rules Are Not Sufficiently Narrowly Tailored To Justify The Burden on Speech

As stated above, the proposed digital must-carry rules do not further a substantial government interest. Should the Commission disagree, it should nonetheless refrain from implementing any such rules because the mere existence of a substantial interest is not enough to satisfy the First Amendment.[62] Instead, regulations that affect speech must "not burden substantially more speech than necessary to further those interests."[63] Moreover, the government must show that the asserted

---

60. *Turner II*, 137 L.Ed.2d at 391. Furthermore, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner I,* 114 S. Ct. at 2471.

61. The *Quincy* and *Century* decisions demonstrate that when the Commission asserts its own interest without the benefit of Congress' judgment and experience, the courts will not hesitate to overrule the Commission's independently asserted interest.

62. *Century Communications Corp.*, 835 F.2d at 295.

63. *Turner II*, 137 L.Ed.2d at 403.

governmental interest will be less effectively served without the regulation.[64] All of the proposed rules requiring cable carriage of digital broadcast signals are too restrictive to satisfy this test.

In undertaking the *Turner* analysis, it is important to recognize that the factual backdrop for this inquiry is entirely different than that which existed when the analog must-carry rules were adopted. As the Commission observes:

> television reception via antennas has been made easier and more convenient than was the case earlier this decade. Legal barriers to over-the-air reception of broadcast signals, caused by restrictions on antenna placement, have been reduced because of the over the air reception device preemption provisions of the Telecommunications Act of 1996. Input selector ("A/B") switches, which allow the subscriber to switch between cable and an antenna, may now be built into television receivers and can be easily controlled from a TV remote control device. Some of the reception problems that made it difficult for certain consumers to receive over-the-air broadcast signals may be eliminated by the conversion to digital. Broadcasting may not be the only source of legal programming as cable operators have developed local news channels[,] and public, educational and governmental access channels, which provide highly localized content, have multiplied in the past six years.[65]

In light of this vastly different set of facts, this situation must be separately analyzed, and rules should not be adopted based on blind adherence to the *Turner II* decision.[66]

In *Turner II*, the Court recognized that cable operators were able to satisfy their analog must-carry obligations with unused channel capacity 87% of the time.[67] For many systems, that cannot happen in the digital context because many cable operators, already required to carry analog broadcast signals, lack any unused system capacity. As the NPRM makes abundantly clear, cable

---

64. *Id.*

65. NPRM ¶ 16 (footnotes omitted).

66. *Century*, 835 F.2d at 299.

67. *Turner II*, 137 L.Ed.2d at 403.

operators with channel-locked systems will have no choice but to drop some programming if digital must-carry obligations are imposed.[68]

Furthermore, the analog must-carry rules were adopted in response to a threat to free over-the-air broadcasting that no longer exists. Broadcasters are guaranteed mandatory carriage by the analog must-carry rules, and there is no threat that those signals will be dropped.[69] Instead, two new threats are implicated here: one aimed at cable programmers, whose programming will be dropped by channel-locked cable operators, and another aimed at consumers, who will soon see their choice of programming sources dwindle if digital must-carry is adopted in any form. These threats, unlike the threat in *Turner II*, militate against imposition of additional must-carry rules for digital transmissions.

(1) *The proposed rules will excessively burden speech*

These factual distinctions demonstrate the very real burden on speech -- the speech of programmers -- that exists here. As described above, the imposition of digital must-carry rules will: (1) force cable operators with channel-locked systems to drop existing programmers; (2) reduce the

---

68. NPRM, ¶ 41; *see also supra* n. 30 (discussing Time Warner's lack of capacity).

69. Broadcasters may argue that their investment in converting to digital will be lost if cable operators do not broadcast their digital transmissions. Assuming, for the purposes of argument only, the merit of that claim, it still does not necessitate must-carry rules. Instead, an easy technical fix, such as an inexpensive A/B switch, can accomplish over the air reception without additional, unduly onerous carriage requirements. *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D. C. Cir. 1987). Some recent tests of over the air reception have been extremely promising, such as Tribune's test in Chicago. *Broadcasting & Cable*, August 3, 1998, p.10. Therefore, instead of mandating carriage, the Commission should encourage antenna and other equipment manufacturers to perfect the equipment for over the air digital reception. A digital must-carry regime will not facilitate over the air reception. Rather, it might well stymie it because there will be little incentive to improve the technology required for adequate over the air reception.

number and diversity of voices available to consumers, thereby depriving them of access to varied programming from a multiplicity of sources; and (3) deny carriage to new programmers that will be unable to find cable operators to disseminate their programming. Cable operators will also suffer, making the proposed must-carry rules far more restrictive than is appropriate under intermediate scrutiny.[70]

These burdens on speech are highly significant, as illustrated by the Commission's own findings. For example, according to the immediate carriage proposal set forth in Paragraph 41 of the NPRM:

> [S]ignificant cable 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. This option may also result in cable rate increases . . . for digital broadcast services that the majority of subscribers will be unable to view, at least initially, because they did not make the significant investment in digital television sets necessary to receive such signals.

Consequently, as the Commission recognizes, some cable programmers will suffer by being dropped from carriage in order to promote duplicate carriage of broadcast stations. Worse yet, as the Commission acknowledges in Paragraph 41, the viewing audience will take a "double hit" by losing a significant portion of the cable programs they are accustomed to viewing, and paying more for fewer cable services and duplicate broadcast services!

The phase-in plan will impose a similar burden, but with a slight twist: the impact will be felt over time instead of all at once. Yet this option will still silence cable programmers, some

---

70. *See, e.g., Turner II*, 137 L.Ed.2d at 428 (O'Connor, J., dissenting) (analyzing restrictiveness of rules and noting that analog must-carry rules burdened both cable operators and programmers, while less restrictive alternatives would not burden programmers). The Commission should likewise look to less restrictive alternatives.

immediately as their programs are eliminated, and others over time. The loss to consumers, while more gradual, will be equally significant. Thus, digital must-carry rules in any form will excessively burden speech, in violation of the First Amendment.[71]

(2) *The transition to digital will not occur less effectively absent digital must-carry rules*

Instead of attempting to solve a hypothetical problem that is ill-defined and likely will never materialize, the Commission should allow broadcasters and cable operators to arrive at a mutually acceptable marketplace solution to the transmission of digital signals. There is simply no evidence demonstrating that the transition to digital television will occur less effectively without digital must-carry rules, as required to satisfy the standards set forth in *Turner II.*

In fact, the evidence currently available suggests that the transition to digital will occur with or without digital must-carry rules. The greatest driving force in the transition to digital will be the consumer, who will determine what is carried. If consumers of cable television want digital transmissions early in the transition, cable operators will have a strong incentive to provide them,

---

71. Furthermore, such rules are unduly vague because their duration is uncertain. In all probability, if digital must-carry rules are imposed, they will likely take effect by early to mid 1999, and could continue until at least 2006, when analog spectrum is supposed to be returned to the Commission. However, numerous licensees will likely retain and use their analog channel well after December 31, 2006, pursuant to exceptions created in the BBA that allow a licensee to extend the spectrum return date beyond December 31, 2006. (NPRM, ¶12). By virtue of the open-ended BBA exceptions, which state no maximum duration, cable operators could be forced to carry both analog and digital signals for many years to come. As a result, the burdens on speech could continue well past 2006. Technological obstacles and concerns about the safety of installing additional transmission towers may likewise cause delays as disputes are resolved. *See supra* n. 51; *see also,* remarks of former FCC Chairman and former Chairman of the Advisory Committee on Advanced Television Service Wiley, *supra* n. 44. This uncertain duration renders the proposed rules additionally suspect. *See Century*, 835 F.2d at 304 (holding that proposed five-year interim period was excessive for "rapidly evolving" industry).

and consumers will settle for no less. If, however, consumers opt to wait for the technology to develop and the prices to fall, then cable operators may wait to provide digital transmission as well. Ultimately, if digital truly is the technology of the future, consumers will buy it, and cable operators will likely carry commercial television in digital format in response to consumer demand. Aside from consumer demand, as the Commission notes in the NPRM, it is negotiation and agreement between the participants in the market, rather than the presence or absence of must-carry rules, that influences the behavior of players in the television industry.[72] The history of the must-carry rules demonstrates that carriage could occur through voluntary contractual arrangements, making digital must-carry rules unnecessary.

Finally, regulation is not appropriate in this instance.[73] Regulation should be imposed when a market fails,[74] not when, as here, there is simply no evidence how the market will act. As the

---

72. *See* NPRM ¶ 19. Furthermore, during the 1993-1996 election cycle, for example, approximately 80% of the broadcasts affected by the analog must-carry rules were broadcast via retransmission consent agreements. (NPRM ¶ 33). Thus, must-carry rules were invoked for a mere 20% of broadcasters, and it is the profit motive--including the money to be made from retransmission consent agreements--that will be the most significant determinant of DTV carriage.

73. Chairman Kennard has acknowledged that the Commission has only a limited role in this transition. In a speech to the International Radio and Television Society in New York on September 15, 1998, he observed that "the pace of the transition will be set by the private sector." In addition, he emphasized reliance on the marketplace, cautioning broadcasters that "trusting in the marketplace means giving businesses the opportunity to fail too."

74. *See* Erwin G. Krasnow and Jack N. Goodman, "The 'Public Interest' Standard: The Search for the Holy Grail," *Federal Communications Law Journal*, Vol. 50, No. 3 (May 1998), at 616 ("regulation is viewed as necessary only when the marketplace clearly fails to protect the public interest, but <u>not</u> when there is only a potential for failure") (emphasis added); *see also*, Remarks of Chairman William E. Kennard before the International Radio and Television Society, September 15, 1998 (observing that the market should guide the

(continued...)

Commission makes abundantly clear in the NPRM, the most salient characteristic of the transition to digital is the rampant uncertainty that surrounds it. Consequently, the Commission cannot know whether regulation is necessarily or likely to be effective during the transition, and therefore cannot carry its burden of articulating a substantial interest that will be served by the proposed rules, as required under *Turner*.

The Commission can achieve the result it desires without the enormous burden on speech, a burden far greater than was at issue in *Turner II*, and it should therefore decline to impose any additional must-carry obligations for digital transmissions.

III. CONCLUSION

This rule making proceeding is not a stroll down media policy lane. It involves a proposal by the Commission that exceeds the scope of the authority Congress delegated to it, and would significantly alter the current competitive programming market landscape. Also striking is the Commission's wholesale adoption of digital television and its advocacy of rules promoting it. The Commission's role is not to force technology upon consumers and industry, but rather to regulate technologies, if necessary, as they develop. That the Commission would embrace digital television so wholeheartedly, at the expense of all other technologies and participants in the television industry, is highly unusual.[75]

---

74. (...continued)
transition to digital, and faulting members of the broadcasting industry for seeking a regulatory advantage and seeking to "goad the government by playing the blame game. They'll say that without government intervention the public will be deprived of DTV. It's government's job to see when arguments are distorted by the prism of self-interest.").

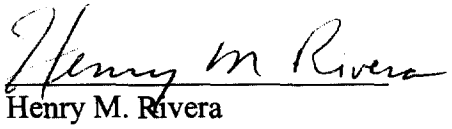
75. Fifth Amendment constitutional issues are also implicated by this rule making. The fact the (continued...)

For the foregoing reasons, the Commission should reject the six digital must-carry proposals and allow industry members to define the parameters of the transition to digital television through negotiations and agreement. The Commission must not exceed the scope of its authority and the Constitution in order to impose a regime that so fundamentally harms diversity and competition, two bedrock principles of Commission policy. If the Commission adopts digital must-carry rules in any form, it will invite constitutional and statutory challenges that will inevitably impede the transition to digital television.

Dated: October 13, 1998

Respectfully submitted,

BET HOLDINGS II, INC.

by: 

Henry M. Rivera
Thomas A. Hart, Jr.
Amy E. Weissman
Kathrine L. Calderazzi
SHOOK, HARDY & BACON L.L.P.
1850 K Street N.W., Suite 900
Washington, D.C. 20006
(202) 783-8400
Its Counsel

---

75. (...continued)
Commission is proposing rules that will drive one segment of the cable industry, niche programmers, out of business while giving a windfall to large broadcasters and their affiliated programmers, "implicates fundamental principles of fairness underlying the Takings Clause" of the Fifth Amendment to the Constitution. *Eastern Enterprises v. Appel*, 1998 U.S. Lexis 4213, *69 (1998) (plurality).