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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

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In the Matter of

Carriage of the Transmission
of Digital Television Broadcast Stations

Amendments to Part 76
of the Commission's Rules

CS Docket No. 98-120

COMMENTS OF HOME & GARDEN TELEVISION AND TELEVISION FOOD NETWORK

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SUMMARY

Commenters, Home & Garden Television ("HGTV") and Television Food Network ("Food"), are developing niche program networks that, after years of struggling to overcome the unexpected hurdle of limited channel capacity on the nation's cable television systems, are finally beginning to realize the possibility of surviving in a highly competitive video marketplace. And yet, just when Commenters thought their distribution goals were attainable, the Commission has proposed a digital must-carry requirement that would prevent many cable systems from adding, and force many others to actually drop, Commenters' networks, thereby thwarting their ability to gain the distribution necessary to recover accumulated losses and achieve and maintain long-term financial viability.

A digital must-carry requirement would further penalize developing cable networks, such as Commenters, that have made substantial investments in, and have aggressively promoted and marketed, their original and innovative programming based on the promise of abundant channel capacity on the nation's cable systems. Since Commenters were launched, not only have cable operators been unable to expand channel capacity as previously predicted, but regulators at both the federal and local levels have placed increasing demands on cable operators' already scarce channel resources. Consequently, Commenters, and other programmers like them, have had to offer significant incentives to cable operators in return for carriage—incentives that, to be effective, required substantial risk and investment, and were not provided for in the networks' original business plans. Commenters have had to offer a combination of free carriage and marketing support, and HGTV has been forced to trade its parent company's retransmission consent rights in exchange for carriage. As a result of these

efforts, Commenters have achieved significant popularity among viewers, cable operators and other program distributors.

Now, after Commenters have done everything within their power and used all means necessary to position the networks for commercial viability, the Commission's proposed digital must-carry rules threaten to create a significant hurdle that even Commenters would find difficult to overcome. Indeed, a digital must-carry requirement would effectively require that cable operators dedicate their little remaining extant cable channel capacity to the redundant digital signals of broadcast television stations, would elevate broadcasters to an even more privileged carriage status than they presently enjoy, and would relegate cable networks such as Commenters to second-class status.

Even The E.W. Scripps Company, a *broadcaster* with nine major network-affiliated television stations and the parent company of HGTV and the general partner of Food, opposes the proposed digital must-carry rules. Notwithstanding that Scripps' numerous broadcast television stations could benefit substantially from the carriage subsidy that would be created by a digital must-carry requirement, it is firmly opposed to digital must-carry because (1) of the severe adverse impact that such a requirement would have on cable networks such as Commenters and (2) the lack of an adequate record to justify such a rule, especially in today's marketplace where cable television operators no longer stand as a bottleneck to the distribution of free over-the-air television. While Scripps' television stations are aggressively committed to digital over-the-air broadcast technology, cable carriage ought not to be mandated, but rather left to the marketplace.

Commenters' success thus far is attributable to the significant investments they have made in the production and acquisition of quality programming, and their aggressive promotion and marketing of their networks to consumers. However, a failure to further increase their distribution levels—as would be caused by a digital must-carry requirement—would undercut Commenters' ability to generate the revenues necessary to pay down accumulated debt and achieve long-term financial viability, and could seriously threaten Commenters' future prospects. The adverse effect of a digital must-carry requirement would be even more acute for planned cable networks. Indeed, the further reduction of already scarce channel capacity under a digital must-carry regime could force the cancellation of the planned launches of such networks by Commenters and others.

While the adverse consequences that a digital must-carry requirement would have on cable networks such as Commenters are clear, the need for such a requirement is anything but clear, and the record to be developed in this proceeding will not be adequate to bring the matter into focus. Consequently, given the largely conjectural record and the absence of a substantial government interest similar to that offered in support of the analog must-carry statute, it is likely that a digital must-carry requirement would be constitutionally infirm and would not survive judicial review.

It would thus be unfair, unwise, unlawful—and most significantly, not in the public interest—for the Commission to adopt a digital must-carry requirement that could conceivably result in the demise of developing cable networks, such as Commenters. The Commission should, therefore, decline to adopt such regulations.

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

COMMENTS OF HOME & GARDEN TELEVISION AND TELEVISION FOOD NETWORK

Home & Garden Television ("HGTV") and Television Food Network ("Food") (collectively "Commenters") submit these comments in response to the Commission's Notice of Proposed Rule Making ("NPRM") released July 10, 1998, in the captioned proceeding.

I. INTRODUCTION

Commenters, two niche cable programming networks, and The E.W. Scripps Company ("Scripps"), one of the nation's preeminent broadcasters and the parent of HGTV and general partner of Food, are positioned to offer a unique perspective on the effects of digital must-carry. Both Commenters *and their parent* strongly oppose a digital must-carry requirement.

Since launching Food in 1993 and HGTV in 1994, Commenters have done everything within their power to overcome the hurdles facing the introduction of new cable networks. For example, Commenters have invested heavily in the production and acquisition of original and first-run programming, and have aggressively marketed the networks using a combination of marketing support and free service to distinguish themselves in the battle for extant cable channel capacity. HGTV has given up its parent company's retransmission consent fees in exchange for carriage. Now, just when Commenters are beginning to approach distribution levels critical to attaining long-term financial viability, the Commission is considering rules that could possibly destroy much of Commenters' progress to date.

Commenters' concerns are in no way outweighed by the supposed benefits that a digital must-carry requirement would have for its parent, Scripps, the licensee of nine television broadcast stations. While Scripps supported Congress' analog must-carry requirement, fundamental changes in the video programming marketplace, brought about in large part by passage of the Telecommunications Act of 1996 ("1996 Act"), now force Scripps to oppose a digital must-carry requirement. Cable operators no longer stand as a bottleneck to the provision of "free television." Off-air reception equipment has improved dramatically and other multichannel video programming providers ("MVPDs") stand ready to provide commercially-desirable broadcast networks to the viewing public. A digital must-carry requirement would be nothing short of a subsidy favoring broadcasters over cable network competitors.

Perhaps most troubling is the fact that these digital signals will displace developing, niche cable networks that offer quality programming desired by the viewing public. As described below, Commenters offer focused, in-depth coverage of home design and repair, gardening, cooking, crafts and entertainment—coverage that is not, and cannot, be duplicated by general entertainment broadcast networks, and that is desired by consumers.

A. Home & Garden Television

Home & Garden Television provides quality programming focusing on homebuilding, home improvement, decorating, gardening and crafts. HGTV was launched in December 1994, and currently has 45.1 million subscribers. In the last full calendar year, HGTV was the fastest growing cable network in terms of subscriber growth, and was ranked as the channel most cable operators would like to have added to their systems.[1] The network has developed a wide-range of quality programming that appeals to both domestic and international viewers.[2] HGTV is carried in 209 of the 212 television markets in the United States, and in Canada, and its programs are distributed in the Europe, Australia and Japan.

HGTV is committed to providing original and innovative programming to the home viewer. For example, HGTV added 800 new hours of new programming as part of its 1998-99 season package. As a whole, HGTV's programming currently consists of 90% first-run programming overall and 100% in primetime.[3] Highlights among HGTV's original programming and first-run specials include: "Grow It! A Gardener's Guide" (a series covering a broad variety of gardening topics); "Decorating Cents" (a weekly series providing decorating tips for the homeowner on a limited budget); "Country at Home" (a series exploring the many facets of American country design); and "A Room of Her Own" (a one-

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1 *Home & Garden TV Pushes Past 30 Million Subscriber Mark*, PR NEWSWIRE, Aug. 19, 1997 (HGTV is ranked as #1 by cable operators as the network they would most likely add in 1997 to satisfy consumer demand; HGTV's wide range of quality programming appeals to broad demographic, domestically and internationally.).

2 *Id.*

3 *Home & Garden Television Adds 800 Hours of New Programming As Part of the 1998-99 Season*, PR NEWSWIRE, June 8, 1998.

hour special looking at the homes and spaces of prominent women from around the country). The quality, depth and diversity of HGTV's programming has been widely recognized. For example, the National Association of Minorities In Communications ("NAMIC") recently awarded first place to another HGTV original program, "African Designs/African Homes," in the "Best News/Informational" category of NAMIC's annual program awards.

To complement its popular cable programming network, during the past two years HGTV also has developed a radio network and created an internet web-site.[4] The Home & Garden Radio Network is a national radio network launched in the spring of 1998, and currently airs programming on the weekends, with plans to expand its schedule to include weekday programs. HGTV has made substantial investments in its web-site, which offers home viewers an opportunity to access a comprehensive HGTV database providing information on products and services, how-to instructions, as well as background detail on room furnishings, decorating or anything else on HGTV programs that might attract a viewer's interest. As evidence of its popularity, HGTV's web-site logged 113 million hits and 11 million page views in the first 5 months of 1998.[5] HGTV also has begun using the internet site to develop and provide interactive programming.

B. Television Food Network

Television Food Network launched in November 1993, and currently has 34.5 million subscribers in the top 50 markets in the United States. Food is uniquely qualified to deliver the finest food-inspired programming because of the significant resources the network has

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[4] *Home & Garden Radio Network to Launch in April*, PR NEWSWIRE, April 13, 1998; Lee Hall, *HGTV Grows By Talking to its Viewers*, ELECTRONIC MEDIA, July 13, 1998, at 29.

[5] Lee Hall, *HGTV Grows By Talking To Its Viewers*, ELECTRONIC MEDIA, July 13, 1998, at 29.

devoted to talented chefs, recipe coordinators, shoppers and marketing experts. Indeed, last year, Food was the second fastest growing cable network behind HGTV, and had an increase of over 110% in primetime ratings from the previous year. As a result, MVPD interest in carrying Food is high—non-affiliated cable operators' interest in carrying Food has grown over 70% since 1996, and last year Food ranked third among cable networks most likely to be added by cable operators.

Food delivers innovative food-related programming 24-hours a day, seven days a week, including a substantial amount of original series and first-run specials.[6] The network plans to air 1,600 one-half hours of original programming and 1,200 new episodes of original shows this year. In fact, 100% of the network's primetime programming will be original. Examples of Food's programming include "Essence of Emeril" (a popular instructional cooking program with entertainment appeal); "Two Fat Ladies" (a popular series that follows the cooking escapades of two portly British women in search of exotic recipes while travelling via motorcycle across Europe); and "East Meets West" (a new daily series showcasing Asian-fusion cuisine and starring Boston chef Ming Tsai). The quality of Food's programming, like that of HGTV's, has been widely recognized, including recent nominations for coveted CableACE awards.[7] Food also conducts a multi-city, cross-country "Cooking Across America" tour, to introduce its programming personalities, sponsors and new

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[6] Jim McConville, *TV Food Network Kicks it up a Notch*, ELECTRONIC MEDIA, April 21, 1997, at 3 ("[Food] programming is about 95% original and 100% original in primetime" and the network "will produce roughly 2,000 original show hours this year" fulfilling the promise of cable television.); Linda Moss, *Food Net to Fatten Up Primetime Lineup*, MULTICHANNEL NEWS, April 20, 1998, at 20 (noting Food's "unprecedented commitment" to original programming).

[7] *See, e.g.*, Linda Moss, *Niche Nets Getting CableACE Due*, MULTICHANNEL NEWS, Nov. 10, 1997, at 32.

programs. In addition to its cable network, Food has launched a series of regional internet web-sites to complement its cable programming and to provide viewers an opportunity to interact with the network.[8]

* * *

Commenters offer precisely the diverse, quality programming that Congress and the Commission have long sought to foster. Indeed, a central purpose of Congress in enacting 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) (emphasis added). The Commission too has recognized the value of cable television in offering diverse programming to consumers.[9] Since the enactment of the 1992 Cable Act, however, diverse, niche networks, such as Commenters, repeatedly have been set back by regulatory burdens on cable operators' channels, making it difficult for these new cable networks to develop to their full potential. As the Commission itself has recognized,[10] its recent proposals for digital must-carry rules threaten to further reduce extant channel capacity on cable systems, rendering it close to impossible for developing, niche networks to prosper. Indeed, a digital must-carry requirement could destroy the achievements of Commenters and other niche cable networks that deliver innovative, high-quality programming to consumers.

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[8] *Cable's Food Network to Launch Regional Web Sites*, MEDIA DAILY, Sept. 30, 1997.

[9] Amendment of Part 76, Subparts A and D of the Commission's Rules and Regulations, 36 RR 2d 781 ¶ 21 (1976) (the Commission stated that it "has long recognized that cable television's multi-channel capacity makes it singularly suited to provide an abundance of diverse programming not otherwise obtainable . . . . [T]he promotion of programming diversity is one of the fundamental goals of a national communications structure that cable development should further.").

[10] "[I]n the cable context, the addition of new digital broadcast television transmissions will likely result in the deletion or absence of carriage of other services." NPRM ¶ 48.

II. COMMENTERS' PARENT COMPANY, THE E.W. SCRIPPS COMPANY, IS A BROADCASTER YET OPPOSES A DIGITAL MUST-CARRY REQUIREMENT.

The E.W. Scripps Company is a leader in innovative information and communications services, principally through the broadcast and print media. In addition to owning HGTV and a majority interest in Food, Scripps operates nine network-affiliated television broadcast stations. Scripps' broadcast ownership interests naturally spurred its interest in the analog must-carry proceeding. However, while Scripps was firmly in favor of the analog must-carry requirement and theoretically would benefit from digital must-carry, it cannot support, and in fact is adamantly opposed to, a digital must-carry requirement in light of the present competitive and regulatory landscape.

First, a digital must-carry requirement would greatly threaten the commercial viability and very existence of hundreds of developing niche cable networks, such as Commenters—the very networks Congress and the Commission have encouraged, indeed promoted, since passage of the 1992 Cable Act.[11] Over one hundred new networks have emerged since 1990, in reliance upon the then-favorable regulatory and competitive landscape, and perceived consumer demand.[12] A digital must-carry requirement, which would more than double

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[11] Congress sought to better serve "the public interest . . . by increasing competition and *diversity* in the multichannel video programming market and the continuing development of communications technology." 47 U.S.C. §548(c)(1) (emphasis added); *see also* 548(c)(4)(D). In 1996, the Commission sought to promote program diversity through adoption of rules governing Open Video Systems. *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems)*, 4 CR 380, 1996 FCC LEXIS 4309 ¶ 224 (Aug. 8, 1996) (citing Conference Report at 172, 177-78). The Commission has recognized that the 1992 Act's program access-exclusivity restrictions were intended to "promote diversity by providing incentives for cable operators to promote and carry a new and untested programming service." *Cablevision Industries Corp. and Sci-Fi Channel*, 1 CR 673 ¶¶ 27-29 (rel. Sept. 7, 1995).

[12] *Compare Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report*, 5 FCC Rcd 4962, 5109-10 and Appendix G (1990)

broadcast carriage demands on the nation's largely channel-locked cable systems and inevitably displace numerous cable networks, would unfairly penalize those networks for heeding the call of regulators and consumers while providing an unnecessary carriage subsidy for broadcasters.

Second, such a regime would make it nearly impossible to launch new cable networks that would be capable of commercial success, thereby eliminating a potential class of programmers that could otherwise fulfill consumer demands. Indeed, new cable networks would be displaced by redundant digital signals of broadcast networks. Such a result runs contrary to the very heart of the 1996 Act—permitting the marketplace and consumer demand to dictate the success of communications services.

Finally, Scripps believes that, unlike the record established in the analog must-carry proceeding, there is no evidence of a public interest or market necessity sufficient to warrant the enactment of a digital must-carry rule. Cable operators no longer stand as the bottleneck to distribution of "free television." Moreover, the Commission's proffered justification for imposition of such a requirement—a smooth transition to digital transmission—does not rise to the level of importance necessary to overcome First Amendment concerns. No one will benefit from protracted litigation over the legality of a digital must-carry requirement that inevitably will fall on judicial review. Accordingly, notwithstanding its very substantial broadcast television assets and the benefit that they might theoretically derive from the proposed digital must-carry rules, The E.W. Scripps Company opposes such a requirement.

(reporting 70 national cable networks) *with Fourth Annual Report*, Annual Assessment of the Status of Competition in Markets for Delivery of Video Programming, CS Docket No. 97-141, 11 CR 147 ¶ 158 (rel. Jan. 13, 1998) (reporting 172 national satellite-delivered cable programming services at end of 1997).

III. COMMENTERS, AS DEVELOPING NICHE CABLE NETWORKS, ARE NOT IMMUNE FROM THE DANGERS OF LIMITED CHANNEL CAPACITY AND DECREASED CARRIAGE.

Commenters' current subscriber distribution levels, while a promising start for developing, niche networks, are by no means grounds for complacency and do not lessen their need for continued growth, as witnessed by the fact that even more widely distributed networks have had to begin offering significant launch incentives to gain additional distribution.[13] Commenters' success to date was achieved at the expense of significant investment in the acquisition and production of original programming as well as aggressive and costly marketing strategies.[14] Commenters must continue to generate sufficient advertising and subscriber revenues to recover this investment by not merely maintaining, but increasing, distribution to levels needed to achieve and maintain long-term commercial viability. Without increased distribution on cable systems, Commenters will not succeed.[15]

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[13] The fact that cable networks with 10 to 20 million more subscribers than Commenters recently have been forced to offer substantial launch incentives in order to secure carriage confirms that Commenters' current subscriber base does not guarantee financial security for the networks. For example, the Sci-Fi Channel, with over 50 million subscribers, recently began offering up-front launch fees in the neighborhood of $2 to $3 per subscriber and, in some cases, free service for carriage. Linda Moss, *Sci-Fi Tries Incentives To Fuel Growth*, MULTICHANNEL NEWS, Oct. 5, 1998, at 10. If larger, 50-million plus subscriber cable networks are having problems with the current limited channel space landscape, imagine the troubles that such networks will have under a more competitive digital must-carry regime.

[14] Launching a new network generally involves $100 to $125 million in start-up costs, or more. *See* Ted Hearn, *Viacom to FCC: Go Slow on Access*, MULTICHANNEL NEWS, Sept. 7, 1998, at 50 (quoting Viacom's August 1998 comments responding to Commission's Fifth Annual Competition Inquiry).

[15] Cable networks "frequently must pay for carriage, and struggle to become an accepted venue for national advertising. These economic circumstances create significant accumulated debt and deferred earnings which must be recovered from revenues if the network is to remain viable." *Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, FCC 98-236, Order on Reconsideration ¶ 54 (rel. Oct. 2, 1998).

A. Commenters Have Invested Substantially In The Production, Acquisition And Promotion Of High Quality Programming.

Commenters have done everything within their power to successfully steer the networks to commercial viability. Commenters have made tremendous initial investments in the production and acquisition of high quality programming in order to create programming packages that are desired by the viewing public, and therefore are attractive to MVPDs. Moreover, both HGTV and Food are far from recovering their investments in research, facility construction, marketing and promotion, employment, and signal transmission. Commenters' investment was critical to their ability to gain carriage in a market where already scarce extant channel capacity was growing even smaller due to regulatory demands.

Commenters also have developed aggressive and costly marketing strategies to distinguish their services from those of other networks vying for carriage in the highly competitive marketplace for video programming. For example, HGTV has provided marketing support to cable operators to gain carriage during the early course of its development,[16] and is using advertising revenue rebates as an incentive to lure affiliates.[17] Similarly, Food's initial business plan for market entry provided that, in many cases, the network would offer free service and not charge affiliate fees for the first ten years of operation, as an enticement to cable operators for carriage. Food has even gone so far as to

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[16] Newer niche networks such as FoxNews Channel and Animal Planet offered launch fees for carriage to jump-start distribution, and programmers such as the Game Show Network, The Box and others are continuing to offer launch fees. Linda Moss, *The Box Ponies Up Launch Fees*, MULTICHANNEL NEWS, Aug. 24, 1998, at 6. *See also E!'s Style Debuts In 5M Homes*, MULTICHANNEL NEWS, Oct. 5, 1998, at 8 (E! Entertainment Television's Style channel is paying launch fees of $5 to $7 per subscriber).

[17] Linda Moss, *HGTV Debuts With More Than 50 Sponsors*, MULTICHANNEL NEWS, Jan. 2, 1995, at 11.

purchase the must-carry rights of a broadcast station to secure carriage on a system.[18] In addition, when it launched, HGTV had, in several cases, relied on the retransmission consent rights of its parent company, Scripps, to gain access to scarce channel space on cable systems. In their continuing efforts to maintain and increase distribution, the networks have made considerable annual investments in marketing and promotion.

Commenters could not have achieved the current distribution levels without their enormous investment in original programming and aggressive marketing strategies, including marketing support and free service, and, in the case of HGTV, giving up its parent company's retransmission consent fees in exchange for carriage. Commenters developed a business plan predicated on a *growing* channel world—a world promised by cable operators as well as regulators. Commenters never would have invested so heavily in programming and promotion if they had foreseen a future where cable channel capacity was actually decreasing, as opposed to increasing.

B. Commenters Must Generate Sufficient Revenues To Recover Accumulated Investment And Achieve And Maintain Long-Term Commercial Viability.

Advertising revenues and affiliation fees comprise cable networks' dual revenue streams and are critical to Commenters' ability not only to recoup accumulated losses, but to

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[18] In 1995, Food paid \$4.3 million to New Jersey Network, a public broadcaster, for the station's must-carry rights to Time Warner's cable systems serving about 1 million New York City subscribers. Although Food initially had used its parent company's retransmission rights for WPIX to gain carriage on the Time Warner system, Time Warner had only enough channel space for a shared channel with New Jersey Network. Ted Hearn, *TV Food Net Buys Must-Carry Rights*, MULTICHANNEL NEWS, Oct. 2, 1995, at 4.

acquire, produce and promote quality programming in the future.[19] Because these revenue sources are dependent upon subscriber distribution, Commenters' financial success, and ultimately their survival, is tied directly to gaining carriage on cable systems.[20]

Commenters' business plans were formulated based on a growing, indeed abundant, supply of channel capacity on the nation's cable systems. Food's business plan, which includes a free service commitment through 2003 for many cable systems, requires continued *growth* in distribution, not simply sustaining current distribution levels. Without increased growth, Food will never be able to recover accumulated debt and become commercially viable. Similarly, although HGTV expects to announce its first cash-flow positive year at the end of 1998, the network is still working to fully recover its significant accumulated investment. These long-term goals presume growing distribution for HGTV.

It is undisputed that extant channel capacity is *already* scarce. As the Commission stated in its NPRM, approximately two-thirds of cable systems currently are channel-locked.[21]

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[19] The financial strain of launching a cable network can be overwhelming, as recognized by even the largest broadcast networks. For example, CBS recently announced that it was selling half of its interest in its Eye on People cable network, which serves 11 million subscribers, to Discovery Communications. Mike Reynolds, *CBS Stumbles in Cable Distribution Game*, CABLE WORLD, Aug. 3, 1998, at 8. In announcing the joint venture, CBS stated that it could not justify the ongoing financial strain of supporting a start-up cable network. *Id.*

[20] Unlike broadcasters, satellite programming networks cannot reach subscribers on their own; they must rely on the distribution resources of MVPDs. Even if a network were to obtain carriage on all of the non-cable MVPDs, it would only reach approximately 9.5 million subscribers. *See Fourth Annual Report*, Annual Assessment of the Status of Competition in Markets for Delivery of Video Programming, CS Docket No. 97-141 (rel. Jan. 13, 1998) at Appendix E, Table E-1. Thus, carriage by cable operators is essential to Commenters' survival.

[21] NPRM ¶ 45. *See also* NPRM ¶¶ 58-61; Stewart Yerton, *Channels Slugging It Out For Viewers At N.O. Show*, THE TIMES-PICAYUNE, March 18, 1997, at C-1 ("If we go to add something . . . we've got to drop something," said Steve Sawyer, spokesman for Cox Communications.); Jim McConville, *Goodies Not Good Enough For Some*, ELECTRONIC MEDIA, March 17, 1997, at 56 ("Cable operators have 7 to 8 channels put in front of them as they're looking to fill 2 or 3 slots.");

The promise of a digital age, with abundant excess channel capacity, has not materialized. Indeed, channel expansion is occurring much more slowly than initially expected.[22] And even where technologies, such as digital compression, have been implemented in an effort to alleviate channel capacity problems, the costly terms and limited audience attainable under such arrangments have undercut the potential remedial effect of those efforts.[23] In addition, federal and local regulatory requirements have further depleted the amount of channel space available to cable networks, frustrating Commenters' well-laid business plans and requiring them to take drastic measures to gain carriage. For example, federal analog must-carry rules required cable operators to devote up to one-third of their channel capacity to television

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Paul Farhi, *Pulling the Plug on Capitol Hill*, THE WASHINGTON POST, Feb. 13, 1997, at C-1 ("cable systems at full capacity"); COMMUNICATIONS DAILY, April 2, 1996, at 6 ("Main road block to [launch of C-SPAN3] is lack of channel capacity on most cable systems . . . .").

[22] Scott Hettrick, *Discovery's New Look Waiting For New Year*, HOLLYWOOD REPORTER, Nov. 29, 1995, at 4 ("Discovery had planned to launch four networks in the second quarter of this year but put those plans on hold when it became apparent that cable system channel capacity was not expanding as quickly as anticipated (HR 5/10). The programmer said it would delay the launch until 1996."); Lee Hall, *TCI Raises Clamor Over Decision To Drop Channels*, ELECTRONIC MEDIA, August 26, 1996, at 3 ("The brouhaha once again points out the problems the industry faces in its ability to accommodate the flood of programmers who want access to national distribution via cable. Cable networks that once counted on the industry's assurance that systems would soon digitize—bringing greatly expanded channel capacity—are learning that the future still isn't here. 'The technology is there, we could deliver it tomorrow, but the economic justification is not there yet for many of our customers,' said Tim Wilk, director of strategic planning for Scientific Atlanta, a major supplier to the cable industry.").

[23] *See, e.g.*, Linda Moss and Leslie Ellis, *HITS Tinkers With Fees And Lineup*, MULTICHANNEL NEWS, May 25, 1998, at 1 (illustrating the limited space for cable network carriage on Headend in the Sky transponders); Linda Moss, *Ops Must Cut Program Deals for HITS*, MULTICHANNEL NEWS, Sept. 29, 1997, at 30 (noting cable networks hesitancy with digital carriage mechanisms, such as Headend in the Sky, due to the limited audience reached by digital tiers and the inability to collect critical local ad sales).

broadcasters.[24] Commercial leased access obligations were amended to ensure that cable operators meet their statutory set-aside obligations.[25] In addition, the Commission's rate regulations initially produced a disincentive to cable operators to add new programming and the Commission's solution to that problem, the creation of unregulated new product tiers, has not been the panacea once predicted.[26] At the local level, increased PEG requirements have consumed a substantial number of cable system channels.[27] Finally, the dramatic rise in the number of new cable networks in the past decade has further intensified the competition for scarce extant cable channel capacity.[28]

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[24] *See* 47 U.S.C. §§ 534, 531; *see* also Marla Matzer, *TV Land Grabber*, L.A. TIMES, May 24, 1997, at D-1 (must-carry is extra burden on "channel-locked" cable operators); Diane Mermigas, *Channel Capacity Issue Looms Larger For Cable Operators*, ELECTRONIC MEDIA, April 7, 1997, at 49 ("We might have been able to launch several new services without must-carry," said John Alchin, senior vice president of Comcast Cable.).

[25] 47 U.S.C. § 532. The Commission's leased access order, which reduced rates that cable operators may charge for leased access channels, will increasingly result in additional channels becoming unavailable to new programming networks. *See Second Report and Order and Second Order on Reconsideration of the First Report and Order*, CS Docket No. 96-60 (rel. Feb. 4, 1997).

[26] *See Sixth Order on Reconsideration* ¶ 22 *(Rate Regulation)*; Ellis Simon, *Cable's Little White Lie*, ELECTRONIC MEDIA, Dec. 9, 1996 ("going-forward rules are a double edge sword because they limit how much an operator can collect, and therefore, his desire to add channels").

[27] *See* 47 U.S.C. § 531. In fact, local governments have demanded increases in the allocation of PEG channels. *See, e.g.*, Peter Lewis, *Local Cable Service May Tie To Internet—TCI Would Also Offer More Channels*, SEATTLE TIMES, Sept. 27, 1995, at B4 (in Seattle, Tele-Communications, Inc. was asked to increase its PEG channels from three to ten); *Renewal May Be Near For Century Cable*, HARTFORD COURANT, Dec. 26, 1994, at B2 (discussing "increasing demand for public access and educational programming").

[28] The most recent data reveals that currently there are more than 250 national and regional cable networks competing for cable carriage. Of these, approximately 133 are national, basic cable networks. National Cable Television Association, CABLE TELEVISION DEVELOPMENTS (Spring 1998) at 6, 27-125. Additionally, at least 57 planned programming services are planning to launch in the near future. *Id.* at 126-42. Such intense competition has forced many cable networks to increase launch fee offerings to cable operators for carriage. *See, e.g.*, Linda Moss, *Masters Moving On After Building E!*, MULTICHANNEL NEWS, Sept. 21, 1998, at 1 ("E! will pay reported launch fees of $5 to $7 per subscriber"); Linda Moss, *Pax Net Will "Touch" Comcast*, MULTICHANNEL NEWS, July 13,

Limited channel capacity already has presented unforeseen obstacles for Commenters. In their struggles to increase distribution, the networks routinely have been denied carriage on systems throughout the United States that are channel-locked due largely to must-carry and other regulatory constraints. To name a few examples, Commenters have been denied carriage on systems in Wisconsin, Michigan, Tennessee, Rhode Island, and the New York City, Boston and Washington D.C. metropolitan areas. Commenters are not alone. Many new networks have delayed launch, or even failed, because of limited channel availability.[29]

As niche cable networks, Commenters are particularly dependent upon maintaining and increasing distribution levels to generate revenues. Unlike broadcasters, Commenters are *niche* networks—focusing on discrete subject areas of home improvement, gardening, crafts and food. They necessarily target a smaller universe of interested viewers and, consequently, a narrower universe of potential advertisers, than larger general entertainment networks. Absent a fundamental change in the video marketplace, Commenters will never generate broadcaster-type revenue. The four major broadcast networks alone (ABC, CBS, NBC and FOX) generated $13.2 billion in advertising revenue in 1997, over $5 billion more than *all* of

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1998, at 34 ("Paxson is offering operators upfront launch fees—reportedly up to $6 per subscriber"); Linda Moss, *Ops Take New Look At Launch Fees*, MULTICHANNEL NEWS, April 27, 1998, at 8 (noting the $10 launch fee offered to launch FoxNews Channel).

[29] Richard Katz, *Popcorn: The Latest Indie to Die*, MULTICHANNEL NEWS, Nov. 25, 1996, at 1; Jim McConville, *New Nets: Tough Act to Open; Cable Television Launches Postponed*, CABLEVISION, Nov. 27, 1995 (networks delay launches due to lack of channel availability, tight finances, and uncertainty about pending rate deregulation). For example, Q2, an upscale version of cable network QVC, recently announced that the network, after failing to increase distribution beyond 8 million subscribers in four years and losing $50 million in its last two years of operation, planned to cease distributing its service on October 1, 1998. Linda Moss, *Comcast Shuts Q2 for Style*, MULTICHANNEL NEWS, Aug. 31, 1998, at 1, 60. *See also* note 38, *infra*.

the nearly 300 local, regional and national cable television program networks combined.[30] Moreover, as the number of new cable networks increases, Commenters' share of available advertising revenues grows increasingly scarce.

Nor may Commenters rely on current affiliation agreements to provide the distribution levels needed to generate affiliation fees or advertising revenues. Many of Commenters' carriage agreements are soon coming up for renewal and renegotiation, providing cable operators an opportunity to drop Food or HGTV from their cable channel line-ups in favor of a must-carry broadcast station or another cable network. This is illustrative of a current marketplace reality: developing cable networks such as Commenters, whose lack of bargaining power in the early stages of development often produces shorter-term carriage agreements, are subject to being dropped from channel-locked cable systems more frequently than more established broadcast and cable networks. Thus, Commenters can predict with certainty that, under a digital must-carry regime, cable systems will be under even more pressure to drop quality niche cable networks, such as Commenters, when affiliation agreements come up for renewal.

In sum, Commenters' investment in high quality programming combined with their aggressive marketing strategies, have allowed Commenters to gradually increase subscriber distribution to their current levels. However, the failure to increase—let alone any decrease in—Commenters' distribution levels would thwart their ability to generate the revenues needed to recover accumulated losses, attain and maintain long-term commercial viability, and

[30] PAUL KAGAN ASSOCIATES, INC., KAGAN'S ECONOMICS OF BASIC CABLE NETWORKS at 65-66 (1998).

continue to produce the high-quality original programming currently enjoyed by viewers of Commenters' networks.

IV. A DIGITAL MUST-CARRY REQUIREMENT WOULD THREATEN COMMENTERS' AND OTHER NETWORKS' DEVELOPMENT, GROWTH AND VERY EXISTENCE WITHOUT PRODUCING ANY CORRESPONDING BENEFITS FOR VIEWERS.

In proposing rules for digital must-carry, the Commission recognized a number of statutory goals, including "minimization of the disruption and costs to subscribers, cable operators and cable programmers."[31] Yet, a digital must-carry requirement would have just the disruptive and adverse effect on cable programmers and subscribers that the Commission acknowledged it must seek to avoid. In fact, a digital must-carry requirement effectively would punish developing, niche networks, such as Commenters, that have taken every possible measure to increase distribution in reliance upon a universe of promised abundant channel capacity. Ironically, such a requirement would also penalize viewers, by displacing popular, quality cable programming with redundant digital signals aired by broadcast networks that seek a competitive subsidy of mandatory access to cable systems.

A. A Digital Must-Carry Rule Would Force Cable Operators To Drop Popular Niche Networks, Such As Commenters.

Under a digital must-carry regime, broadcasters would deliver two or more signals—one analog and one or possibly *multiple* digital signals[32]—to compete with cable

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[31] NPRM ¶ 1.

[32] NPRM ¶ 9 (under the rules governing the transition from analog to digital transmission, stations have flexibility to broadcast in a high definition mode, in a multiple program standard definition mode, or a mixture of both).

networks for channel space. As the Commission has acknowledged, as a result of a digital must-carry requirement, cable operators' must-carry demands would double, at a minimum.[33]

Consequently, channel-locked systems would be forced to drop existing channels.[34] Even those cable systems that are not technically channel-locked because they have invested in system rebuilds and upgrades or in digital compression, do not have an unlimited supply of extant channels.[35] A digital must-carry requirement would force those systems to fill any available channel capacity with duplicative digital broadcast signals, and to drop some cable networks to make room for additional carriage demands. Any channels that actually remain unfilled by digital must-carry signals will be the subject of intense competition among cable networks.

The resulting decrease in carriage and corresponding revenues would seriously jeopardize Commenters' long term viability. Commenters would be forced to devote their

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[33] 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. NPRM ¶¶ 39, 41.

[34] Doug Halonen, *FCC Jumps Into Digital Must-Carry Debate*, ELECTRONIC MEDIA, July 13, 1998, at 1A ("This '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," said NCTA President Decker Anstrom); Robert Kapler, *Cable Has No Space for Digital*, TV TECHNOLOGY, May 18, 1998, at 10 (according to NCTA, "[m]ost cable systems would have to drop one analog channel for each digital channel carried"); Linda Moss, *Small Ops See 'Difficult' 1999*, MULTICHANNEL NEWS, Aug. 10, 1998, at 8 ("channel-locked small operators are also worried about the impact of any digital must-carry for broadcasters' digital networks").

[35] Linda Moss, *Networks Prospect for Analog Slots*, MULTICHANNEL NEWS, Oct. 27, 1997, at 3 (It is not clear that channel capacity will increase rapidly through promised cable system rebuilds and upgrades, procedures which generally require an enormous investment of resources and years to complete. Even where rebuilds and upgrades do occur, they may open one or two analog channels a year. Moreover, not all analog slots will go to basic services, as operators will use new analog channels to satisfy must-carry and retransmission consent obligations and to add PPV channels and premium multiplexes.).

diminishing revenues to marketing and promotion, and to scale back on the production and acquisition of high quality, original programming, the attribute most identified by viewers and cable operators as Commenters' greatest strength. Commenters would be unable to recover accumulated debt and could, and very likely would, fail.

At the same time that cable operators are forced to drop high quality, popular cable networks, they will be adding redundant signals of marginal broadcasters. Indeed, the Commission notes in the NPRM that, "[t]oward the end of the [transition], there will be an increasing redundancy of basic content between analog and digital stations as the Commission's simulcasting requirements become applicable." (NPRM ¶ 39). Thus, instead of creating *more* high-quality programming, as intended by Congress and the Commission, a digital must-carry requirement would eliminate programming diversity and choices for the home viewer, relegate cable networks to second-class status and contribute to an unnecessary carriage subsidy for broadcasters.

B. The Harmful Effects Of A Digital Must-Carry Requirement Would Be Even More Acute For Planned Cable Networks, Which Would Be Forced To Scuttle Launch Plans.

In addition to the adverse impact on developing cable networks, such as Commenters, the rules must realistically assess the impact on *planned* cable networks. A digital must-carry requirement would condemn to near certain death planned cable networks, such as the new network, Do-It-Yourself ("DIY"), which Scripps currently is preparing for launch in 1999.

DIY is intended to be a 24-hour analog and digital programming service dedicated to "how-to" programs offering step-by-step instruction on projects related to home remodeling and repair, decorating, gardening, cooking, entertaining and crafts. Already, Scripps has