

DOCKET # 98-120

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)
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Carriage of the Transmissions of)
Digital Television Broadcast Stations)
)
Amendments to Part 76)
of the Commission's Rules)
_____)

CS Docket No. 98-120

To: The Commission

COMMENTS OF PAPPAS TELECASTING INCORPORATED, ET AL.

Pappas Telecasting Incorporated, Pappas Telecasting of the Midlands, a California Limited Partnership, Pappas Concord Partners, Pappas Telecasting of Nevada, a California Limited Partnership, Pappas Telecasting of Lexington, a California Limited Partnership, Pappas Telecasting of Opelika, a California Limited Partnership, Pappas Telecasting of the Carolinas, a California Limited Partnership, Pappas Telecasting of Sioux City, a California Limited Partnership, Pappas Telecasting of Iowa, L.L.C., Pappas Telecasting of Southern California, L.L.C., and Harry J. Pappas and Stella A. Pappas (collectively, all of the foregoing entities and persons are referred to hereinafter as "Pappas"), by their undersigned attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby respectfully submit these Comments

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in response to the Commission's *Notice of Proposed Rule Making* in this proceeding ("*NPRM*"), FCC 98-153, adopted on July 9, 1998 and released on July 10, 1998, 63 Fed. Reg. 42330 (published on August 7, 1998). ^{1/}

Pappas holds licenses or construction permits from the Commission that authorize Pappas to operate or to build collectively a total of 12 analog commercial television broadcasting stations in various communities in southeastern, midwestern, and western states. ^{2/} The principal of Pappas, Mr. Harry J. Pappas, is a career television broadcaster, who for nearly 30 years has been involved directly in the planning, construction, development, acquisition, and operation of those 12 stations, plus others that were sold. Pappas has typically acquired under-performing stations, or obtained authorizations from the Commission to build entirely new stations, commonly operating on UHF channels in smaller and mid-sized markets, and lacking an affiliation with the so-called "Big Three" national television networks (*i. e.*, the National

^{1/} These Comments are timely filed, in accordance with the revised schedule for submitting Comments in this proceeding that was adopted in the *Order* in this proceeding, DA 98-1719, adopted and released on August 27, 1998.

^{2/} The 12 stations are as follows: KMPH (TV), Visalia, California; KPTM (TV), Omaha, Nebraska; KTNC (TV), Concord, California; KFWU (TV), Fort Bragg, California; KREN (TV), Reno, Nevada; WBFX (TV), Lexington, North Carolina; WSWS (TV), Opelika, Alabama; WASV (TV), Asheville, North Carolina; KPTH (TV), Sioux City, Iowa; KPWB-TV, Ames, Iowa; a new television broadcasting station to operate on Channel 54 in Avalon, California, for which no call sign has yet been assigned; and WMMF-TV, Fond du Lac, Wisconsin.

Broadcasting Company, CBS, Inc., and the American Broadcasting Company). Pappas believes that given its collective experience, its views on the need for mandatory carriage by cable television systems of the signals of digital television broadcasting stations will be helpful to the Commission.

Summary

In these Comments, Pappas demonstrates that the Commission is under an affirmative statutory mandate from Congress to amend the so-called “must-carry” rules for cable television systems to the extent “necessary to ensure” that cable systems carry the signals of local commercial television stations that are transmitting in the digital mode in accordance with the Commission’s standard for digital television (“DTV”) broadcasting. The Commission’s belief, as stated in the *NPRM*, that it has “broad authority” to decide whether, and -- if so -- under what conditions it may impose must-carry obligations upon cable systems for DTV broadcasts is mistaken.

Pappas demonstrates in these Comments that extending the mandatory carriage requirements to the DTV transmissions of local commercial television stations would be entirely constitutional, relying upon the same basic findings of Congress in 1992 that supported the constitutionality of the imposition of mandatory carriage for

analog transmissions. Those findings relate to the respective natures of cable and broadcasting, and are not dependent upon whether the broadcasters' transmissions are in the analog or the digital mode. At least as compelling a case can be made for the substantial governmental interest supporting the rapid and widespread deployment of DTV as for the imposition of must-carry for analog television.

Pappas urges the Commission to adopt regulations that respect the Congressional command that cable systems pass television signals on to their subscribers "without material degradation." This means that the cable operator may not alter the format or any other characteristic of the retransmitted DTV broadcast signal.

Pappas here demonstrates that the Commission should not rely upon retransmission consent as a possible means of avoiding the imposition of mandatory carriage upon cable operators for DTV broadcasts. Retransmission consent is not practically available to many stations, including some of those owned by Pappas, that lack the leverage to bargain with their local cable operators for acceptable carriage terms. The Congressional scheme is to offer stations the alternatives of retransmission consent or must-carry; the Commission's proposal that the former make the latter unnecessary is in derogation of the choice Congress specifically gave to broadcasters in 1992.

In the interests of promoting the fastest and widest acceptance by the public of DTV broadcasting, which will serve the public interest (and, indeed, the longer-term interests of all of the affected industries, cable included), Pappas urges the Commission to require carriage of all DTV transmissions of local commercial television stations by cable systems. A phased-in requirement for systems in the 25 largest markets will lessen the immediate impact of a universal and complete must-carry obligation. Pappas reminds the Commission that its own annual reports to Congress demonstrate that the cable industry has made rapid advances in expanding channel capacity and in making more efficient use of existing channel capacity. A reduced must-carry obligation may be imposed upon so-called "smaller" cable systems, defined in accordance with the statute.

Pappas responds in these Comments to the *NPRM*'s questions concerning several statutory provisions. The DTV transmission and the separate analog transmission of a broadcast station should not be considered to be "duplicate" signals, even if their program content is identical, because the difference in their transmission formats makes it unlikely that they will share the same audience. The requirement that a cable system carry the "primary video" of a local commercial television station extends to any signal that is transmitted by a broadcast station with the intention that it be received by all consumers equipped with analog receivers, digital receivers,

converter boxes, or any combination of them. Pappas supports the *NPRM*'s proposal to allow cable systems to carry the DTV signals of local noncommercial, educational television stations and low-power television stations on unoccupied channels that have been designated for public, educational, and governmental use.

Pappas urges the Commission to require that the cable programming tier on which a broadcast station's DTV signal is carried is available to all cable subscribers without additional charge and without inconvenience. Pappas submits that the channel placement for cable retransmission of a local commercial television station's DTV signals should be selected by the affected broadcaster, in order to provide uniformity in channel number designation for all cable systems in the station's market as a means of enhancing the awareness and attractiveness of digital programming on the part of a public that is not currently familiar with such fare.

Pappas argues in these Comments that the Commission should, at least initially, define each DTV station's "market" -- for purposes of the must-carry and retransmission consent rules -- as being co-extensive with the station's affiliated analog station's market. Pappas believes that the Commission should not rely upon the utility of input selectors or so-called "A/B" switches as a method for making mandatory carriage unnecessary, since to do so would stigmatize the DTV transmissions of local

commercial broadcast stations at a time when it is of paramount importance to the successful introduction of digital television to gain the widest possible public acceptance of such transmissions.

In these Comments, Pappas urges the Commission not to permit cable operators to raise their rates to their subscribers because of any increased costs resulting from the adoption of mandatory carriage requirements for DTV broadcasting. Cable's financial health is robust, according to the Commission's own report to Congress earlier this year, and passing costs on to subscribers will only antagonize the public against DTV. Pappas submits that cable systems should provide notification to their subscribers whenever a DTV signal is added by the system. Pappas strongly urges the Commission not to revisit the network non-duplication, syndicated programming exclusivity, and sports blackout rules in this proceeding, inasmuch as those rules were developed in lengthy, complicated, and contentious proceedings involving a multiplicity of competing interests, and those rules protect rights that must be protected irrespective of whether stations are transmitting in an analog or a digital format. Lastly, Pappas submits that at least at the beginning of the period of transition from the analog environment to the digital one, a station transmitting digital programs should be deemed to be "significantly viewed" in the same areas as its associated analog station.

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The Commission is Under a Clear Congressional Mandate to Require Cable Carriage of Local Commercial Digital Television Broadcast Stations

1. Section 614(b)(4)(B) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (hereinafter referred to as the "1992 Act"), codified at 47 U.S.C. Section 534(b)(4)(B) (1997), sets forth the Congress's unambiguous instruction to the Commission six years ago, as follows:

(B) ADVANCED TELEVISION. -- At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

2. The statute speaks clearly and unmistakably: the Commission is commanded to initiate a proceeding to establish changes in the cable television mandatory carriage regulations ". . . necessary to ensure . . ." cable carriage of the signals of local commercial television stations that have been changed to conform to the Commission's standards for digital television broadcasting. The Commission is not instructed to initiate a proceeding to decide whether such mandatory carriage is

appropriate. In the presence of such a plain and unequivocal direction, the *NPRM* -- in questioning whether mandatory carriage for DTV can and should be adopted -- has strayed from Congress's mandate. Rather than inviting comments upon proposals that would run counter to Section 614(b)(4)(B)'s explicit command, such as proposals that contemplate less than universal and complete cable carriage of the DTV signals of local commercial television stations, the Commission should be devoting its attention faithfully to discharging that command.

3. The *NPRM* correctly notes that in connection with the subsequent enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (hereinafter referred to as the "1996 Act"), the Senate Conference Report made reference to Section 614(b)(4)(B). In Section 201 of the 1996 Act, codified at 47 U.S.C. Section 336 (1997), Congress addressed, *inter alia*, the provision by television broadcasters within their DTV channel capacity of so-called "ancillary and supplementary services." Section 336(b)(3) specifically provides that any such ancillary and supplementary services that a broadcaster may opt to transmit shall not enjoy must-carry rights under Section 614. In discussing this provision, the Senate Conference Report wandered from the must-carry issue as it applied to ancillary and supplementary services, and purported to address the must-carry issue for primary DTV transmissions

intended for reception by the general public. In so doing, the Senate Conference Report stated that the conferees had not intended that Section 336(b)(3) “. . . confer must carry status on advanced television or other video services offered on designated frequencies. . . .,” and that that issue “. . . is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act.” Telecommunications Act of 1996, Senate Conference Report, 104th Cong., 2d Sess., Report 104-230, at 161 (1992).

4. Likewise in connection with the passage of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), Congress again addressed the transition of television broadcasting from analog to DTV. In Section 3003 of the Balanced Budget Act, codified at 47 U.S.C. Section 309(j)(14) (1997), Congress provided for a possible extension beyond December 31, 2006 of the deadline for returning analog television channels to the federal government, if certain conditions relating to the availability and accessibility of DTV signals on the part of the public have not been satisfied. In the House of Representatives Conference Report accompanying the Balanced Budget Act, Congress again addressed the question of mandatory carriage of local commercial television broadcast DTV signals by so-called “multichannel video programming distributors” (“MVPDs”), including cable television systems. The House Conference Report stated that the Balanced Budget Act was “. . .

not attempting to define the scope of any MVPD's 'must-carry' obligations for digital television signals. . . .," and that the decision whether to mandate carriage of DTV signals by MVPDs is ". . . . for the Commission to make at some point in the future." H.R. Conf. Rep., 105th Cong., 1st Sess. No. 105-217, at 577 (1997).

5. The *NPRM* finds in the Conference Reports for the 1996 Act and the Balanced Budget Act a basis for diluting the unambiguous command of Section 614(b)(4)(B) of the 1992 Act and for giving the Commission "broad authority" to define the scope of a cable television system's must-carry obligations for the DTV signals of local commercial television broadcasting stations. *NPRM* at Para. 13. Pappas respectfully disagrees. The pronouncements in the Conference Reports cited by the *NPRM* in connection with the enactment of the 1996 Act and the Balanced Budget Act are not themselves law; they merely constitute legislative histories that are available, when appropriate and needed, to assist in the construction and interpretation of statutory language that may be unclear or ambiguous. It is well established that resort to legislative history will not be had to assist in the interpretation -- to say nothing of the outright contradiction -- of unambiguous language of a statute, such as Section 614(b)(4)(B). *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (" . . . subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history

prior to its enactment”); *U.S. v. Price*, 361 U.S. 304, 312 (1960) (“ . . .the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one;” citation omitted). Accordingly, the unofficial “afterthoughts” that were tucked into the Conference Reports accompanying the 1996 Act and the Balanced Budget Act (neither of which Acts were directly concerned with cable television’s must-carry obligations with respect to the primary DTV transmissions of local commercial television broadcasting stations) do not have the effect of repealing Section 614(b)(4)(B) (which did directly address those obligations). Indeed, the above-quoted passage from the Senate Conference Report accompanying the 1996 Act acknowledges the continuing efficacy of Section 614(b)(4)(B). Inasmuch as Section 614(b)(4)(B) speaks without ambiguity, the Commission has in fact no “broad authority” to do anything other than to comply with the command of that provision and to make such changes in the Commission’s cable television mandatory carriage regulations as shall be “necessary to ensure” cable carriage of the broadcast signals of local commercial television stations that have been modified to conform to the Commission’s DTV transmission standards.

**Extending Mandatory Carriage Requirements
to DTV Signals Would Not be Unconstitutional**

6. In *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) (hereinafter referred to as “*Turner II*”), the United States Supreme Court upheld the

constitutionality of the Commission's must-carry regulations as they apply to analog television stations. In so doing, the Court implicitly upheld Section 614(b)(4)(B) of the 1992 Act, inasmuch as the constitutional challenge was aimed directly at Section 614. In holding Section 614's provisions to be constitutional, the Court gave considerable weight to the extensive Congressional findings that accompanied the 1992 Act. Pappas would like to remind the Commission of some of those findings, which relate to the basic nature of free, over-the-air broadcast signals and cable television systems and the relationship between television stations and cable distribution systems, because those findings are not dependent upon whether the broadcast signal is transmitted in an analog or a digital format and the basis for them has not changed in the six years since the 1992 Act:

(9) The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.

(10) A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

(11) Broadcast 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.

(12) Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

(13) As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.

(14) Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems.

(15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a [must-carry] requirement, additional local broadcast signals will be deleted, repositioned, or not carried.

(16) 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.

(17) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services. The regulatory system created by the Cable Communications Policy Act of 1984 was premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local television stations would be protected from anticompetitive conduct by cable systems.

(18) Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.

Sections 2(a)(9) -- (18) of the 1992 Act, Pub L. No. 102-385, 106 Stat. 1460, 1461-62 (1992).

7. There is ample basis for concluding that the findings in Section 2(a) of the 1992 Act retain their vitality, and -- in some cases -- even understate the

nature of the problem faced by DTV broadcasters if must-carry regulations are not imposed upon cable systems for DTV transmissions. Pappas respectfully calls the Commission's attention to the findings in the Commission's *Fourth Annual Report* to Congress under Section 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. Section 628(g) (1997), *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, 13 FCC Rcd 1034 (1998) (hereinafter referred to as the "*Fourth Annual Report*").

Inter alia, the *Fourth Annual Report* made the following findings:

- Cable television subscribership continues to grow and in June, 1997 stood at 64.2 million subscribers, an increase of 1% over the preceding nine months, 13 FCC Rcd at 1040;
- The number of homes subscribing to cable television has been increasing since December, 1995, rising to 66.2% of all television households by the end of June, 1997, *id.* at 1049, Paragraph 14;
- "[V]iewership of broadcast station programming continued to gradually decline as viewership of cable and satellite network programming increased," *id.* at 1042.

8. Thus, simply confining the analysis to the current analog environment, cable has continued to grow in terms of its penetration of the national television viewing audience, and broadcasting has continued to lose audience share to MVPDs, including cable. These findings in the *Fourth Annual Report* bolster the

findings in the 1992 Act to the effect that analog broadcast television continues to need must-carry regulations if free, over-the-air, locally-programmed television is to continue to be in a position to provide quality service to Americans. Given that DTV is an altogether novel service -- with an audience that is not currently equipped to receive DTV signals and may not be for an indefinite period, with very limited programming inventory, and with a technical plant that has not yet benefitted from widespread empirical experience -- the undiminished findings of the 1992 Act speak even more urgently in favor of the substantial governmental interest supporting mandatory carriage of DTV transmissions, particularly since it is intended that DTV signals will replace the analog signals which are constitutionally entitled to mandatory carriage. Moreover, as will be shown in Paragraphs 15 through 20 of these Comments, *infra*, the impact upon cable systems of a DTV must-carry obligation for local commercial television stations will not be great; the cable industry, on its own and without federal prompting, is actively engaged in expanding its channel capacity and in making more efficient use of its existing channel capacity through digital compression techniques. Under these circumstances, the intermediate First Amendment scrutiny that the *Turner II* Court applied to Section 614 would yield a judicial determination that the extension of full must-carry rights to the DTV signals of local commercial television broadcast stations is entirely constitutional.

The “Without Material Degradation” Requirement

9. Section 614(b)(4)(A) of the 1992 Act, codified as 47 U.S.C. Section 534(b)(4)(A) (1997), provides the Commission with one of the cardinal requirements of the transition from analog to DTV:

(A) NONDEGRADATION; TECHNICAL SPECIFICATIONS. -- The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. . . .

10. Pappas believes that the “without material degradation” requirement is equally applicable to DTV signals as to analog ones. If the public is to be persuaded to accept and watch DTV programs (absent such acceptance, continued advertiser support of such programs will likely evaporate, which in turn would jeopardize television stations’ ability to provide at least one free DTV service, as required by the Commission’s *Fifth Report and Order* in the Advanced Television proceeding^{3/}), the public must not be presented with such programs in a confusing array of different transmission formats. A consumer watching a station’s digitally-

^{3/} *Fifth Report and Order* in MM Docket No. 87-268, *In the Matter of Advanced Television Systems and their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809 (1997) (hereinafter referred to as the “*Fifth Report and Order*”), modified on reconsideration, 13 FCC Rcd 6860 (1998).

transmitted program in the 1080i format, using an over-the-air reception device, should see the identical picture that a cable subscriber receiving the same program simultaneously by cable will see. Otherwise, the non-uniform delivery of DTV programming will harm the long-term attractiveness of the programming to consumers, who will not be able to understand why DTV programming appears differently depending upon whether the reception is over-the-air or by cable. Pappas respectfully submits that the "without material degradation" requirement should be held especially applicable to DTV broadcasts, in view of the fact that DTV -- as a nascent medium -- is even more fragile than analog broadcasting, which is protected by that requirement. Moreover, the requirement should be interpreted to mean that cable systems carrying DTV transmissions of broadcasting stations may not alter the technical characteristics of the broadcast signal in retransmitting the programs of such stations to cable subscribers. To the extent that this means that cable set-top boxes to be provided to subscribers by their cable service provider must be able to process and pass through broadcast transmissions in all formats, Pappas supports such a requirement. Similarly, since the "without material degradation" requirement is principally important to ensure that the consumer receives the programming transmitted by the television broadcaster without impairment by the intervening cable retransmission medium, the only appropriate place at which to measure material degradation is at the cable subscriber's receiver input.

Retransmission Consent

11. The *NPRM* quotes an estimate that approximately 80 percent of commercial television broadcasters elected retransmission consent over must-carry during the 1993-96 election cycle. *NPRM* at Para. 33. The *NPRM* goes on to suggest that universal election of the retransmission consent option by DTV broadcasters would render it unnecessary to address DTV must-carry. *Id.*

12. Pappas vigorously disputes the *NPRM*'s suggestion that retransmission consent provides a method for avoiding compliance with Section 614(b)(4)(B)'s mandate to extend must-carry to local commercial stations operating in conformance with the Commission's DTV standards. Retransmission consent is available to television stations whose attractiveness to their viewers -- including cable subscribers -- is so strong that the cable system cannot reasonably fail to offer its subscribers access to the programming of such stations. Such stations are typically affiliates of the Big Three networks, offering programs with national recognition and "brand-name" appeal to viewers. Such stations are fully aware of the attractiveness of their programs and the relative indispensability of their presence on a cable system's basic program service tier. Accordingly, such a station will choose retransmission consent and will then bargain with the cable operator over additional or other

consideration that will pass between the parties in order for the cable system to obtain the station's permission to distribute the latter's programs to the former's subscribers.

13. The stations which Pappas has built or acquired, or is in the process of building and acquiring, commonly do not have the same bargaining strength in relation to their local cable television systems as the Big Three network affiliates. Even if the stations lacking such bargaining leverage represent only 20% of the universe of currently-operating commercial analog stations, those stations are still entitled to must-carry, because Congress had those stations in mind when Congress provided that retransmission consent and must-carry are alternative choices. Many of Pappas's stations operate in the UHF band and are either not affiliated with a network or affiliated with one of the newer or emerging networks, such as Fox Broadcasting Company, The WB, or the United Paramount Network. Lacking the leverage of longer-established VHF stations that enjoy affiliations with the Big Three, all but one of Pappas's stations have uniformly been forced to opt for must-carry.^{4/} Given those facts, and the likelihood that they will persist through at least the next three-year election cycle, retransmission consent offers Pappas and those similarly situated no realistic alternative to must-carry for both analog and DTV signals. Pappas concurs in the

^{4/} The one exception is KMPH (TV) in Visalia, California, a Fox Broadcasting Company affiliate that has been in operation for over twenty years and has historically enjoyed unusually high viewer ratings for a UHF station in a market of its size.

proposal in Paragraph 36 of the *NPRM* that a station commencing its digital operations during the middle of one of the triennial retransmission-consent/must-carry election periods be treated as a so-called "new" station and be permitted to make its election for the DTV transmissions at any time between the 60th day prior to the commencement of such transmissions and the 30th day thereafter.

Must-Carry During the Transition Period

14. Pappas believes that the issues discussed in Paragraphs 39 through 53 of the *NPRM* lie at the heart of whether the transition to DTV will be marked by smooth progress and early success, or by a prolonged and agonizing process that is detrimental to the public and to the affected industries alike. Pappas has recently undergone a refinancing of a number of its companies and stations, in order to fund certain acquisitions of, and certain capital improvements to, some of Pappas's existing analog stations. As set forth in the Declaration of Mr. Pappas that is appended to these Comments as Exhibit A, he has had discussions with Pappas's senior lenders regarding the need for financing to support the construction of DTV facilities. Mr. Pappas reports that a recurring concern in those discussions is that from the lender's perspective, DTV -- at least initially and perhaps for an indefinite period -- is unlikely to enjoy sufficient audience support to attract a minimum base of advertising revenue to

justify the capital costs to build out those DTV facilities. A critical component in maximizing audience is to ensure that cable television subscribers can and will have cost-effective access to the advertiser-supported programming of terrestrial DTV stations. (Again, the Commission's own Fourth Annual Report shows that two out of every three television households subscribes to cable; *see* Paragraph 7 of these Comments, *supra*.) Moreover, the sooner that stations can provide lenders with a level of comfort that audiences for DTV programming will be maximized as a consequence of a universal and comprehensive DTV must-carry requirement, the sooner financing will be available to permit broadcasters to inaugurate their DTV service. Thus, to the extent that any must-carry regulations during the transition period may have the effect of postponing or rendering less certain the prospect that cable subscribers will have universal, low-cost, and convenient access to the unmodified DTV transmissions of local television stations, the Commission would also be postponing and rendering less smooth the overall transition to DTV. In an extreme (but by no means improbable) case, if the deployment of DTV and consumer acceptance of DTV were to suffer prolonged delay, the December 31, 2006 date for returning analog channels to the federal government would have to be extended under the provisions of Section 309(j)(14) of the Communications Act.

15. Consequently, it is critical that the Commission -- having ordered broadcasters to convert to DTV by certain deadlines -- follow through by ensuring that other relevant industry sectors fulfill their obligation to ensure the rapid and widespread dissemination of DTV programming. To that end, Pappas supports the adoption of the *NPRM*'s so-called "Phase-in Proposal" (*NPRM* at Paragraph 46) for the 25 largest Designated Market Areas ("DMAs") in the country, where the number of television stations is highest and therefore the impact of DTV must-carry will be felt the most by local cable operators. Under Pappas's proposal, cable systems in the Top 25 DMAs would be required to carry at least five local commercial televisions stations' DTV signals promptly upon the commencement of the transmission of such signals, in the order in which they commenced, with a further requirement to add not fewer than four additional local commercial television stations' DTV signals each year thereafter, in the order that such stations commence their DTV service. For all other DMAs, Pappas urges the Commission to adopt the so-called "Immediate Carriage Proposal" (*NPRM*, Paragraphs 41-43). The balance of the Commission's proposals -- denominated as the "System Upgrade Proposal," the "Either-Or Proposal," the "Equipment Penetration Proposal," the "Deferral Proposal," and the "No Must Carry Proposal" in Paragraphs 44-45 and 47-50 of the *NPRM* -- simply would not provide broadcasters, advertisers, and broadcast lenders with the level of assurance that free, over-the-air DTV programming will achieve an acceptably-broad penetration of television households and