

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURNER BROADCASTING SYSTEM,
INC., et al.,

Plaintiffs,

v.

FEDERAL COMMUNICATIONS
COMMISSION, et al.,

Defendants.

Civil Action No. 92-2247
(and Consolidated Cases
Civil Action Nos. 92-2292,
92-2494, 92-2495, 92-2558)

(SFW, TPJ, SS)

**PUBLIC BROADCASTER DEFENDANT-INTERVENORS'
SUPPLEMENTAL STATEMENT OF EVIDENCE BEFORE CONGRESS**

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**PUBLIC BROADCASTER DEFENDANT-INTERVENORS'
SUPPLEMENTAL STATEMENT OF EVIDENCE BEFORE CONGRESS**

Intervenor-defendants, the Association of America's Public Television Stations ("APTS"), the Public Broadcasting Service ("PBS"), and the Corporation for Public Broadcasting ("CPB") (collectively "the public broadcasters"), submit this statement in support of their motion for summary judgment. This statement supplements Defendants' Joint Statement of Evidence Before Congress filed in connection with the summary judgment motions of all defendants. In this document, references to the record before Congress signify the record in connection with Congress's consideration of "must-carry" provisions for public television, eventually enacted as Section 5 of the Cable Television Consumer Protection and Competition Act of 1992. Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. § 535 (West. Supp. 1995).

I. EVIDENCE THAT CABLE CARRIAGE IS IMPORTANT TO FULFILLMENT OF PUBLIC TELEVISION'S MISSION TO PROVIDE UNIVERSAL ACCESS TO AN ALTERNATIVE, NON-COMMERCIAL PROGRAMMING SOURCE

A. Evidence Regarding the Unique Nature of Public Television Programming

1. Congress was aware that: "The Federal government recognized the need for noncommercial broadcasting as early as 1952 when 242 channels were set aside in the spectrum by the FCC for the exclusive use of public television. Since that time, Congress repeatedly and unequivocally has supported public telecommunications services." Source: Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 628, 102d

Cong., 2d Sess. at 68 (June 29, 1992) (hereafter "1992 House Report"); CR VOL. I.A, EXH. 4, CR 00447.

2. Congress was reminded that it had "recognized that the 'marketplace' alone could not be relied upon to make adequate provision for noncommercial, educational uses." Hearing Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation at 95 (hereafter "1989 Senate Hearings") (Testimony of David Brugger); CR VOL. I.F, EXH. 12, CR 04105.

3. Congress was also reminded of its previous determination that "it furthers the general welfare" to encourage public broadcasting "which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications service for all citizens of the nation. . . ." 1989 Senate Hearings at 95 (Testimony of David Brugger) (quoting 47 U.S.C. § 396(a)(4) (1991)); CR VOL. I.F, EXH. 12, CR 04105.

4. The record before Congress included the following summary of previous congressional enactments regarding public television:

- In renewing and expanding funding for facilities construction in 1976, Congress repeated its intent that public television should serve as "a source of high quality programming responding to the educational needs and interests of our diverse population and supplementing the existing commercial broadcasting system." Comments of the Association of America's Public Television Stations (hereafter "APTS") in MM 90-4 at 16 (Feb. 14, 1991) (CR VOL. I.D, EXH. 43, CR

10123); Comments of APTS in MM 89-600 at 7 (CR VOL. I.T, EXH. 103, CR 12189) (both quoting S. Rep. No. 447, 94th Cong., 1st Sess. 3 (1975) (emphasis added)).

- In 1978, Congress again noted that "[a] strong and varied public broadcasting system has a crucial role to play. Because it is free of the scramble for ratings, public broadcasting has room for experimentation and risk-taking. Public broadcasting is for all Americans. It can meet the needs of audiences that number in the millions but are seldom served anywhere else." Comments of APTS in MM 90-4 at 16-17 (Feb. 14, 1991), CR VOL. I.O, EXH. 43, CR 10123-23; Comments of APTS in MM 89-600 at 8, CR VOL. I.T, EXH. 103, CR 12190 (both quoting H.R. Rep. No. 1178, 95th Cong., 2d Sess. 4 (1978) (in turn quoting President Jimmy Carter) (emphasis added)).
- In 1981, Congress repeated its view that public television was to bring to the American public "the very best in television programming, . . . that which is unavailable anywhere else, and to develop programs that meet the needs of underserved and diverse audiences throughout the country." Comments of APTS in MM 90-4 at 17 (Feb. 14, 1991), CR VOL. I.D, EXH. 43, CR 10124; Comments of APTS in MM 89-600 at 8, CR VOL. I.T, EXH. 103, CR 12190 (quoting H.R. Rep. No. 82, 97th Cong., 1st Sess. 7, 21 (1981) (emphasis added)).
- In 1988, Congress again reaffirmed that public television has an "original mandate" to serve as "an educational, innovative, and experimental alternative to commercial broadcasting, and should continue to create, develop, and broadcast innovative and diverse new forms of programming." Comments of APTS in MM 90-4 at 17 (Feb. 14, 1991), CR VOL. I.O, EXH. 43, CR 10124; Comments of APTS in MM 89-600 at 9, CR VOL. I.T, EXH. 103, CR 12191 (quoting H.R. Rep. No. 825, 100th Cong., 2d Sess. 10 (1988) (emphasis added)).

5. The record before Congress included the following:

"Public television stations are non-profit, educational, public service institutions with their roots in the community, dedicated to the community's service." Source: 1989 Senate Hearings at 96 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04106.

6. The record before Congress described public television stations' unique local programming targeted to minorities and other special audiences. Source: 1989 Senate Hearings at 96 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04106.

7. The record before Congress included the following: "Public television stations constitute the only locally controlled programming service in the United States whose sole purpose is to produce and distribute educational, informational, cultural and instructional programming at the community level." Source: Comments of APTS in MM 90-4 at 8 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10795.

8. There was testimony before Congress that: "Public television stations are not passive local outlets for packaged satellite services and advertising messages originated hundreds or thousands of miles away; they are non-profit public service institutions with their roots in the community, dedicated to its service. Indeed, with the recent trends in broadcast acquisitions, mergers and buyouts, [public television] may well become the last bastion for truly local control in the broadcast and cable industries." Source: Cable Television: Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2nd Sess. (March 30 and May 11, 1988) at 523 (hereafter "1988 House Hearings") (Statement of David Brugger); CR VOL. I.D, EXH. 9, CR 02612.

9. The record before Congress indicated that public television stations are locally controlled and locally based, in many cases by state education agencies, and that "nationwide public television spent almost \$530 million (or 40% of its resources) in 1989 on local production, instructional programming, and other community services." Source: Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 102d Cong., 1st Sess. (March 20, June 18 and 27, 1991) at 839 (hereafter "1991 House Hearings") (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07843.

10. Congress was informed that: "Public television can provide programs that would otherwise never reach American audiences. [Public television is] willing to air programs that commercial broadcasters, for obvious economic reasons, cannot." Source: 1991 House Hearings at 837 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07841.

11. The record before Congress included the following testimony:

Today, public broadcasting is the only locally-controlled service among the communications media of the United States whose sole purpose is to produce and distribute programs designed to serve the public and educational interests, rather than commercial interests. Television increasingly has become viewed only as a business -- and most of the television in America today is big business. Distinct from commercial and cable television, however, public television's objective is to satisfy viewers needs, impart knowledge and

understanding, and open doors to the vast range of our cultural diversity -- not to deliver advertisements to audiences. Public television stations are nonprofit, educational, public service institutions with their roots in the community, dedicated to the community's service.

1989 Senate Hearings at 96 (Testimony of David Brugger); CR VOL. I.F, EXH. 12, CR 04106.

12. The following testimony also appeared in the record before Congress:

[Public television is], quite simply, different. We are public, non-profit, a national resource available to every American. There are no monthly cable charges, no three minute breaks for commercials, no effort on our part to exchange quality for quantity because of the dictates of the market. If we behave differently than our colleagues in the telecommunications industry it is because we are different. We have different goals, a different agenda, and a different definition of what we deem success.

1991 House Hearings at 841 (Testimony of Henry Becton); CR VOL. I.J, EXH. 18, CR 07845.

13. The record before Congress also included a submission from 18 state broadcasting networks, which noted that "state governments support public television networks in order to fill a void in public affairs and cultural programming." Source: Comments of State Public Broadcasting Networks in MM 85-349 at i; CR VOL. I.CC, EXH. 166, CR 16227.

14. The record before Congress revealed that in 1984, twenty-three States plus Puerto Rico and the Virgin Islands directly operated public stations, and another twenty states

provided direct funding to public or noncommercial stations not licensed to the State. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 23; CR VOL. I.CC, EXH. 166, CR 01625.

15. The record before Congress indicated that "public television provides a variety of unique services to their communities. These include local news and public affairs programs, and coverage of local cultural groups and governmental activities, such as city council meetings, school board sessions, and state legislative sessions." Source: Comments of the Corporation for Public Broadcasting (hereafter "CPB"), the National Association of Public Television Stations (hereafter "APTS") and the Public Broadcasting Service (hereafter "PBS") in MM Docket No. 85-349 at 15 (Jan. 29, 1986); CR VOL. I.BB, EXH. 163, CR 15988.

16. The record before Congress included the following:

[T]he Nashville Board, the school board licensee of public television Station WDCN in Nashville, Tennessee, carries the Nashville Metropolitan Government Council meetings on alternate Tuesday. . . . Similarly, the Nashville Board airs a weekly program entitled Tennessee Outdoorsman. This is a local program meeting local needs, as is Tennessee Arts, shown alternate Tuesday. Tennessee Arts is not only shown to the local Nashville audience but is aired throughout Tennessee by other public television stations. Nashville Business Edition, aired weekly, is a uniquely local service. The Tennessee Teachers program, aired monthly, serves specialized needs of a vital audience. PBS does not meet these needs; commercial television in Tennessee does not meet these needs and no national centralized originating

program source could begin to meet these needs. The loss of this kind of service is irreparable. The fact that mass markets cannot be attracted to support this programming is irrelevant. There is a societal value in this kind of local programming which commercial networks and cable systems do not recognize or seek to foster.

Source: Joint Comments of Metro Board of Education, et al. in MM Docket 85-349 at 10 (April 25, 1986); CR VOL. I.CC, EXH. 172, CR 16502.

17. The record before Congress included the following statement: "Importantly, recognition by Congress of the continuing need for public television services came even as cable penetration passed 50 percent and as commercial cable channels were multiplying." Source: Comments of APTS in MM 89-600 at 9 n.11 (citing H.R. Rep. No. 825, 11th Cong., 2d Sess. 10 (1988)); CR VOL. I.T, EXH. 103, CR 12191.

18. The record before Congress indicated that: "Cable services may offer some programs that resemble some of public television's offerings, but they do not have public television's educational purpose and commitment to local service." Source: 1989 Senate Hearings at 97 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04107.

19. The record before Congress included the following statement: "There are many more cable programming choices available today than five years ago. . . . Public television programming remains distinctive and unique. Viewers continue to show their support for this important public service by

contributing to their local stations and encouraging increased tax-based support." Source: 1989 Senate Hearings at 108 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04118.

20. The record before Congress indicated that the "marketplace cannot do the job of protecting the public's interest in high-quality, innovative educational programming. A separate public broadcasting service will continue to be needed, and viewer access to it will have to be assured." Source: 1991 House Hearings at 835 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07839.

21. There was evidence before Congress that the "cable-only" Learning Channel had only been able to commit 37% of its programming to instructional television, and that much of that was originally produced by public television. Source: 1991 House Hearings at 838 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07842.

B. Evidence of the Diversity of Programming Among Public Television Stations

22. There was evidence before Congress that: "In many markets, especially those with large and diverse populations, the local community supports more than one public television service." Source: 1989 Senate Hearings at 105 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04115.

23. The record before Congress indicated that "[i]n most markets where there are two or more public television stations, the stations are licensed to different types of

entities -- e.g., nonprofit organizations (community licensees), school boards, state educational institutions -- and the different missions and goals of these different types of licensees result in materially different programming services." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 14 (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

24. The record before Congress included the following statement: "[S]tudies of the actual program schedules of multiple public television station serving the same market show that, with rare exceptions, those stations offer a substantial diversity of programming, either in the actual programs carried or in the time at which the same program is carried." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 14 (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

25. There was testimony before Congress that 80 percent of public television programming is unduplicated. Source: 1988 House Hearings at 597 (Testimony of David Brugger); CR VOL. I.D, EXH. 9, CR 02684.

26. The record before Congress included evidence that, in Boston, which has two public TV stations, only 2% of programming is duplicated. Source: Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. (May 9 and 16, 1990) at 96 (hereafter "1990 House

Hearings") (Statement of George Miles); CR VOL. I.I, EXH. 16, CR 06263.

27. There was evidence in the record before Congress that during one prime time evening in New York, there was no duplication in programming among six public television stations. Source: 1990 House Hearings at 96 (Statement of George Miles); CR VOL. I.I, EXH. 16, CR 06263.

28. The record before Congress included the results of a 1978 survey conducted by CPB, which showed that of "a total of 185 different programs broadcast in the Los Angeles market during the week of January 9-15, 1978, approximately 125, or 68%, were broadcast by only one of the three public television stations in the market. Similar results were reported in the other three markets" surveyed. Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 15 (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

29. The record before Congress also included the results of a survey by CPB during the week of May 11-17, 1985, which showed that of the five separately programmed local public television stations whose signals reach all or part of the Washington, D.C. market, there were a total of 321 different programs, of which only 31.5% were offered by more than one of the five stations. "Even with respect to this limited number of programs offered by more than one station, the stations aired the programs at different times, so that the same program was broadcast simultaneously by more than one station only 26% of the

time." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 15 (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

30. The record before Congress included a letter explaining that, in the San Francisco area, KQED, KTEH, and KCSM have largely nonduplicative programming. Source: Letter from David Brugger to Congressman Markey (July 26, 1991) in 1991 House Hearings at 1039; CR VOL. I.J, EXH. 18, CR 08041.

C. **Evidence Regarding Public Television's Mission of Universal Access**

31. Congress recognized that:

[I]n the Public Broadcasting Act of 1976 . . . , Congress specifically found that . . . "it is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make [public broadcasting services] available to all the citizens of the United States." Congress has authorized almost \$400 million since 1962 to build and improve public television facilities to "extend delivery of public telecommunications services to as many citizens of the United States as possible" and as recently as 1988 authorized \$200 million through FY 1993 to replace and upgrade the satellite systems carrying public telecommunications services to stations across the country. Unimpeded access to public television programming is such an important telecommunications objective that Congress requires that the Public Broadcasting Service (PBS) maintain one clear, unencrypted satellite feed for use by satellite dish owners in unserved areas.

Source: 1992 House Report at 68 (emphasis added) (internal citations omitted); CR VOL. I.A, EXH. 4, CR 00447.

32. The record before Congress indicated that the Public Broadcasting Act was founded on the principle that all Americans must have access to public television. Source: 1991 House Hearings at 831 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07835.

33. The record before Congress indicated that "public television has a unique orientation. "[Its] stake is in ensuring that universal access to noncommercial educational programming remains a guiding principle." Source: 1991 House Hearings at 834 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07838.

34. The record before Congress included testimony that public television "seek[s] to reach every American, and particularly those on the margin of our society." Source: 1991 House Hearings at 841 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07845.

35. The record before Congress included a description of new technology developed by public television to reach special audiences, such as the visually impaired and hearing impaired. Source: 1991 House Hearings at 840 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07844.

36. The record before Congress indicated that: "[Public television] is trying to reach all Americans of different tastes and different backgrounds." Source: 1991 House Hearings at 837 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07841.

37. The record before Congress included testimony that public television "bring[s] a variety of new experiences and viewpoints to all Americans in our cities and in our rural areas, whether or not they can afford to subscribe." Source: 1991 House Hearings at 837 (Testimony of Henry Becton); CR VOL. I.J, EXH. 18, CR 07841.

38. The record before Congress included the following statement on behalf of state public broadcasting networks: "State funding from general tax revenues is frequently predicated on universal access to educational programming by a state's population." Source: Comments of State Public Broadcasting Networks in MM 85-349 at 11-12 & n.10; CR VOL. I.CC, EXH. 166, CR 16239-40.

39. The record before Congress included testimony by a public television representative that: "There is a need to assure that the American public has access to public television services that it supports through its tax dollars and through its direct contributions," and refers to the public's right to its tax-supported services provided by stations that are, for the most part, licensed through public supported state and local institutions. Source: 1989 Senate Hearings at 89 (Testimony of David Brugger); CR VOL. I.F, EXH. 12, CR 04099.

40. The record before Congress included the statement that the public has "the right to expect guaranteed access to public interest programming of public television." Source: 1991

House Hearings at 833 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07837.

41. The record before Congress included testimony by a public television station representative that: "What we want is equity for all citizens. That means that you must assure access to public TV services as a public right and not a class privilege." Source: 1989 Senate Hearings at 90 (Testimony of David Brugger); CR VOL. I.F, EXH. 12, CR 04100.

D. Evidence About the Importance of Cable Carriage to Achieving Universal Access

42. The record before Congress included testimony that "public television viewers are 27 percent more likely to subscribe to cable than non-public television viewers" and that "[t]wo-thirds of cable subscribers say one of the reasons they subscribe is for better reception of a PBS station or access to more than one public station." Source: 1988 House Hearings at 524 (Statement of David Brugger); CR VOL. I.D, EXH. 9, CR 02613.

43. The record before Congress included testimony that "cable has extended the reach of some public television stations. . . . Four percent [of public television's coverage] is due to cable's extension of over-the-air reach. Source: 1989 Senate Hearings at 92 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04102.

44. The record before Congress indicated that in Northern California "three public television stations in partnership with sixty-four offices of education and 600 school

districts provide instructional services to 70,000 teachers and 1.5 million students. The delivery of this important service to classrooms is, in many instances, dependent on local cable operators' decision to place and maintain the public television services on their schedule." Source: 1989 Senate Hearings at 96 (Statement of David Brugger); CR VOL. I.K, EXH. 12, CR 04106.

45. The record before Congress indicated that "in the case of two-thirds of America's public television stations, to impede access to their services is to disrupt the ability of state governments, universities and local government -- the stations' licensees -- to educate, communicate with and serve their citizens." Source: 1989 Senate Hearings at 96 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04106.

46. The record before Congress included testimony that: "For public television to achieve the public interest goals set for it by Congress and expected of it by the American public, carriage of public television services on cable systems must continue." Source: 1989 Senate Hearings at 93 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04103.

47. The record before Congress included the following statement: "For public television, cable carriage is particularly important since more than 60% of public television stations currently . . . operate in the UHF band and virtually all of the public television stations remaining to be constructed in the future will be UHF. . . . As the [FCC] has recognized on numerous occasions, UHF stations suffer from severe technical

handicaps which limit their ability to reach viewers in their service areas. Cable carriage, while not a panacea, alleviates those problems and improves the ability of those stations to reach their audiences." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 8-9 (Oct. 15, 1985) (citing Report and Order, Docket No. 78-391 90 F.C.C. 2d 1121, 1124-25 (1982)); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

48. The record before Congress included testimony that: "Since more than 62 percent of public television stations operate on UHF channels, cable also has improved the reception quality and ease of access to public television signals for many viewers." Source: 1989 Senate Hearings at 92 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04102.

49. The record before Congress indicated that retransmission consent/leased access is inappropriate for public television stations because it did not advance the goal of universal access, even though some stations might benefit financially. Source: Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 1st Sess. (March 14, 1991) at 459 (Letter from David Brugger to Senator Inouye) (Mar. 31, 1991); CR VOL. I.I, EXH. 17, CR 06917.

50. The record before Congress also indicated that "[a]dditional funding . . . [is] not more important than universal access to all unduplicated public television services."

Source: 1991 House Hearings at 848 (Letter from David Brugger to Congressman Markey (June 26, 1991); CR VOL. I.J, EXH. 18, CR 07852.

51. The record before Congress included the following statement by a public television representative: "Absent mandatory cable carriage requirements, there is a substantial likelihood that citizens who have supported local public television services will be deprived of those services. Public television services, which have been funded by tax sources, are intended to be universally available because of their essential public service value." Source: 1991 House Hearings at 847, (Letter from David Brugger to Congressman Markey (June 26, 1991)); CR VOL. I.J, EXH. 18, CR 07851.

52. The record before Congress included the following statement by a public television representative: "The American people should have access to the public television programs that they fund. If the FCC or the courts will not act to allow taxpayers cable access to the public television programs they fund, then I believe that Congress should." Source: 1988 House Hearings at 601 (Letter from Donald Ledwig to Representative Markey (Apr. 8, 1988); CR VOL. I.D, EXH. 9, CR 02688.

53. The record before Congress included the following statement on behalf of public television organizations: Congress's clear intent was that "all Americans should be entitled to access to such alternative programming. It would be inconsistent with this intent to allow access to public

television to turn on the market-directed behavior of cable operators." Source: Comments of APTS and PBS in MM Docket No. 88-138 at 8; CR VOL. I.Z, EXH. 140, CR 15292.

54. The record before Congress included the following comments by public television organizations: "[A]llowing any public television station to survive or fail based on the profit-motivated decisions of cable operators is inconsistent with the substantial government interest underlying public television and jeopardizes this nation's 25-year, \$1.5 billion investment in public television." Source: Comments of APTS and PBS in 88-138 at 28; CR VOL. I.Z, EXH. 140, CR 15312.

55. There was testimony by a public television representative before Congress that: "The 'must-carry' issue for public television is consistent with a broader public policy principle: the American public should have unimpeded access to public television services that exist to service the public interest and which have been supported by their tax dollars and direct contributions." Source: 1989 Senate Hearings at 93 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04103.

56. There was testimony before Congress that: "The American viewing public has a right of access to the public television services for which their tax dollars pay. . . . Without appropriate federal action, public television may fall short of the Congressional goal of assuring nationwide availability of public television service to every American."

Source: 1989 Senate Hearings at 97 (Statement of David Brugger);
CR VOL. I.F, EXH. 12, CR 04106-07.

**II. EVIDENCE THAT PUBLIC TELEVISION STATIONS ARE ESPECIALLY
VULNERABLE TO NON-CARRIAGE BY CABLE SYSTEMS**

57. The record before Congress included the following description of cable practices: "According to a United Cable/Brown, Bortz and Coddington study, MSOs assign value to the program services that their systems carry by calculating both 'direct' and 'indirect' revenues from each service. . . . Because public television stations obviously contribute no direct revenues to cable systems, the value attributable to public service programming comes almost exclusively from the subjective inputs of viewer satisfaction and the opinion of cable management. By its very nature, programming specially targeted to reach unserved or underserved audiences -- while serving a vital public interest -- may generate little 'indirect revenue.'" Source: Comments of APTS in MM Docket No. 89-600 at 18; CR VOL. I.T, EXH. 103, CR 12200.

58. The record before Congress indicated that under the econometric model produced by United Cable and Brown, Bortz, and Coddington, "public stations would be at a disadvantage because they produce no direct revenues to a cable system. Alternative programming may not be supported by the marketplace." Source: Comments of APTS and PBS in 88-138 at 5-6; CR VOL. I.Z, EXH. 180, CR 15289-90.

59. There was testimony before Congress that given the differing motivations of public television and cable operators, "there exists a substantial risk that many public television stations will not be carried by their local cable systems without rules requiring such carriage." Cooperation with cable operators has been successful, but it is not sufficient to protect carriage of all local public television services. Source: 1989 Senate Hearings at 107-108 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04117-18.

60. The record before Congress indicated that: "Public television stations cannot provide local ad spots for use by cable operators, cannot afford to pay for carriage, and are not, by virtue of their congressional mandate, designed to please mass audiences as a primary goal." Source: Comments of APTS and PBS in 88-138 at 9; CR VOL. I.Z, EXH. 140, CR 15293.

61. There was testimony before Congress by a public television representative that: "[P]ublic TV is at a natural disadvantage compared with most other program services. Our stations are owned by universities, school systems and nonprofit community groups. We cannot offer an equity position to major cable operators, nor can we offer advertising time to cable systems as do many program services." Source: 1990 House Hearings at 89 (Testimony of George Miles); CR VOL. I.I, EXH. 16, CR 06256.

62. The record before Congress also included this statement: "The fact that cable operators must meet their

financial objectives also suggests carriage and positioning decisions will be designed to benefit cable owned services."

Source: 1989 Senate Hearings at 101 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04111.

63. The record before Congress included the following submission: "Public television provides programs that serve the needs of those unserved or underserved by commercial television. Examples include children, the elderly, the handicapped, and ethnic and racial minorities. Cable operators are generally interested in offering a program lineup with the greatest revenue potential. Thus, there is a substantial risk that many public television stations will not be carried by their local cable systems without must-carry rules." Source: Comments of APTS and PBS in MM Docket No. 88-138 at 7; CR VOL. I.Z, EXH. 140, CR 15291.

64. The record before Congress indicated that: "[p]ublic stations are especially vulnerable to non-carriage by cable systems. Unlike commercial stations, they do not cater to mass audiences. Nor do they offer programming, like specialty cable programmers, that promises to increase the cable operator's potential revenues." Source: Comments of State Public Broadcasting Networks in MM 85-349 at i; CR VOL. I.CC, EXH. 166, CR 16227.

65. There was testimony before Congress that: "There is already evidence that cable operators will structure their program delivery system to benefit cable program services. . . .

A year ago TCI announced that it would be reducing channel capacity in certain systems, in part to raise ratings on cable services. . . . TCI's senior vice president for programming, admitted that TCI reduced the number of channels in a Pittsburgh system from 66 to 44 and stated 'it's not at all clear that more channels are better' for TCI." Source: 1989 Senate Hearings at 101 (Testimony of David Brugger; CR VOL. I.F, EXH. 12, CR 04111.

66. The record before Congress included testimony that analyzing the programming decision-making criteria of cable operators is "likely to be a far better indicator of future behavior than the few drops and shifts in the regulated or 'about-to-be-regulated' market. The major factor cable operators consider in deciding which channels to carry is their ability to generate revenue. . . . Public television services are unlikely to rate high on implicit or explicit criteria in this sort of decision-making." Source: 1989 Senate Hearings at 100 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04110.

67. Senator Gore stated that: "Public television stations are uniquely vulnerable to noncarriage. As we all know . . . cable systems are for-profit enterprises and naturally seek to carry programming which maximizes dollars and audience. Public television, in fulfilling its mandate to serve those audiences not served by commercial enterprises, carries much programming that cable systems find economically unattractive." Source: 138 Cong. Rec. S595 (Jan. 29, 1992) (Statement of then-Senator Al Gore); CR VOL. I.EE, EXH. 198, CR 17136.

68. On the basis of this and other evidence, a congressional committee with responsibility for must carry legislation concluded that: "Because cable operators are for-profit enterprises, they necessarily seek to provide customers with the package of programming and services that will maximize the operators' profits. As commercial enterprises, cable operators ordinarily lack strong incentive to carry programming that does not attract [sic] sufficient dollars or audiences. Traditionally public television has provided precisely the type of programming commercial broadcasters and cable operators find economically unattractive." Source: 1992 House Report at 70; CR VOL. I.A, EXH. 4, CR 00449.

III. EVIDENCE THAT PUBLIC TELEVISION STATIONS HAD BEEN DROPPED OR REPOSITIONED IN THE ABSENCE OF MUST CARRY REGULATION.

A. Evidence Summarizing Public Television Stations' Experiences

69. The record before Congress included a report by the National League of Cities and U.S. Conference of Mayors which states that after judicial elimination of must-carry in mid-1980s, "[c]able operators began dropping broadcast stations, particularly public broadcasting and UHF stations." Source: 1990 House Hearings at 389; CR VOL. I.G, EXH. 13, CR 04586.

70. The record before Congress indicated that at one point in 1983 close to 100 public television stations found themselves dropped by cable operators. Source: 1991 House

Hearings at 835 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07839.

71. The record before Congress included a report by the public broadcasters that by October 1985 "a few public television stations have already been dropped by cable systems, and other public television stations have been asked to pay for carriage by cable systems, sums they can ill afford." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 11 (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

72. The record before Congress included the results of a telephone survey conducted in 1987, in which APTS verified 74 instances in which cable systems had ceased carrying public television signals that were entitled to carriage under the pre-Quincy rules. "This includes 16 local public television stations that were dropped and restored, but does not include drops that NAPTS had not yet been able to verify." Source: Comments of APTS and PBS in 88-138 at 13-14; CR VOL. I.Z, EXH. 140, CR 15297-98.

73. The survey conducted by APTS in 1987 that was included in the Congressional Record revealed that of 74 verified drops of local public stations, about 80% were of UHF stations. UHF stations tend to have greater reception problems, making their viewers more dependent on cable carriage for their reception. "Of the 74 drops, more than half were of stations licensed to local school boards, colleges, or universities.

These types of stations tend to carry more instructional and specifically educational programming than community licensees."

Source: Comments of APTS and PBS in 88-138 at 14; CR VOL. I.Z, EXH. 140, CR 15298.

74. The record before Congress indicated that in 36 of 74 verified drops identified by APTS in a 1987 survey, "the replacement service was a programming service exclusive to cable, generally a so-called cable network such as Discovery or MTV."

Source: Comments of APTS and PBS in 88-138 at 15; CR VOL. I.Z, EXH. 140, CR 15299.

75. The record before Congress indicated that, for 74 verified drops identified by APTS in a 1987 survey, there was a loss of over 2,100,000 cable households that were unable to see a particular local public station on their cable system. Source: Comments of APTS and PBS in 88-138 at 15; CR VOL. I.Z, EXH. 140, CR 15299.

76. The record before Congress indicated that in 1987 APTS verified 128 instances where cable systems had moved public television signals from the cable system channel location on which the signals had been carried prior to July 19, 1985. In addition, eight instances of channel shift threats were reported to NAPTS by local stations. Source: Comments of APTS and PBS in 88-138 at 22; CR VOL. I.Z, EXH. 140, CR 15306.

77. The record before Congress indicated that of the 128 verified local channel shifts identified by APTS in a 1987 survey, about 70% were UHF stations and about 30% were VHF sta-

tions. Sixty percent of those shifted were stations licensed to local school boards, colleges, and universities. Source: Comments of APTS and PBS in 88-138 at 23; CR VOL. I.Z, EXH. 140, CR 15307.

78. The record before Congress included the following: The APTS telephone verification survey conducted in 1987 indicated that about three million cable households were affected by channel shifts of local public television stations. Some viewers were not willing to relocate the station and obtain a converter for some or all sets in the households. These presumably dropped out as viewers of and possible contributors to the affected station. Source: Comments of APTS and PBS in 88-138 at 23; CR VOL. I.Z, EXH. 140, CR 15307.

79. The record before Congress included the following: The APTS telephone verification survey conducted in 1987 revealed that "[t]here are 17 public television stations that have come on the air since July 19, 1985. Informal interviews with these stations reveal that at least one has been shifted upward by a cable system, and three have reported problems obtaining or retaining carriage on local cable systems. One of these three, WMHX, Schenectady, New York, a primarily instructional station which came on the air on September 21, 1987, reports being dropped by Cablevision in Glen Falls, New York, a town within its Grade B contour." Source: Comments of APTS and PBS in 88-138 at 16; CR VOL. I.Z, EXH. 140, CR 15300.

80. There was testimony before Congress that by the spring of 1988 APTS had received 94 reports of cable systems that had dropped public TV stations, in which the service had not been restored. There was also testimony that APTS had had additional reports of drops, but the service had been restored. Source: 1988 House Hearings at 597 (Testimony of David Brugger); CR VOL. I.D, EXH. 9, CR 02684.

81. There was testimony before Congress that by the spring of 1988 APTS had received 197 reports of channel shifting of public TV stations. The President of APTS testified: "That number shifts all the time because it is happening all the time. I just had a letter this week from one up in Wisconsin. The school system has lost service because the cable system channel shifted program of the Wisconsin State network." Source: 1988 House Hearings at 597 (Testimony of David Brugger); CR VOL. I.D, EXH. 9, CR 02684.

82. The record before Congress included the "Cable System Broadcast Signal Carriage Survey Report" issued by the Federal Communications Commission in 1988 ("1988 FCC Survey"), which reported that, of 4,303 cable companies responding to FCC survey, there were 463 total incidents and 347 systems had dropped or denied carriage to a public television station that would have been entitled to carriage under the FCC's former must-carry rules. Source: FCC Cable System Broadcast Signal Carriage Report, MM Docket No. 90-4 at 10 (Sept. 1, 1988); CR VOL. I.P, EXH. 32, CR 10654.

83. The record before Congress included a report that, of 4,303 cable companies responding to the 1988 FCC survey, 432 systems repositioned public television stations, with 182 stations being repositioned and 541 total incidents. Source: Id. at 19, CR VOL. I.P, EXH. 32, CR 10663.

84. The record before Congress included a report that 88 of 237 public television stations responding to the 1988 FCC survey reported that they had been repositioned, with 417 total incidents. Source: Id. at 18, CR VOL. I.P, EXH. 32, CR 10662.

85. The record before Congress included a report that 80 of 237 public TV stations responding to the 1988 FCC survey reported that they had been dropped or denied carriage by a system that would have been required to carry them under the FCC's former must-carry rules, with 345 total incidents of drops or denial of carriage. Source: Id. at 9, CR VOL. I.P, EXH. 32, CR 10653.

86. There was testimony before Congress by an FCC Commissioner in 1988 that: "Public broadcasting was formed by the government to provide a distinctive, separate service. It is funded by the federal and, in many cases, state governments. Yet, the National Association of Public Television Stations informs me that over 100 stations have been dropped by cable systems. In addition, over 100 public stations have had their channels repositioned and some have been forced to share channel space with another program service. . . . Public stations feel and are desperately threatened by no must carry. They should not

have to depend upon plea bargaining or the generosity of a local cable company to reach the audience they are officially licensed by the government to serve." Source: 1988 House Hearings at 307 (Statement of James Quello, FCC Commissioner) (citing letter from David Brugger to Senator Dingell (Mar. 29, 1988)); CR VOL. I.D, EXH. 9, CR 02393.

87. The record before Congress included the following comments made by APTS in early 1991: "Since the beginning of 1990, at least seven [public television] stations serving a total of 263,179 subscribers have been dropped from cable systems that previously carried their signals." Source: Comments of APTS in MM 90-4 at 10 n. 21 (Feb. 14, 1991); CR VOL. I.O, EXH. 43, CR 10117.

88. The record before Congress referred to a mail survey of 196 CPB licensees in 1991 (with 168 responding), in which 16 stations reported that they had been dropped since 1989 by cable systems with headends within 50 miles of the stations' main transmitters. The survey revealed an additional 11 drops of stations beyond 50 miles of the respective cable headend. "In several cases, the dropped stations either provided unique instructional or educational programming to the cable community or were programmed to avoid any substantial duplication with other public television services also available on the system. Moreover, in the majority of cases, local public television stations were replaced with cable-exclusive program services."

Source: Comments of APTS in MM 90-4 at 14-15 (Sept. 25, 1991);
CR VOL. I.P, EXH. 64, CR 10801-02.

**B. Evidence Regarding Drops and Shifts of Individual
Public Television Stations**

89. The record before Congress included the example of Iowa TCI, which moved Iowa Public Television (KIIN) from over-the-air channel 12 to channel 22 in four towns in Dubuque County, an area with hilly terrain. Following that action, "Iowa public television noticed that membership contributions in the area of the channel shift were down 75% as compared to the rest of the state. The channel shift meant that viewers needed a converter for non-cable-ready sets. Many subscribers apparently did not obtain the converters, did not know how to install them, or did not acquire them for second sets in their homes." Source: 1989 Senate Hearings at 102 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04112.

90. The record before Congress included evidence that KOCE, Huntington Beach, California, a public television station, was dropped from the cable system in Glendale, California in 1989. Turner Network Television ("TNT") and Prime Ticket were added by the cable system at that time. Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

91. The record before Congress included evidence that WPBT, Miami, Florida, a public television station, was dropped from a number of local cable systems in October 1990. The

station diverted personnel and financial resources to fight this action but was unable to restore service to all systems. Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

92. The record before Congress included evidence that Connecticut Public Television (which attracts 18 percent of its prime-time audience from Massachusetts) was deleted from the East Lawn Meadow, Massachusetts system in 1988 and 1989 when the system was rebuilt. Source: Comments of APTS in MM 90-4 at 16 (Sept. 25, 1991); CR VOL. I.P, EXH. 68, CR 10803.

93. The record before Congress included evidence that viewers in Hernando, Mississippi lost access to WKNO, Memphis, Tennessee, a public television station, on their local cable system in May 1991. The cable system replaced WKNO with Mississippi ETV, another public television service, despite the fact that Hernando is just 10 miles from Memphis and viewers had become accustomed to receiving WKNO's programming. When WKNO was dropped, the system also added E! (Entertainment Television), a cable-exclusive channel. Source: Comments of APTS in MM 90-4 at 15-16 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802-03.

94. The record before Congress included the following statement: KCSM-TV (San Mateo, CA), a public television station, "is licensed to the San Mateo County Community College district. KCSM was reportedly dropped by at least five cable systems within its Grade B contour, principally during 1986. According to KCSM, the most devastating of these drops was by Viacom Cable in San

Francisco, serving 106,000 subscribers. Although Viacom Cable carries other public television stations, San Francisco cable households were deprived of KCSM's unique mix of programming" (college level telecourses). KCSM "claims to offer more telecourses than any other station in the country. Without warning, Viacom dropped KCSM from its San Francisco cable system during the August enrollment period in the summer of 1986." Source: 1989 Senate Hearings at 100 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04110.

95. The record before Congress included evidence that WNIN, Evansville, Indiana, a public television station, was replaced with CNN on the cable system in Loggotee, Indiana in February 1991." Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

96. The record before Congress included evidence that WJCT, Jacksonville, Florida, a public television station, was dropped by a cable system in Palm Coast, Florida and replaced with instructional programming from a college television station. The drop resulted in viewers losing service from a regional PBS affiliate, including specific programs directed at Palm Coast residents. WJCT launched an aggressive member campaign, and station representatives met with the local operator and the system's parent company to urge that service be restored. The station was off the system for six weeks before reinstatement. Source: Comments of APTS in MM 90-4 at 16 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10803.

97. The record before Congress included evidence that Georgia Public Television was replaced with TNT on a cable system in Peachtree City, Georgia in February 1990. The drop terminated service to 20,000 homes and in-school program services were cut off. Georgia Public Television devoted one staff member on a full-time basis to restoring carriage on the system, and several of the organization's executives joined in the campaign. After one month, the service was reinstated. Source: Comments of APTS in MM 90-4 at 16 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10803.

98. The record before Congress included evidence that "WIPB, Muncie, Indiana, a public television station, was dropped and replaced with the USA Network on the cable system in Bluffton, Indiana in April 1991." Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

99. The record before Congress included evidence relating to WLRN (Miami), a public television station licensed to a local school board. WLRN noticed actual effects in its viewer levels measured by Arbitron ratings, which it felt resulted from cable carriage drops and shifts in its area. After Selkirk Cable in Ft. Lauderdale dropped WLRN around Christmas of 1986, a gradual decline was noted. Following a drop, subsequently restored, by Cablevision of Miami and a shift by Storer Cable of North Miami, the station's cumulative rating dropped to 176,000 in May 1987. As of 1988, the station's subscriber count was still 25,000 cable households less than before its cable carriage

woes began. Prior to November 1986, the audience had been growing dramatically. WLRN generates over 800 hours per year of local programming. It has a regular schedule of programming in both Spanish and Creole and covers high school sports. Source: Comments of APTS and PBS in 88-138 at 20; CR VOL. I.Z, EXH. 140, CR 15304-05.

100. The record before Congress included evidence that WGBX (Boston), a public television station, was dropped by Heritage Cablevision in Providence County, Rhode Island. "This cable system, with 58,000 subscribers, apparently dropped WGBX under the mistaken impression that it was a mere repeat service for WGBH" (Boston). In fact, WGBX is programmed for a variety of specialized audiences" not served by WGBH. Source: Comments of APTS and PBS in 88-138 at 18-19; CR VOL. I.Z, EXH. 140, CR 15302-03.

101. The record before Congress included the following evidence concerning a public television station: "WLRN (Miami) last month learned that Miami Cablevision, a TCI system, had relocated WLRN away from its over-the-air channel (Channel 17) to Channel 26. Many of the 69,000 subscribers to Miami Cablevision 'just lost' WLRN. People lost track of where Channel 17 had gone and assumed it had gone off the air. WLRN feels that the channel shift jeopardized its future fund-raising support and viewer levels." Source: Comments of APTS and PBS in 88-138 at 24; CR VOL. I.Z, EXH. 140, CR 15308.

102. The record before Congress included the following evidence about a public television station: Nebraska ETV Network's KTNE was moved from Channel 8 to Channel 28 in Alliance, Nebraska, by the Alliance Community TV Company. The former channel number was subsequently restored, but in the meantime ETV Network received many complaints from subscribers and anticipates a decline in member contributions. Subscribers complain that the higher number required an additional converter box, which costs extra for second sets. One former member of KTNE returned his membership pledge form refusing to contribute until KTNE was moved to a channel with better reception. Other viewers complained that the necessity of the converter box required people with remote control units that only work up to Channel 13 to get up from their seats to change the channel, and that this posed a special problem for older citizens. Viewers also complained that the reception was much poorer. Source: Comments of APTS and PBS in 88-138 at 25-26; CR VOL. I.Z, EXH. 140, CR 15309-10.

103. The record before Congress included the following evidence about a public television station: "WCET (Cincinnati, OH) was dropped on April 1, 1988, by Viacom Cable in Dayton. WCET was replaced with the Discovery Channel. While Viacom continued to carry the Dayton public television station, WCET alone provides a number of instructional programs and also provides a number of local companion documentaries which supplement the Project Literacy outreach program, as well as classic

movies on Saturday nights. PBS programming on the two stations is usually scheduled at different times." Source: Comments of APTS and PBS in 88-138 at 18; CR VOL. I.Z, EXH. 140, CR 15302.

104. The record before Congress included the following evidence about a public television station: "In 1986, KCSM (San Mateo, CA) was dropped by at least five cable systems within its Grade B contour. The most devastating of these drops was by Viacom Cable in San Francisco, serving 106,000 subscribers . . . KCSM offers unique college level telecourses, and claims to offer more telecourses than any other station in the country." As a result of a drop without notice in the summer of 1986, KCSM estimates that it lost more than half of its paying telecourse enrollments. In addition, other people were deprived of this educational enrichment. Two representative complaint letters from viewers were attached as part of the record before Congress. Source: Comments of APTS and PBS in 88-138 at 17; CR VOL. I.Z, EXH. 140, CR 15301.

105. The record before Congress indicated that viewers in Miami, Florida, gradually saw an erosion in access to WLRN-TV, Channel 17, a public television station licensed to a local school board in Miami. The record included the following testimony: "The cumulative Arbitron rating of WLRN declined steadily from 223,000 households in November 1986 to 197,000 in 1988, in part because of drops and shifts by Miami-area cable systems. Before November 1986, WLRN's audience had been steadily increasing. Loss of access to WLRN is particularly damaging

given that the station leads the nation in hours of local programming produced, much of it targeted to minorities and women." Source: Comments of APTS in MM 90-4 at 11 (Feb. 14, 1991); CR VOL. I.O, EXH. 43, CR 10118.

106. The record before Congress included an application by WNYC, a public television station, for a Temporary Restraining Order prohibiting Manhattan Cable from shifting its channel. Source: Memorandum in Support of WNYC's Application for a Temporary Restraining Order, TBS v. FCC, CA No. 92-2247; CR VOL. I.N, EXH. 27, CR 09652.

107. The record before Congress included the following evidence about a public television station: "[T]he state of Virginia contracts with WTVT in Northern Virginia to provide instructional television for school use. One cable company dropped the station from its carriage, resulting in a loss of instructional television service in 14 schools within its coverage area. Pressure from the schools themselves convinced the cable operator to restore WTVT's signal." Source: 1989 Senate Hearings at 99 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04109.

108. The record before Congress included the following: WFYI, Indianapolis, Indiana, a public television station, was dropped from the cable system in New Castle, Indiana, in June 1991. The Encore programming service was added. Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

109. The record before Congress included the following evidence about a public television station: "WKAR, East Lansing, Michigan was dropped from the system in Battle Creek in June 1991, thus depriving viewers of WKAR's coverage of the Michigan Legislature. WKAR is the only public television station in Michigan providing coverage of the State Capitol. The cable operator added Encore and rearranged the system to provide an 'extended basic tier.'" Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

110. The record before Congress included the following: The educational programming provided by WVUT, Vincennes, Indiana, a public television station, to the cable system in Jasper, Indiana was deleted in June 1991. Encore, Court TV and Prime Sports Network were added. Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

111. The record before Congress included the following: Four thousand viewers in Luling, Louisiana have been unable to receive college credit, GED and other literacy programs offered by Louisiana Public Broadcasting since Oct. 1990, when a local cable system dropped LPB's services. WYES, New Orleans, still on the cable system, does not offer these educational services." Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

112. The record before Congress included the following: "KCWC, Riverton, Wyoming, a public television station, conducted an unsuccessful campaign to obtain carriage on its local cable

system. The operator chose to continue carrying a more distant public television station. Source: Comments of APTS in MM 90-4 at 21 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10808.

113. The record before Congress included a letter from the Director of the Ohio University Telecommunications Center informing the FCC that immediately after the D.C. Circuit's decision in Quincy, his public television station (WOUB-TV) had been dropped from a cable system located in its Grade B contour. He noted that the immediate impact of this drop was "to deny over 6,000 Ohio youngsters access to publicly funded instructional television programming and to cut off the remaining local public television program service from WOUB-TV which is the only television station of any kind operating in the region." He also noted "[w]hy is this being done? It is not due to a lack of channel capacity. It is not due to a lack of subscriber and community interest. It is because the operator realizes that he no longer has a regulatory obligation and has chosen to replace this tax supported public educational channel with an electronic billboard where he can sell advertising." Source: Letter from Ohio University Telecommunications Center to FCC, in MM Docket No. 85-349 (June 23, 1986); CR VOL. I.CC, EXH. 175, CR 16564.

114. The record before Congress also included a letter from WNYC, a public television station, informing the FCC that after the Quincy decision it had been dropped or realized a reduction in carriage hours on at least seven cable systems. This station noted: "Generally, a Pay-TV service has replaced

the channel WNYC-TV had been on prior to the 1985 ruling. In most cases where WNYC shares the channel position (which occurs on 16 cable systems), we are shared with a Pay-TV service. Clearly the cable operator is interested in securing income." Source: Materials submitted by WNYC in MM Docket No. 88-138 (July 8, 1988); CR VOL. I.Z, EXH. 134, CR 15245.

115. The record before Congress included evidence that WPBT, a public television station, was repositioned by Americable Associates from channel 8 to cable channel 16. This move was made without notification to WPBT-2 and occurred during its membership drive. In order to access channel 16, subscribers without a "cable-ready" television set had to lease a converter box. Source: Letter from WPBT-2 (Miami) to J. Cadwuller, National Association of Broadcasters, May 6, 1988, in Comments of National Association of Broadcasters in MM Docket No. 88-138 at Appendix C (July 8, 1988); CR VOL. I.Y, EXH. 128, CR 14796

116. The record before Congress included the following evidence concerning a public television station:

The dilemma of new stations is aptly illustrated in Pittsburgh. Metropolitan Pittsburgh is presently involved in the restoration of Station WQEX(TV), Pittsburgh, Pennsylvania, which has been dark for over one year. Metropolitan Pittsburgh anticipates investing approximately \$1 million in station renovations. . . . The station is being revived because there is a need in Pittsburgh for a new mix of instructional, informational and cultural programming. Metropolitan Pittsburgh anticipates at this time that little or none of the new station's fare will be duplicative of the existing Station WQED-TV programming.

. . . Metropolitan Pittsburgh's ability to achieve its goals for Station WOEX (TV) depends largely on the availability of adequate cable carriage. Cable penetration in the Pittsburgh market is a high 58%. As such, the majority of the station's potential audience may never have a practical opportunity to view the station absent cable carriage. . . . Lack of viewers will translate directly into a lack of station members and membership dollars. Lack of funds could result in curtailment or termination of station operations, thereby depriving the public of a new and important source of programming.

Source: Joint Comments of Metropolitan Board of Education, et al., in MM Docket No. 85-349 (April 25, 1986); CR VOL. I.CC, EXH. 172, CR 16505-06.

C. Evidence That The Historical Drop/Shift Statistics Understated the Extent of the Problem For Public Television Stations

117. The record before Congress regarding public television included the following: "Data on drops and shifts is extremely difficult to assemble with accuracy. Many stations are unaware of which cable systems are carrying them, on which channels, and whether such systems are within their grade B contour. Cable lineups can change, making up-to-date information difficult to obtain. There is no requirement that cable systems notify dropped stations that they have been dropped." Source: Comments of APTS and PBS in 88-138 at 12-13; CR VOL. I.Z, EXH. 140, CR 15296-97.

118. The record before Congress regarding public television indicated that "[n]ot all stations reporting drops have the resources to devote to determining the precise amount of the

viewing audience lost as the result of cable drops." Source: Comments of APTS in MM 90-4 at 18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10805.

119. The record before Congress included the following statement by a public television representative: "Actual drops do not tell the whole story. Many stations expend limited resources to keep cable services from dropping them or to get service restored." Source: 1991 House Hearings at 842 (Attachment to testimony of Henry Becton); CR VOL. I.J, EXH. 18, CR 07846.

120. The record before Congress included the following statement by public television organizations: "Adverse effects may take many years to become apparent. The experience of individual public television stations may be too brief to reveal the full story." Source: Comments of APTS and PBS in 88-138 at 10; CR VOL. I.Z, EXH. 140, CR 15294.

121. The record before Congress included the following statements by public television organizations: "The period 1985 to 1988 is not a fair test period for determining the behavior of cable operators in an unregulated market. Must-carry rules were under consideration, and cable operators were cautioned by NCTA to be on their best behavior. In addition, must-carry regulations created habits and patterns of behavior among cable operators. These are likely to disappear as market incentives are better understood." Source: Comments of APTS and PBS in 88-138 at 3; CR VOL. I.Z, EXH. 140, CR 15287-88.

122. The record before Congress included the following statement by a public television representative concerning cable carriage: "The situation is better today, but problems still occur and the threat remains -- particularly as the market becomes more competitive for cable operators as they seek to maximize their profits." Source: 1991 House Hearings at 835 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07839.

123. The record before Congress included the following testimony by a public television representative: "Public television believes that, as the must carry rules recede further into the past, cable operators will continue to drop, shift or exclude public television services at an accelerating rate. Both FCC and NCTA data show that not all cable operators would choose to carry all local public television services. If they do carry them, they may relegate them to undesirable channel positions. Even carriage on a station's assigned channel could cause quality reception problems because of co-channel interference." Source: 1989 Senate Hearings at 102 (Testimony of David Brugger); CR VOL. I.F, EXH. 12, CR 04105.

124. The record before Congress included testimony by a public television representative that "drops to date cannot accurately predict future harm. Cable systems have been on their best behavior. Market incentives will prompt cable operators to drop cable television stations in an unregulated environment. Cable systems find public television programming to be "economically unattractive." Source: 1991 House Hearings at 843

(Attachment to Statement of Henry Becton); CR VOL. I.J, EXH. 18,
CR 07847.

**IV. EVIDENCE THAT MUST-CARRY REQUIREMENTS HELP TO ENSURE THE
"WIDESPREAD DISSEMINATION OF INFORMATION FROM A MULTIPLICITY
OF SOURCES"**

125. The record before Congress indicated that revenue is not the "bottom line" for public television stations. Comments by public television stations included the following statements: "Public television's goal is the delivery of a quality alternative programming service to all Americans. Diversity of programming and universality of service are the real yardsticks by which to measure public television's success. For every cable subscriber lost, there is a real, measurable loss." Source: Comments of APTS and PBS in 88-138 at 26; CR VOL. I.Z, EXH. 140, CR 15310.

126. The record before Congress included a letter from a cable subscriber who lost access to KCSM, a public television station, and who wrote that "my family would be lost without it. I have taken many TV courses on it and continue to do so, also my sons that are now 27 years old. They work various shifts and some semesters it is the only way they can get in a college course. It is also so very good for poor folks that find this is the only way they can further any kind of education at this time[.]" Letter from M. Anderson (viewer) to Western Cable TV, Nov. 19, 1986, in comments of NAPTS and PBS in MM Docket No. 88-138, (July 8, 1988); CR VOL. I.Z, EXH. 140, CR 15317.

127. The record before Congress also included a letter from another Sammons subscriber who complained about the loss of Japanese-language programming with the drop of WNYC. The letter stated: "My wife, who is Japanese, is very upset as are many of her friends." Source: Letter from McCallister (viewer) to Borrelli, August 25, 1986 in FCC 88-138; Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab S.

128. The record before Congress also included a letter from a cable subscriber whose public television station was repositioned to a channel requiring a converter box. The subscriber wrote that her children were no longer able to watch Sesame Street. Letter from N. Price (viewer) to Alliance Cable TV, in comments of NAPTS and PBS in MM Docket No. 88-138 (July 8, 1988), Attachment 8; CR VOL. I.Z, EXH. 140, CR 15322.

129. The record before Congress indicated that WOUB-TV was dropped because the cable operator wanted only one public television station, even though the two stations carried the same programming only 1% of the time. Source: Letter from Ohio University Telecommunications Center to FCC, in MM Docket No. 85-349 (June 23, 1986); CR VOL. I.CC, EXH. 175, CR 16563.

130. In connection with consideration of must-carry legislation, Senator Adams stated that: "The must-carry provision is essential to protect public television and the rights of small independent commercial stations. Without this, these stations could be swept off cable or be saddled with obscure channel positions on the cable dial. The must-carry

provision also guarantees the actual distribution of public television and small independent commercial TV stations."

Source: 138 Cong. Rec. S592 (Jan. 29, 1992); CR VOL. I.EE, EXH. 196, CR 17132.

131. The record before Congress included the following statement by public television organizations: "Individual drops and shifts can cause major harm, even if not part of nationwide trends. The harm caused by loss of even one public station to one cable system's subscribers cannot be understated." Source: Comments of APTS and PBS in 88-138 at 10; CR VOL. I.Z, EXH. 140, CR 15294.

132. The record before Congress included the following statements by public television organizations: "[E]ven if a public television service is not dropped, it may be subject to pressures to compromise its service objectives -- that is, to shift toward programming with a broader appeal in order to enhance its prospects for cable carriage." Source: Comments of APTS in MM 89-600 at 3-4; CR VOL. I.T, EXH. 103, CR 12185-86.

133. The record before Congress indicated that: "Cable carriage decisions have resulted in the loss of valuable educational services. Each instance of a cable system's termination of carriage of a local public television station causes harm, not only to the schools and cable subscribers, but also, because of viewer and revenue loss to the public television station dropped, to all of the other viewers of the public station." Source:

1989 Senate Hearings at 99 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04109.

134. The following statement by a public television representative was included in the record before Congress:

"[W]ithout mandatory carriage, there is no guarantee that cable systems will carry even one local PTV station. Instead, if they decide to carry any PTV station at all, they could opt for a distant, larger, more powerful PTV station. Even if they carry one local PTV station, they will likely not carry a second or a third local PTV station, on the assumption that only the programming fed by PBS needs to be carried. This assumption ignores the plethora of educational programming geared to the local community that is provided by PTV stations throughout the day, as well as the wealth of regional programming not distributed through PBS. Such programming differs greatly from station to station within the local market. Thus, without mandatory cable carriage, there will be a severe reduction in the diversity of programming available through PTV stations to the American people." Source: 1988 House Hearings at 602 (Letter from Donald Ledwig to Rep. Markey (Apr. 8, 1988)); CR VOL. I.D, EXH. 9, CR 02689.

V. EVIDENCE THAT MUST-CARRY HELPS TO PRESERVE PUBLIC TELEVISION STATIONS' ABILITY TO ATTRACT AND MAINTAIN FINANCIAL SUPPORT.

135. Congress was aware that "public television stations receive 21 percent, or more than \$263 million, of their

annual funding from private individual contributions, the largest single source of funds for public programming. . . . Viewers have invested \$11 billion in public television since 1972. When a local public television station disappears from a cable system, it loses its ability to reach out to viewers on the system and to attract contributions that underwrite a large part of the station's service to the community. Local viewers, in turn, lose access to the unique public television programming that their contributions and volunteer efforts support." Source: Comments of APTS in MM 90-4 at 17-18 (Sept. 25, 1991) (internal citations omitted); CR VOL. I.P, EXH. 64, CR 10804-05.

136. There was testimony before Congress by an FCC Commissioner that: "The most significant problem confronting public television today is adequate funding. As the former Chairman of the Temporary Commission on Alternative Financing for Public Telecommunications, I can attest to the difficulties public stations have in securing non-government funds. The dropping of a public television station can have enormous impact on a station's revenues. . . . Given current uncertainties surrounding the levels of government funding for public broadcasting, declines in revenues from being dropped by cable operators can be devastating. Moreover, some advertiser supported cable networks compete with public television for programming. Increased cable revenues combined with decreases in funding place public television in a form of double jeopardy."

Source: 1988 House Hearings at 323-24 (Statement of James Quello); CR VOL. I.D, EXH. 9, CR 02409-2410.

137. The record before Congress indicated that: "[T]he financial losses resulting from cable drops ultimately disadvantage cable and over-the-air audiences alike. Clearly, membership contributions from cable subscribers are an important component of a station's overall support. When those dollars are lost because of non-carriage, a station's ability to continue serving the entire viewership is diminished. If enough losses occur, a station can easily slip below the level of viability required to continue providing service to its entire audience. The consequence is a significant loss of diversity of programming for all viewers. Under a telecommunications policy which seeks to 'assure that cable communications provide the widest possible diversity of information sources and services to the public,' this loss of diversity is plainly antithetical to the federal interest." Source: Comments of APTS in MM 90-4 at 18-19 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10805-06.

138. The record before Congress indicated with respect to public television that: "The loss of viewers inherent in a loss or degradation of cable carriage often means a loss of membership contributions. These are a significant percent of public television support. Even though revenues may not be the bottom line, financial stability is essential to public television's ability to fulfill its mission to reach the largest number of Americans possible with quality alternative

programming." Source: Comments of APTS and PBS in 88-138 at 27; CR VOL. I.Z, EXH. 140, CR 15311.

139. The record before Congress included the following: "Each instance of a cable system's termination of carriage of a local public television station causes harm not only to the cable subscribers, but also, because of viewer and revenue loss to the public television station dropped, to all of the other viewers of the public television stations." Source: Comments of APTS and PBS in 88-138 at 16-17; CR VOL. I.Z, EXH. 140, CR 15300-01.

140. The record before Congress indicated that: "Non-carriage results in reduced viability of public television stations because "[l]oss of cable viewers means loss of private contributions, the largest single source of funds for public programming. Without key financial support from cable households, public television stations can easily slip below the level of viability required to serve its broadcast audiences." Source: 1991 House Hearings at 843 (Attachment to Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07847.

141. The record before Congress contained the following statement by a public television representative: "Every drop by a cable system of a public television station is harmful to the public television station. To illustrate this point we have enclosed a sample of letters from cable subscribers to operators complaining about cable drops or to public stations discontinuing financial support because they no longer receive the station. This mail shows Americans angered by their inability to view the

very public television that their tax dollars help to pay for. It also shows public stations losing desperately-needed public contributions." Source: 1988 House Hearings at 323 (Statement of Commissioner James Quello, quoting Senator Dingell. (Mar. 29, 1988)); CR VOL. I.D, EXH. 9, CR 02409.

142. There was testimony before Congress with respect to public television that "[w]here a station has dedicated a great deal of time and effort to building station identification on a particular cable channel, any move can be devastating, even if the shift is to the (usually higher) over-the-air channel number." Source: 1989 Senate Hearings at 102 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04112.

143. The record before Congress included evidence that WKNO, a public television station, lost members after it was dropped from the cable system in Hernando, Mississippi. Source: Comments of APTS in MM 90-4 at 18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10805.

144. The record before Congress also included evidence that WNIN, a public television station, reported a membership loss after it was dropped from the cable system in Loogootee, Indiana. Source: Comments of APTS in MM 90-4 at 18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

145. The record before Congress also included evidence that WIPB, a public television station, suffered a membership loss after it was dropped by the cable system in Bluffton,

Indiana. Source: Comments of APTS in MM 90-4 at 18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10805.

146. The record before Congress included the following: "TCI decided to move Iowa public television's KIIN from its over-the-air Channel 12 to Channel 22 in four towns in Dubuque County. Cable carriage is particularly important in [this] county because of its hilly topography. After the shift, Iowa public television noticed that membership pledge increases from the area of the channel shift were down 75% as compared to the rest of the state. The channel shift meant that viewers needed a converter for non-cable-ready sets. Many subscribers apparently did not obtain the converters, did not know how to install them, or did not acquire them for second sets in their home. Thus it is likely that a decline in viewership affected membership contributions from the area." Source: Comments of APTS and PBS in 88-138 at 24-25; CR VOL. I.Z, EXH. 140, CR 15308-09.

147. The record before Congress included the following evidence about a public television station: "In San Mateo, California, KCSM-TV, Channel 60, a university licensee, was dropped by at least five cable systems within its Grade B contour. The effect of being dropped from even just one of these systems -- the one serving San Francisco -- was for 106,000 cable subscribers to lose access to KCSM. KCSM primarily offers college-level telecourses and was dropped in San Francisco during the height of its 1986 fall enrollment period. As a result, KCSM estimates that it lost more than half of its paying enrollment."

Source: Comments of APTS in MM 90-4 at 11 (Feb. 14, 1991); CR VOL. I.Z, EXH. 140, CR 15301.

148. The record before Congress also included the following: "WKAR, a public television station, reported a loss of 592 contributing members in the Battle Creek area when the station was dropped from the local cable system." Source: Comments of APTS in MM 90-4 at 18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10805.

149. The record before Congress included a 1991 APTS survey that revealed that many public television stations annually devoted thousands of dollars and hundreds of staff hours to promoting carriage among local cable operators to guard against deletion of their signals. The record also indicated that many stations monitored local systems to guard against drops undertaken without advance notice from the cable operator. Public television organizations advised Congress that: "These efforts, which would largely be unnecessary in a must-carry environment, drain away funds that stations otherwise could invest in programming and other service to local viewers." Source: Comments of APTS in MM 90-4 at 6 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10793.

150. The results of the 1991 APTS survey of public television stations were reported to Congress as follows: "Among the 93 stations that provided cost estimates for their 'cable relations' efforts, spending averaged \$4,800 annually and ranged as high as \$30,000. Approximately 20 stations reported

expenditures of \$8,000 or more annually to remain in contact with their local cable systems, and the staff members dedicated to these efforts spent as much as 30 to 50 percent of their time on cable issues." Source: Comments of APTS in MM 90-4 at 20 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10807.

151. The 1991 APTS survey also reported that local public television stations "devote considerable time, personnel and money to cable monitoring and marketing. For example, of the 151 licensees that have specific marketing schemes:

89 percent contact cable operators directly

70 percent promote cable viewing through program guides

22 percent use special events to increase cable viewer awareness

22 percent use newsletters to reach members, and

32 percent use other mechanisms."

Source: Comments of APTS in MM 90-4 at 20 (Sept. 25, 1991).
CR VOL. I.P, EXH. 64, CR 10807.

152. The 1991 APTS survey of public television stations concluded that: "[A] substantial majority of all stations channel considerable time, personnel, money and effort into cable carriage campaigns on a continuing basis. Every dollar invested in these efforts is a dollar unavailable for meaningful service to public television viewers in programming, follow-up educational efforts and local production." Source: Comments of

APTS in MM 90-4 at 21 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10808.

153. The record before Congress indicated that "seven out of ten stations responding to the 1991 APTS survey of CPB licensees had assigned at least one staff member to monitoring and promoting cable carriage, and over half of the respondents spend thousands of dollars annually marketing their services to cable operators. These efforts divert precious financial resources from the stations' programming and community outreach and represent funds that are unavailable to support programming acquisition and production." Source: Comments of APTS in MM 90-4 at 19 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10806.

154. The record before Congress included a submission from Wyoming Public Television reporting that it spent nearly a quarter of a million dollars to upgrade its equipment in an unsuccessful attempt to persuade Casper Cable Company to carry its signal in Casper, Wyoming. Source: Comments of Wyoming Public TV, in MM Docket No. 90-4 at 2 (Sept. 26, 1991); CR VOL. I.Q, EXH. 72, CR 11054.

155. The record before Congress included the following: WUFT, Gainesville, Florida, a public television station, incurred substantial costs in 1991 in an extensive campaign to restore carriage on local cable systems that dropped the station's signal. Source: Comments of APTS in MM 90-4 at 20 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10807.

156. The record before Congress included the following: KCET, Los Angeles, a public television station, provides press releases, preview tapes, outreach and promotional materials to cable systems and is an active member of the regional cable association. Source: Comments of APTS in MM 90-4 at 20 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10807.

157. The record before Congress included the following: KOCE, Huntington Beach, California, a public television station, has upgraded its transmitter, produced promotional spots to inform viewers where to find the station on the cable system and purchased special Arbitron cable reports. Source: Comments of APTS in MM 90-4 at 20-21 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10807-08.

158. The record before Congress indicated that: "Local cable carriage has profound ramifications on a station's ability to attract and maintain financial support. Therefore, the business planning and fundraising of public television stations cannot be dependent solely on the goodwill of cable operators. Legally-assured cable carriage is especially critical in a market where cable operations are bought and sold frequently. Scarce dollars and time spent convincing a cable manager to carry a public television station will be wasted if the cable operator's management changes. Because of the substantial government interest underlying, as well as the government's 25-year, \$1.5 billion investment in public television, public TV cannot be left to survive or die based on the business decisions of

commercially-motivated cable operators." Source: Comments of APTS and PBS in 88-138 at 9; CR VOL. I.Z, EXH. 140, CR 15293-94.

159. There was testimony before Congress by a public television representative that: "Loss of carriage can start a whole chain reaction. If we lose viewers, we lose the viewers' contributions, and that is now the largest single source of funds for public television. If they do not have those funds, they cannot meet the matching funds that we need for other Federal and non-Federal funders. . . . These are difficult issues for public TV because our return on investment is the public interest, paid for, to a great extent, with tax dollars." Source: 1988 House Hearings at 522 (Testimony of David Brugger); CR VOL. I.D, EXH. 9, CR 02611.

160. The record before Congress included the following: "[E]ach public television station that loses cable carriage suffers a loss in audience and viewer contributions, which reduces the ability of that station to acquire programming to service its community. This loss of carriage of individual stations exerts a cumulative drag on the ability of the stations to finance production of new and innovative programming, because public television funds many of its programs collectively through such mechanisms as the Station Program Cooperative and the Program Challenge Fund. Thus, carriage loss of each individual station harms the overall public television system." Source: 1988 House Hearings at 602 (Letter from Donald Ledwig to

Congressman Markey (Apr. 8, 1988)); CR VOL. I.D, EXH. 9, CR 02689.

161. The record before Congress indicated that:
"[B]ecause of the interdependence of public television program producers and stations -- with the producers relying on financial support from the stations and the stations, in turn, relying on program producers for continued quality programming -- a diminution in the economic strength of individual stations affects the overall program quality and diversity that all stations offer. Thus, any significant loss in cable carriage can, and will, have a substantial impact not only on individual stations, but also on the public television system as a whole."
Source: Joint Petition of CPB, APTS, and PBS for Rulemaking (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

162. The record before Congress included the following:
"The Public Broadcasting Act authorizes financing for public broadcasting stations on the basis of a matching formula of nonfederal to federal financing. Today, public television stations exceed their matching requirement to receive the full amount of funds authorized by the Act. However, if enough stations suffered a substantial reduction in their contributions as a result of loss of carriage on their local cable systems, the overall amount of federal financing intended by Congress to be available to public broadcasting could be reduced." Source: 1988 House Hearings at 602 (Letter from Donald Ledwig to

Congressman Markey (Apr. 8, 1988)); CR VOL. I.D, EXH. 9, CR 02689.

163. The FCC informed Congress that: "The continued viability of noncommercial television (which by its very nature is affected by market forces in different ways than are commercial broadcasting) may depend on targeted mandatory carriage obligations for multichannel video providers." Source: FCC Report to Congress in Docket No. 89-600 (7/26/90); CR VOL. I.L, EXH. 23, CR 08973.

164. During consideration of must-carry provisions, Senator Gore stated that: "The impact of noncarriage is particularly devastating to public television stations. The largest single source of funding for public television is from private individual contributions. When a local cable system drops a public television station, its contributions from its cable viewers are in jeopardy. Without the key financial support from its cable audience, a public television station can easily slip below the level of viability required to continue to provide service to its broadcast audience. Stations not only lose audience and contributors, they also lose paying enrollees to their college telecourses, and elementary and high school students are deprived of their instructional programming. I was amazed to learn that sixty-nine percent of the public television stations that provide instructional programming to schools distribute that programming via cable." Source: 138 Cong. Rec.

S595 (Jan. 29, 1992) (Statement of then Senator Gore); CR VOL. I.EE, EXH. 198, CR 17136.

VI. EVIDENCE THAT THE MUST-CARRY PROVISION FOR PUBLIC TELEVISION STATIONS IS NARROWLY TAILORED

A. Evidence that Over-the-Air Broadcasting Is Not An Acceptable Alternative

165. The record before Congress indicated that the most important component in assuring adequate UHF reception is the adequacy of the receiving antenna systems, and that subscribers to cable systems are unlikely to incur the substantial costs associated with purchasing their own quality receiving systems given that they often subscribe to cable service for just such quality reception. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 15; CR VOL. I.CC, EXH. 166, CR 16243.

166. The record before Congress included evidence that apartment and condominium dwellers rarely have an opportunity even to install an outdoor antenna. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 15 n.18; CR VOL. I.CC, EXH. 166, CR 16243.

167. The record before Congress also included evidence of the complexity of manually orchestrating the cable converter (which must be turned off or disconnected), an A/B switch, the TV tuner adjustment, plus any necessary redirectionizing of the antenna. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 16 n.19; CR VOL. I.CC, EXH. 166, CR 16243.

168. The following appears in the record before Congress: "[P]ublic station transmitters are [frequently] located on state-owned property" which is more economical but may offer less powerful coverage than transmit sites atop mountains or tall structures. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 14; CR VOL. I.CC, EXH. 166, CR 16242.

169. The following also appears in the record before Congress: "In other instances, the station transmit sites are engineered to serve the largest geographical area, frequently resulting in relatively weaker signals over the large population areas." Source: Comments of State Public Broadcasting Networks in MM 85-349 at 14; CR VOL. I.CC, EXH. 166, CR 16242.

170. The record before Congress indicated that in light of public television's dependence on UHF channels, "the availability of the A/B switch will not . . . provide a viable alternative to cable carriage since homes equipped with A/B switches may not be able to receive an adequate over-the-air signal even though they are within the station's service contour. Moreover, as the [FCC] itself concluded, the most important component in assuring adequate UHF reception is the adequacy of the receiving antenna systems, and subscribers to cable systems are unlikely to incur the substantial costs associated with purchasing their own quality receiving systems given that they often subscribe to cable service for just such quality reception." Source: Joint Petition of CPB, APTS, and PBS for

Rulemaking at 9 (Oct. 15, 1985) (citing Report and Order, in Docket No. 78-391, 90 F.C.C. 2d 1121, 1124-25 (1982)).

171. The record before Congress indicated that:
"Because of the 'UHF handicap,' the availability of an A/B switch permitting viewers to toggle between cable and over-the-air broadcasting cannot diminish the substantial harm that the public suffers when distinctive public television services are excluded from cable systems." Source: Comments of APTS in MM 89-600 at 22; CR VOL. I.T, EXH. 103, CR 12204.

172. Congress was aware of evidence that "fewer than 1 percent of cable subscribers have an outdoor antenna and an A/B switch." 1992 House Report at 70 (citing 1985 study submitted by National Association of Broadcasters); CR VOL. I.A, EXH. 4, CR 00449.

173. On the basis of this and other evidence, Congress concluded that: Various technical factors considered by the Committee convince it that continued over-the-air broadcasting by public television stations is not an answer to this problem. "In many places, due to terrain problems and buildings, high quality over-the-air signals cannot be received. Two-thirds of public television stations operate on the UHF band, which is far more vulnerable to interference from the earth's contours and atmospheric disturbances than the predominantly commercial VHF band." If cable retransmission of these signals, which has counteracted this UHF handicap, were unavailable, these public television stations would be severely disadvantaged. "Even where

there is no UHF or terrain handicap, cable subscribers must have both an input selector switch and an exterior antenna in order to receive high-quality television signals over the air. Evidence shows that fewer than 1 percent of cable subscribers have an outdoor antenna and an A/B switch [citing 1985 ELRA study submitted by NAB]. Both the cable and broadcast industries, in filings before the Commission and Congress, have stated that the A/B switch is not the solution. The Committee finds, based on this and other evidence before it, that the technical and economic complexities involved with the A/B switch make it an unworkable solution. Under these circumstances, the Committee believes that there is a very significant danger that millions of Americans that now subscribe to cable will be cut off from the services of this local public institution which they support." Source: 1992 House Report at 70-71; CR VOL. I.A, EXH. 4, CR 00449-50.

B. Evidence About PEG Channels

174. Congress was aware that there was unused capacity on public, educational and governmental ("PEG") channels. Source: 138 Cong. Rec. H6554 (July 23, 1992) (Statement of Rep. McMillen); CR VOL. I.EE, EXH. 195, CR 17128.

C. Evidence Concerning The 1990 NCTA-APTS Agreement

175. Congress was aware of the 1990 must-carry agreement between APTS (then known as "NAPTS") and the National Cable Television Association ("NCTA") and the fact that this agreement was reflected in H.R. 4415. Source: 1990 House

Hearings at 89 (Statement of George Miles); CR VOL. I.I, EXH. 16, CR 06255.

176. The record before Congress included the testimony of James Mooney, the President and Chief Executive Officer of the NCTA, who described the agreement as "a pure and simple must carry rule" and "a workable compromise guaranteeing that public television will remain an integral part of cable's basic programming package." Source: 1990 House Hearings at 151, CR VOL. I.I, EXH. 16, CR 06318; see also 1990 Senate Hearings at 70, CR VOL. I.H, EXH. 15, CR 05644.

177. The record before Congress included testimony by a public television representative that the 1990 NCTA/APTS agreement "accomplishes its intent without placing an undue financial burden on the cable industry. Based on our initial analysis, only three percent of the nation's cable systems -- largely limited to seven television markets -- would be required to carry more than two stations." Source: 1991 House Hearings at 835 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07839.

178. Congressman Rinaldo described the 1990 NCTA-APTS agreement as one that "is fair to both sides and benefits both sides. Most of all it benefits the public, who will be assured of receiving the public television which their tax dollars support." Source: 1990 House Hearings at 87; CR VOL. I.I, EXH. 16, CR 06254.

179. The record before Congress included testimony that, with respect to must carry for public television stations, "there appears to be no conflict between public television's position and that of the cable industry." Source: 1991 House Hearings at 835 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07839.

180. The record before Congress included no opposition to the 1990 NCTA-APTS agreement either in Congress or before the FCC. Source: Reply comments to APTS, MM Docket No. 90-4 at 2, 3, n.6 (Oct. 25, 1991); CR VOL. I.Q, EXH. 79, CR 11318-19.

D. Evidence on the Overall Impact of Must-Carry on Cable

181. On the basis of this and other evidence, Congress concluded that "[t]he burden imposed on the cable industry by the legislation is minimal. Data compiled by the Association for Public Broadcasting indicate that mandatory carriage of all qualified local public television stations whose programming is substantially unduplicated would have the following effect on the cable industry: 84 percent of the nation's cable systems would be required to carry one public television service; 13 percent could be required to carry two public television stations; and 3 percent of all systems could be required to carry more than two services. All of these systems are found in seven television markets: New York, Los Angeles, Chicago, San Francisco, Boston, Washington (D.C.), and New Orleans. . . . [T]o ensure that the impact of the legislation is limited (in terms of the public television stations to be added to cable systems), the

legislation has not adopted such a blanket 'must carry' requirement. Instead, it requires that cable systems carry only qualified local public television stations that request carriage. In addition, the legislation minimizes the effect on small- and medium-sized cable systems by imposing caps on the number of public television stations that must be carried by systems with limited channel capacity. Furthermore, the legislation does not require systems of more than 36 channels to carry substantially duplicated public television services if such a system otherwise would have to carry more than three public stations." Source: 1992 House Report at 71; CR VOL. I.A, EXH. 4, CR 00450.

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