

[REDACTED]

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'
MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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INTRODUCTION

The public broadcasters showed in their summary judgment papers filed on May 26 that substantial evidence supports Congress' decision to enact Section 5 of the 1992 Cable Act and that the provision is constitutional as a matter of law.¹ While plaintiffs purport to seek summary judgment regarding Section 5, they say little about public television. Their briefs focus almost entirely on Section 4, the commercial must-carry provision. Most of plaintiffs' arguments -- including those involving retransmission consent, the financial health of many commercial network affiliates, advertising revenues, and the Century rules -- have little or nothing to do with public television. Plaintiffs acknowledge that Section 5 essentially adopted a 1990 legislative proposal endorsed by plaintiff NCTA.

On this record, it is doubtful that plaintiffs are seriously contesting the validity of Section 5. To the extent they have attempted to do so, however, their arguments are without merit, and their summary judgment motions must be denied.

¹ See the Public Broadcasters Defendant-Intervenors' Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Public Broadcasters' May 26 Brief"), the five-volume Appendix to that memorandum, and the Public Broadcaster Defendant-Intervenors' Supplemental Statement of Evidence Before Congress.

In this memorandum (as in their May 26 brief), the public broadcasters focus on Section 5, the must-carry provisions relating to public television stations. The public broadcasters incorporate by reference the briefs and other papers filed by the federal defendants and the commercial broadcasters in response to plaintiffs' summary judgment motions and in support of defendants' summary judgment motions.

As an initial matter, plaintiffs' motions are wholly inadequate because they fail to show that the evidence before Congress when it passed the 1992 Cable Act was insufficient to support Congress' judgment regarding Section 5. Although the legislative record constitutes the central evidence in this case, plaintiffs largely disregard it. As shown in the Public Broadcasters' May 26 Brief, substantial evidence in the legislative record strongly supports Congress' decision to enact Section 5. Because plaintiffs have not shown that the evidence before Congress fails to support that decision, they cannot even defeat the public broadcasters' motion, much less obtain summary judgment themselves.

In support of their motions, plaintiffs rely primarily on evidence they have developed on remand. Such evidence is not a substitute for the legislative record; at most, it would serve as a supplement to the evidence before Congress. In any event, the new evidence would not support a grant of summary judgment in plaintiffs' favor. In fact, the expert declaration on which plaintiffs principally rely actually shows that, prior to must-carry, many public television stations were not carried, thereby confirming the need for must-carry.

At best, plaintiffs' new evidence generates disputes of fact that preclude a grant of summary judgment in their favor.² For that reason alone, plaintiffs cannot obtain summary judgment in this case. If the Court concludes that Congress had before it sufficient evidence in the legislative record to make reasonable judgments concerning the need for must-carry legislation, it should grant summary judgment for defendants. However, even if plaintiffs were able to show that the legislative record is insufficient, it would be necessary for the Court to consider whether additional evidence adduced by the parties on remand provides the requisite support for Congress' judgment. Before the Court could consider ruling in favor of plaintiffs, it would have to hold an evidentiary hearing in order to resolve the disputes of fact that are material for purposes of plaintiffs' claims.

Ultimately, however, an evidentiary hearing is unnecessary, because none of the factual disputes raised by the additional evidence is material for purposes of defendants' summary judgment motions. Because the evidence in the legislative record is undisputed and is more than sufficient to

² One plaintiff, Time Warner, has identified more than 1,000 statements of fact it characterizes as material for purposes of its motion. See Statement of Material Facts as to Which Time Warner Entertainment Company, L.P. Contends There Should Be No Genuine Issue. Many of these "facts" are disputed. See Defendants' Joint Response to Statement of Material Facts. For many others, defendants have not been provided with adequate opportunity for discovery. See Fed. R. Civ. P. 56(f).

support Congress' judgment, the Court should declare Section 5 constitutional as a matter of law and deny plaintiffs' summary judgment motions.

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN THAT THE EVIDENCE IN THE CONGRESSIONAL RECORD FAILS TO SUPPORT CONGRESS' JUDGMENT REGARDING SECTION 5.

Plaintiffs' motions cannot succeed because they have overlooked the key task of the parties and the Court on remand -- analysis of the evidence before Congress. The Public Broadcasters' May 26 Brief showed that there is ample evidence in the legislative record to warrant summary judgment in defendants' favor on Section 5. In order to defeat the public broadcasters' motion, plaintiffs at a minimum would have to show that the legislative record is not sufficient to support Congress' judgment with respect to Section 5. A fortiori, they must make such a showing in connection with their own motions.³ Because they have not even attempted to do so, they could not be entitled to judgment as a matter of law.

The Supreme Court remanded this case for formulation by this Court of factual findings relevant to the First Amendment

³ As explained in the Introduction, if plaintiffs were able to show that the legislative record was not sufficient, they still would not be entitled to summary judgment. It would be necessary to consider whether additional evidence provided the requisite support for Congress' judgment.

standard articulated in United States v. O'Brien, 391 U.S. 367 (1968). Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994). The Supreme Court held that the must-carry provisions are content-neutral and that the government interests supporting these provisions are substantial. However, the plurality sought from this Court further findings as to (a) whether Congress had drawn "reasonable inferences based on substantial evidence" that the must-carry provisions would advance important government interests, and (b) whether the provisions "'burden substantially more speech than is necessary to further the government's legitimate interests.'" Id. at 2470 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

The Supreme Court left no doubt that, in making these determinations, this Court was to examine the evidence that was before Congress when it considered the must-carry provisions. The plurality stressed that "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" the issues in this case. 114 S. Ct. at 2471 (quoting Walters v. National Assn. of Radiation Survivors, 473 U.S. 305, 381 n.12 (1985)). The plurality also pointed out that the obligation to exercise independent judgment regarding First Amendment claims is not "a license to reweigh the evidence de novo . . ." 114 S. Ct. at 2471. It suggested that this Court

should provide a "more substantial elaboration" of the "evidence upon which Congress relied." Id. at 2472.⁴

Despite this clear guidance, plaintiffs largely overlook the record before Congress. Several plaintiffs address a limited amount of the evidence before Congress, particularly the carriage survey conducted by the Federal Communications Commission in 1988. But no plaintiff reviews the full body of evidence in the legislative record or attempts to explain why it is not sufficient to show that Congress drew "reasonable inferences based on substantial evidence" regarding must-carry protection in general or Section 5 in particular. Thus, plaintiffs have not taken even the initial step toward making a showing that would support summary judgment in their favor.

Time Warner actually asserts that this case must be decided on the basis of evidence outside the legislative record, because the Supreme Court supposedly has concluded that the evidence before Congress was insufficient. See Time Warner Brief, pp. 16-19. This is an obvious mischaracterization of the Supreme Court's opinion. The Supreme Court did not make any judgment about the adequacy of the record before Congress to

⁴ Justice Stevens' opinion makes clear that he would decide this case based on what was before Congress.- 114 S. Ct. at 2473-75 (Stevens, J., concurring in part and concurring in the judgment). The plurality indicated that, in addition to examining the legislative record, this Court might find it necessary to examine "some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty." 114 S. Ct. at 2472.

support must-carry. The plurality merely concluded that this Court had not made sufficient findings of fact to support the grant of summary judgment and suggested that this Court's record on some points had not been fully developed. See Turner, 114 S. Ct. at 2470, 2472. The plurality opinion clearly contemplates that this Court could grant summary judgment upholding the must-carry provisions, so long as it articulates appropriate findings and elaborates on the evidence before Congress that supports its decision to enact must-carry. Id. at 2472.

On remand defendants have provided the "more substantial elaboration" of evidence before Congress called for by the Supreme Court plurality.⁵ As shown in the Public Broadcasters' May 26 Brief, there was substantial evidence before Congress showing that public television stations were particularly vulnerable to adverse cable carriage actions, including historical evidence that such stations had been dropped or repositioned in significant numbers.⁶ There was also evidence that must-carry requirements would help to prevent financial harm to public television stations and to ensure the

⁵ This Court did not have before it a full "elaboration" of the congressional record at the initial stage of this case. Those proceedings were expedited, and the parties' briefs largely focused on the proper level of First Amendment scrutiny. The public broadcasters' submissions contained only summary discussions of the evidence before Congress relating to Section 5.

⁶ Public Broadcasters' May 26 Brief, pp. 21-31.

widespread dissemination of information from noncommercial sources.⁷ Finally, the evidence before Congress showed that Section 5 is narrowly tailored and would not impose a significant burden on the cable industry.⁸

During the legislative process, cable industry representatives had repeated opportunities to provide Congress with any factual or statistical information that might have countered this evidence regarding carriage of public television stations, but they failed to do so.⁹ In fact, the cable industry affirmatively endorsed the legislative proposal that ultimately became Section 5.¹⁰ On this record, it clearly was

⁷ Id. at pp. 31-45.

⁸ Id. at pp. 46-52.

⁹ NCTA did submit the results of its own carriage study to the FCC and presented a general statement of the results to Congress. See Competitive Problems in the Cable Television Industry: Hearings Before the Subcommittee on Antitrust, Monopolies and Business Rights of the House Committee on the Judiciary, 101st Cong., 1st Sess. 226-28 (1990), CR VOL. I.H, EXH. 14, CR 05159- CR 05161. However, even within the narrow parameters used in the NCTA questionnaire (see NAB/INTV May 26 Brief, p. 51), the study revealed a substantial number of adverse carriage actions affecting public television stations. See Public Broadcasters' May 26 Brief, p. 26.

¹⁰ See Public Broadcasters' May 26 Brief, pp. 51-52, 82-83; Turner Brief, p. 58 n.145 (noting that while Section 4 expanded must-carry obligations beyond the scope of an agreement between NCTA and commercial broadcasters, Section 5-"fundamentally adopted the terms" of the NCTA-APTS agreement). In a 1990 statement submitted to a House committee, Mr. Mooney, the President of NCTA, stated, "We are perfectly happy that there should be a reasonable must-carry rule and have already worked out a compromise with the public broadcasters on a rule covering their stations, which we have jointly recommended to the committee."

reasonable for Congress to infer that must-carry for public television stations would serve important governmental interests and that Section 5 was narrowly tailored to do so. As the Supreme Court plurality noted, such predictive judgments are entitled to substantial deference. Turner, 114 S. Ct. at 2471.

In view of the strength of the legislative record in support of must-carry, it is not surprising that, for the most part, plaintiffs have ignored it. In order to defeat defendants' summary judgment motions, however, they must show that Congress did not draw "reasonable inferences based on substantial evidence" in deciding to enact Section 5. See Turner, 114 S. Ct. at 2471. Plaintiffs have not even acknowledged most of the evidence that was before Congress, much less attempted to make the necessary showing regarding that evidence. For that reason alone, they have not shown that they are entitled to summary judgment, and their motions must fail.

II. PLAINTIFFS' SUBMISSIONS CONFIRM THE REASONABLENESS OF CONGRESS' JUDGMENT THAT PUBLIC TELEVISION STATIONS WOULD SUFFER SIGNIFICANT HARM WITHOUT MUST-CARRY PROTECTION.

As shown in the Public Broadcasters' May 26 Brief (pp. 21-31), there was substantial evidence before Congress that public television stations would suffer significant harm without

Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 101st Cong., 2d Sess. 128 (1990), CR VOL. I.I, EXH. 16, CR 06295.

must-carry protection. This evidence was both historical and predictive.

Plaintiffs assert that evidence they have developed on remand shows that broadcast television stations (apparently including public television stations) did not suffer harm in the absence of must-carry.¹¹ Because the legislative record contains more than enough evidence to support Congress' judgment on this point, this Court need not consider plaintiffs' additional evidence. The Supreme Court has specifically prohibited reweighing of the evidence de novo. Turner, 114 S. Ct. at 2471. Thus, it is sufficient that Congress acted reasonably at the time it passed the 1992 Cable Act, drawing reasonable inferences about the future need for must-carry protection based on the extensive evidence before it. This Court need not complicate the task before it -- elaboration of the evidence in the legislative record and a determination of whether Congress' judgment was reasonable -- by considering material that could have been presented to Congress (but was not) or evidence developed after the fact.

In any event, the additional evidence plaintiffs offer does not call into question Congress' judgment that public television stations will suffer significant harm without must-

¹¹ See, e.g., Time Warner Brief, pp. 38-53; Turner Brief, pp. 17-26.

carry protection. Indeed, plaintiffs' expert testimony actually confirms Congress' judgment on this point.

A. The Proper Focus for Analysis of Section 5 Is the Condition of Public Television Stations.

At the outset, it is important to note that plaintiffs' arguments concerning the need for must-carry proceed from a misguided premise. Plaintiffs assert that Congress based its decision to enact must-carry on a finding that, without such legislation, the entire television industry would be in jeopardy. They then establish that many television stations are successful, and from that fact they conclude that there is no basis for must-carry.¹² In short, plaintiffs have sought to define the inquiry in a manner that dictates the result they seek.

Congress actually proceeded in a different manner altogether. Rather than treating the entire television industry as a "monolith," Congress expressly recognized that not all stations had suffered from adverse carriage actions.¹³ The fact that it enacted retransmission consent provisions at the same time as must-carry indicates that Congress understood that some commercial broadcast stations would be highly attractive to cable operators and therefore would not need must-carry protection.

¹² See, e.g., NCTA Brief, pp. 12-26; Time Warner Brief, pp. 19-38.

¹³ H.R. Rep. No. 628, 102d Cong., 2d Sess. 52 (1992) ("1992 House Report"), CR VOL. I.A, EXH. 4, CR 00431.

Congress was aware, however, that certain types of stations -- including public television stations -- were particularly vulnerable to being dropped or shifted by cable operators. Congress expressly recognized that public television stations are particularly dependent on cable carriage to reach a broad audience and to remain financially viable.¹⁴ The record before Congress indicated that public television stations and their viewers had suffered substantial harm from loss of access to cable subscribers.¹⁵ Congress enacted a distinct set of must-carry provisions applicable to public television stations and excluded public television from the retransmission consent provisions of the statute.

While Congress could anticipate that popular commercial stations ordinarily would elect retransmission consent, it reasonably concluded that public television stations are more vulnerable and therefore require the protection of must-carry. Thus, the fact that commercial network affiliates, for example, may appear to be financially healthy has no relevance to

¹⁴ See 1992 House Report, pp. 70-71, CR VOL. I.A, EXH. 4, CR 00449-CR 00450; Public Broadcasters' May 26 Brief, pp. 21-29.

¹⁵ See, e.g., Public Broadcasters' May 26 Brief, p. 25 (1988 FCC survey results showing drops and shifts of hundreds of public television stations). While all types of public television stations experienced adverse cable carriage actions, those licensed to local school boards and colleges suffered special harm from loss of access to cable. See *id.* at 43-44 (descriptions of the experiences of KCSM and WLRN, among others).

Congress' judgment about the need for must-carry legislation for public television stations.

B. Dr. Besen's Study Confirms That Public Television Stations Need Must-Carry Protection.

Additional evidence plaintiffs have put forward confirms that Congress was right to be concerned about carriage of public television stations. Plaintiffs rely heavily on the declaration of one of their experts, Stanley Besen. Dr. Besen's analysis is flawed in numerous respects.¹⁶ But even accepting his results at face value, they demonstrate the difficulties experienced by public television stations in obtaining carriage. Further, Dr. Besen's conclusion that cable carriage decisions are dictated by viewership ratings supports defendants' contention that public television stations are especially vulnerable to being dropped by cable operators.

1. Historical Data

On the basis of his analysis of a sample of cable systems, Dr. Besen concludes that prior to must-carry the typical cable subscriber was served by a system that carried only 78 percent of local public television stations. Besen Decl., pp. 5, 44. Put another way, this means that 22 percent of local

¹⁶ See generally the rebuttal declarations submitted by Dr. Noll, Dr. Dertouzos, Mr. Meek, and Dr. Rohlf's for criticisms of Dr. Besen's methodology and results.

public television stations -- or almost one in four -- were not being carried.¹⁷

In fact, Dr. Besen's sample shows an even lower rate of carriage for public television stations. After correcting for Dr. Besen's error in averaging technique, Dr. Rohlf's analyzes Dr. Besen's sample of cable systems and concludes that only 64 percent of local television stations were being carried prior to must-carry.¹⁸ In other words, 36 percent, or more than one-third, of public television stations were not carried.

¹⁷ Dr. Besen also concludes that only 69 to 70 percent of public television stations operating in the UHF band were carried in the period prior to must-carry. See Besen Decl. Exs. C-4, C-5. This means that 30 percent or more of these stations were not carried in the absence of must-carry. As explained in the Public Broadcasters' May 26 Brief (pp. 55-56), approximately two-thirds of public television stations are assigned to the UHF band and are therefore particularly dependent on cable carriage for quality signal transmission.

Dr. Besen's figures do not even reflect the full impact of noncarriage on public television stations, because he did not consider all stations entitled to carriage under Section 5. Under his methodology, only those stations within 50 miles of a cable system were counted. Besen Decl., p. 33. Stations that are outside the 50-mile radius, but whose Grade B service contour includes the cable system, were excluded, although these stations are defined as local under Section 5.

¹⁸ See Rohlf's Rebuttal Decl. ¶¶ 6-15. Dr. Besen also derives a figure of 64 percent for carriage of public television stations, using a different sample of cable systems and a system-weighted (rather than subscriber-weighted) average. Besen Decl., Ex. C-3. Dr. Rohlf's derivation of a 64 percent carriage figure is based on a subscriber-weighted average. (Dr. Besen's 78 percent figure is also based on a subscriber-weighted average, but as explained above, the averaging technique he uses is incorrect.)

Under either analysis, large numbers of public television stations were not being carried in the absence of must-carry regulation. As defendants have previously explained, this occurred even in a period when it was generally understood that the cable industry was exercising considerable self-restraint on carriage matters.¹⁹ Thus, Congress' perception of an historical problem with carriage of public television stations was not only completely reasonable, but clearly correct. If anything, plaintiffs' new evidence confirms that the historical problem of noncarriage was significantly understated in the record before Congress.²⁰

2. Predictive Evidence

Dr. Besen's declaration also confirms Congress' predictive judgment that cable systems will have an incentive to drop public television stations. Based on analysis of carriage data and Nielsen ratings information, Dr. Besen finds that the great majority of stations with "reportable ratings" for viewership in non-cable households were being carried prior to must-carry. Besen Decl., pp. 5, 28, 39-45. Based on this evidence and a series of regression analyses, he concludes that

¹⁹ See, e.g., NAB/INTV May 26 Brief, pp. 52, 87-89; Public Broadcasters' May 26 Brief, pp. 29-30; Defendants' Joint Statement of Evidence Before Congress ¶¶ 524-530.

²⁰ This conclusion is consistent with the additional evidence defendants have developed on remand. See pages 20-21, infra.

cable operators make carriage decisions solely on the basis of viewership ratings. Id. at 50-52, 55-64.²¹

Again taking Dr. Besen's analysis at face value, it fully supports Congress' judgment that public television stations need must-carry protection. Viewership has never been the criterion by which public television measures its performance. Public television was established as a noncommercial service, with the mission of serving otherwise unserved or underserved audiences. The whole point of public television, therefore, is to provide services that are not necessarily designed to appeal to a mass audience.²² As a result, viewership of a number of public television stations is typically not high enough to meet Nielsen's minimum standards of reportability.²³

²¹ Dr. Besen's conclusion that cable operators act only on the basis of viewership ratings is questionable. See Dertouzos Rebuttal Decl. ¶¶ 8-11. Moreover, as Dr. Noll explains, the relevant comparison is between ratings of a broadcast station and ratings of the replacement services available to the cable operator. Noll Rebuttal Decl. ¶¶ 19-20. Because many cable program services have very low viewership, the ratings of even the least watched public television station may compare favorably with those of the replacement programming. See id. ¶ 30; Meek Decl. ¶¶ 102-103 (DAE VOL. II.A); Meek Rebuttal Decl. ¶¶ 19-28.

²² See Public Broadcasters' May 26 Brief, pp. 16-18, 55-58.

²³ Dr. Besen acknowledges that, even when a public television station is assigned a zero viewership rating by Nielsen, the station has some viewership. Besen Decl., p. 42 n.42.

Dr. Besen criticizes the use of Nielsen "cumulative" viewership ratings by several of defendants' experts on the ground that such ratings merely measure the "reach" of a

Under Dr. Besen's analysis, cable operators -- motivated entirely by viewership ratings -- will fail to carry many public television stations. This will be particularly true for the second and third public television stations in a market, which often fill special niches by focusing on areas such as instructional programming or programs tailored to minority audiences.²⁴ These stations are valued by many viewers (e.g., those who depend on telecourses to earn a college degree). As Dr. Noll points out, the second or third public television station in a market attracts member contributions -- a clear indication that it is valued by some individuals.²⁵ However, such stations often do not appeal to a large audience, and some do not achieve minimum Nielsen viewing levels.²⁶ Under

station's signal. However, his own definition of "cumes" disproves that assertion. See Besen Decl., p. 38 n.35. In fact, given the comparatively low viewership of many public television stations, cumulative ratings (which are more sensitive than other types of ratings) are more useful for public television's purposes, and public television stations regularly use them. Use of "cumes" is particularly appropriate in light of public television's mission to reach as many Americans as possible. See Meek Rebuttal Decl. ¶ 29.

²⁴ See Downey Decl. ¶¶ 13-15 & Ex. B. (Pub. Br. May 26 App., Vol. 4).

²⁵ See Noll Rebuttal Decl. ¶ 13.

²⁶ As one illustration, if all 325,000 PBS Adult Learning Service degree-candidates throughout the country were to view a telecourse at the same time, the program would achieve only about a [REDACTED]. Despite this relatively low rating, the program is critical for each of those degree-candidates. See Downey Decl. ¶ 10 (Pub. Br. May 26 App., Vol. 4).

Dr. Besen's analysis, these stations are likely to be dropped, or never carried at all. The result will be to weaken such stations financially, thereby reducing their ability to offer high quality programming, and to eliminate access to diverse noncommercial information sources.

Thus, Dr. Besen's evidence confirms not only that large numbers of public television stations were not carried in the period prior to must-carry, but that the incentives of cable operators will lead them to drop such stations in the future. That evidence alone is a sufficient basis for finding that Congress made a reasonable predictive judgment in enacting Section 5. When Dr. Besen's new evidence is considered together with the evidence before Congress, there is no question that Congress acted reasonably in enacting Section 5.

C. Plaintiffs' Other Evidence Regarding Public Television Does Not Call Congress' Judgment Into Question.

Apart from Dr. Besen's testimony, plaintiffs say relatively little about the condition of public television stations and their need for must-carry. They focus almost exclusively on commercial broadcast stations and the need for Section 4. Plaintiffs no doubt recognize that public television could not be described as financially robust and that the circumstances of public television stations do not fit their arguments against must-carry.

To the extent plaintiffs have introduced evidence or arguments concerning public television, their claims are not persuasive. Nothing they put forward casts doubt on Congress' judgment that public television stations need must-carry protection.

Plaintiff NCTA argues that Congress' findings about the incentives of cable operators to prefer carriage of cable programmers do not apply to public television, because public television stations do not engage in advertising. NCTA Brief, pp. 28, 34. These arguments betray a basic misunderstanding of how these incentives work. While public television stations do not compete with cable operators for advertising revenues, they are vulnerable to being dropped or shifted because, unlike many cable programmers, they do not offer the cable operator a stream of revenue, either from local advertising or from any other source.²⁷

There was substantial evidence before Congress showing that public television stations in fact had been dropped or shifted in substantial numbers. See Public Broadcasters' May 26 Brief, pp. 24-30. Time Warner's suggestion that the historical

²⁷ See Noll Decl. ¶¶ 29-30 (DAE VOL. II.B); Brugger Decl. ¶ 37 & Ex. 7 (Pub. Br. May 26 App., Vol. 1). Dr. Dertouzos finds that Dr. Besen's results encompass the possibility that noncarriage of a public television station is highly correlated with vertical integration of the cable operator and with the number of local ad-insertable channels on the system. See Dertouzos Rebuttal Decl. ¶ 10.

evidence of drops and shifts that the public broadcasters compiled and provided to Congress and the FCC was inaccurate (Brief, pp. 51-52) is mistaken and is not supported by the citation Time Warner offers.²⁸

In any event, new evidence developed by both plaintiffs and defendants makes it clear that this historical information was understated, not overstated. As discussed in the Public Broadcasters' May 26 Brief, Mr. Meek found that the total number of drops reflected in data filed by cable companies with the Copyright Office (maintained by Cable Data Corporation ("CDC")) was more than double the total number estimated from the 1988 FCC Survey.²⁹ Since the FCC survey, the number of cable drops has steadily increased. Mr. Feldman, using the CDC data, found that by the end of 1992, 314 public television stations had been dropped from 1,616 different cable systems. As of 1992, public

²⁸ APTS witnesses testified that, with the arrival of a new research director in early 1987, APTS began efforts to verify reports of adverse cable actions it received from public television stations. Brugger Decl. ¶¶ 13-15 (Pub. Br. May 26 App., Vol. 1). APTS did conclude that some of the data it had compiled prior to that time was inaccurate. McGuire Dep., pp. 88, 161. However, the information APTS provided after early 1987 was subject to a careful verification process. Brugger Decl. ¶¶ 13-15 (Pub. Br. May 26 App., Vol. 4); McGuire Dep., pp. 88-89, 135-38. (Excerpts from the deposition of Dr. Bernadette McGuire are contained in the Appendix to this Memorandum in Opposition.)

²⁹ See Public Broadcasters' May 26 Brief, p. 62, citing Meek Decl. ¶ 11 (DAE VOL. II.A).

television stations had lost access to over 10 million subscribers due to these drops.³⁰

Even plaintiffs' own data confirm the substantial nature of the problem. As discussed above, Dr. Besen's analysis shows that at least around one in four, and more likely over one-third of, public television stations were not being carried as of late 1992, just prior to the effective date of the must-carry statute.

The declarations of the Time Warner fact witnesses confirm that public television stations are at risk without must carry. A number of the declarants readily admit that Time Warner would remove a public television station from its lineup if must-carry were overturned.³¹ This includes even stations that were carried prior to the enactment of Section 5.³² In view of this continuing threat to public television stations, there can be no question that Congress acted reasonably in providing must-carry protection.

³⁰ See Public Broadcasters' May 26 Brief, pp. 63-64, citing Feldman Decl. ¶¶ 11-12 & Illustration 2 (Pub. Br. May 26 App., Vol. 4).

³¹ See, e.g., Aurelio Decl. ¶ 13; Cottingham-Decl. ¶¶ 60, 82, 87; Ellis Decl. ¶¶ 12, 82, 157; Gault Decl. ¶¶ 105, 321, 332. The declarants also say they would consider dropping other public television stations. See, e.g., Cottingham Decl. ¶¶ 47, 49; Ellis Decl. ¶¶ 23, 102; Gault Decl. ¶¶ 88, 272, 343.

³² See, e.g., Ellis Decl. ¶ 102.

There is ample evidence that must-carry helps to protect the financial viability of public television stations and promotes the goal of universal access to public television services. See Public Broadcasters' May 26 Brief, pp. 31-45. Time Warner's suggestion (see Time Warner Brief at 23 n.19, 28 n.27, 29), that public television is financially well off and therefore not in need of must-carry protection is without substance.³³ Time Warner's own brief acknowledges that the public broadcasting system is "chronically underfunded" (id. at 23 n.19). The testimony of public television witnesses is that loss of access to cable subscribers means loss of financial support, which in turn has a serious negative impact on the

³³ The documents Time Warner cites indicate only that viewer contributions and business donations to public television went up in real terms from 1985 to around 1989 or 1990; the cited pages show that after 1989 these revenues became flat in real terms. See TW App. Exs. 6, 7, 11. The increases in contributions during the 1980s were largely due to the institution by public television stations of more sophisticated fundraising techniques. See Abbott Decl. ¶ 19 (Pub. Br. May 26 App., Vol. 4).

One document cited by Time Warner states that viewer and business support grew faster than other sources of public television revenues during the 1987-1992 period. See TW App. Ex. 6, cited at Time Warner Brief, p. 29. This fact in isolation says nothing about the overall financial performance of public television during this period. Indeed the document Time Warner cites states on the same page that "membership dollars are beginning to decline." Moreover, if anything, the increasing importance of viewer contributions confirms the need to ensure that public television stations have access to as many potential contributors as possible, including cable subscribers. See Abbott Decl. ¶¶ 7-11 (Pub. Br. May 26 App., Vol. 4).

quality and quantity of programming a public television station can offer to all of its viewers, cable and non-cable.³⁴

Finally, plaintiffs fail to address the full scope of government interests underlying must-carry. As explained at length in the Public Broadcasters' May 26 Brief (pp. 15-21, 31-45, 70-81), must-carry protection not only preserves the financial viability of vulnerable public television stations; it advances Congress' interest in the widespread dissemination of multiple information sources. Plaintiffs' briefs barely give lip service to the latter interest. It is, however, one of the key

³⁴ See Downey Decl. ¶¶ 24-29, 33; Abbott Decl. ¶¶ 7-13, 30-37 (both contained in Pub. Br. May 26 App., Vol. 4). See also, e.g., Anderson Decl. ¶ 12; Dial Decl. ¶ 12; Green Decl. ¶¶ 12, 13; Smith Decl. ¶ 14 (all contained in Pub. Br. May 26 App., Vols. 3-4).

The fact that some public television stations went on the air during the 1985-1992 period does not suggest that public television was unaffected by adverse cable actions. Because public television stations are nonprofit entities with a mission to provide educational services, prospects for cable carriage are not necessarily a determinative factor in a licensee's decision to begin operations. In any event, Dr. Besen's figures indicate that the rate of entry for public television stations had slowed by the early 1990s. Besen Decl., Ex. D-1. This is the more relevant point for purposes of this case. See Noll Rebuttal Decl. ¶¶ 33-34.

The fact that no public television stations went dark during the 1985-1992 period also does not suggest that such stations will thrive without must-carry protection. As explained in the Public Broadcasters' May 26 brief (pp. 4-5, 39 n.53), many public television stations have a financial "safety net" (in the form of government funding sources or institutional support), which helps them avoid a shutdown in the short term. However, inability to obtain cable carriage can still have financial consequences and a negative impact on a station's ability to fulfill its mission.

underpinnings of the must-carry provisions (Turner, 114 S. Ct. at 2469), and it is an especially significant interest in connection with public television. Congress reasonably concluded that ensuring access by cable subscribers to public television stations would fulfill the longstanding government interest in universal access to, and widespread dissemination to the public of, their noncommercial services.³⁵

III. PLAINTIFFS HAVE NOT SHOWN THAT MUST CARRY REQUIREMENTS FOR PUBLIC TELEVISION STATIONS IMPOSE ANY SIGNIFICANT BURDEN ON THE CABLE INDUSTRY.

A. The Evidence Before Congress Indicated That Section 5 Would Not Impose an Undue Burden on Cable.

As the Turner plaintiffs acknowledge, in enacting Section 5 Congress "fundamentally adopted the terms" of the 1990 agreement reached by APTS and NCTA. Turner Brief, p. 58 n.145. NCTA's negotiation and endorsement of the legislative proposal

³⁵ Time Warner's expert witness, Ms. McLaughlin, suggests that must-carry provides no benefit to public television stations because the viewership of a limited number of such stations added by Time Warner systems allegedly did not increase after must-carry. In fact, Ms. McLaughlin's figures show that viewership ratings for some of these stations did increase. See McLaughlin Affidavit, Ex. 5, p. 2. Moreover, four of defendants' experts have conducted more sophisticated analyses and have found that cable carriage increases lead to increased viewership for broadcast stations, including public television stations. See Rohlfs Decl. ¶¶ 6, 8-33 (DAE VOL. II.B); Meek Decl. ¶ 97 (DAE VOL. II.A); Feldman Decl. ¶¶ 19-21 (Pub. Br. May 26 App., Vol. 4); Schutz Rebuttal Decl. ¶¶ 17-33. See also Rohlfs Rebuttal Decl. ¶¶ 18-24.

that became Section 5 effectively undercuts any of plaintiffs' current claims of burden with respect to that section.³⁶

In view of its origins, it is not surprising that on its face Section 5 is carefully tailored to minimize the burden on cable operators. See Public Broadcasters' May 26 Brief, pp. 48-50. Moreover, Congress had evidence before it concerning the likely impact of Section 5, and the House Committee report expressly concluded that the burden imposed on cable was minimal.³⁷ Data provided to Congress indicated that, even with a blanket requirement for carriage of substantially unduplicated local public television stations, only three percent of all cable systems would be required to carry more than two stations.³⁸ The House Committee report pointed out that Section 5 included various limitations that would reduce any burden even further,

³⁶ Members of the 1990 NCTA Board, which approved the APTS-NCTA agreement included, among others, the President of Warner Cable Communications, Inc. (predecessor to plaintiff Time Warner), the President and Chairman of plaintiff Turner, and the President and CEO of plaintiff USA Network. See the NCTA Listing tab in the Appendix to this memorandum.

Plaintiffs barely mention the 1990 agreement in their briefs. Indeed, the brief of plaintiff NCTA, which negotiated the 1990 agreement on behalf of the cable industry, does not even acknowledge its existence.

³⁷ 1992 House Report at 71-72, CR VOL. I.A, EXH. 4, CR 00450-00451.

³⁸ Id. at 71, CR VOL. I.A, EXH. 4, CR 00450.

including caps on the number of stations to be carried by systems with limited channel capacity.³⁹

The cable industry did not provide Congress with any evidence that the must-carry provisions for public television were likely to impose a burden on cable. In fact, Congress was well aware that plaintiff NCTA had endorsed most of the features of Section 5 pursuant to its 1990 agreement with APTS.⁴⁰ This in itself is enough to establish that Congress had a reasonable basis for concluding that Section 5 would not impose an undue burden on cable.

B. Plaintiffs' Anecdotal Evidence Does Not Show That Section 5 Has Imposed Any Significant Burden on Cable.

The additional evidence developed on remand indicates that Section 5 has not imposed any significant burden on cable.

³⁹ Id. at 71-72, CR VOL. I.A, EXH. 4, CR 00450-CR 00451.

⁴⁰ See Public Broadcasters' May 26 Brief, pp. 51-52. See also 136 Cong. Rec. H6071 (Mar. 29, 1990) (statement of Hon. John D. Dingell introducing H.R. 4415) (commending APTS and NCTA for working out compromise legislation), reproduced in Pub. Br. May 26 App., Vol. 5, Tab Q.

The channel positioning requirements contained in Section 5 were not part of the 1990 NCTA-APTS agreement. However, as previously explained in the Public Broadcasters' May 26 Brief (pp. 51-52 n.80), there is no significant First Amendment interest in a particular channel position. Plaintiffs' assertions about the effect on cable programmers of being moved to a higher channel confirm the public broadcasters' contentions that public television stations were harmed as a result of involuntary channel shifts during the 1985-1992 period. In providing the right to return to the channel position occupied in July 1985, Congress was merely seeking to "redress past harms" suffered by stations that had experienced such shifts. See Turner, 114 S. Ct. at 2470.

Defendants have presented extensive and compelling additional evidence showing that the actual effects of must carry on cable are de minimis.⁴¹ That evidence includes the following:

- Broadcast stations added pursuant to must carry have required only approximately 1.5% of the industry's channel capacity;
- Almost 90% of the time, the addition of must carry stations has not required the cable operator to drop any programming service from its existing lineup;
- Because of expanding channel capacity, cable operators, after fulfilling must carry requirements, are able to carry more than 99.8% of the programming they were carrying when must carry was enacted.⁴²

The fact declarations submitted by plaintiffs only reinforce the conclusion that Section 5 has imposed virtually no burden on cable.⁴³ Accepting plaintiffs' allegations at face value, the harm supposedly resulting from carriage of public television stations appears to be de minimis. The fact declarations provided by the Turner programmer plaintiffs identify only 24 instances -- from a universe of more than 11,000 cable systems nationwide -- in which must-carry allegedly resulted in the addition of a public television station or stations to a cable line-up. In most of these cases, it appears

⁴¹ See NAB/INTV May 26 Brief, pp. 104-28; Government May 26 Brief, pp. 82-110.

⁴² See NAB/INTV May 26 Brief, pp. 104-10.

⁴³ See, e.g., Maguire Decl. ¶ 26b; Davids Decl. ¶ 21(b).

that the system had sufficient capacity such that no cable programming service was dropped.⁴⁴ The Time Warner witnesses' assertions of "harm" from carriage of public television stations also appear to be minimal, particularly when viewed in the context of the entire Time Warner operation. Of a total of almost 300 Time Warner systems in the country, it appears that only 20 were required to add any public television station as a result of must carry.

Moreover, Time Warner's assertions of "harm" do not withstand scrutiny. The Time Warner declarants generally complain that added public television stations "duplicated" the programming of other stations already carried. However, these allegations seem to be based on the general premise that every public television station offers the same programming, which is simply not the case. As set forth in the public broadcasters' evidence, a second or third public television station in a market generally offers diverse program services designed to differentiate it from the other public television stations in the

⁴⁴ The Turner allegations are so conclusory as to make them nearly impossible to respond to. In any event, Turner acknowledges that, in view of the large number of cable programmers, competition for channel capacity will be fierce with or without must-carry. Turner Brief, pp. 30-31. The addition of a limited number of public television stations is unlikely to make any appreciable difference in Turner's prospects.

The declaration submitted by Discovery does not even identify whether any of its alleged injury was due to the addition of public television stations. See Goodwyn Declaration.

area. Thus, the second or third public television station is likely to focus on instructional programming (K-12, GED, or college level instruction), programming geared toward minority audiences in the community, or other niche programming.⁴⁵

Declarations provided by managers of several of the public television stations referred to in the Time Warner affidavits point out the error of the "duplication" allegations. For example, Time Warner witness Cottingham alleges that Time Warner's Albany system was harmed because it was required to carry the "duplicative programming" of WMHQ and WMHT, public television stations located in Schenectady, New York. Donn Rogosin, President and General Manager of these two stations, explains in his declaration that there is very little duplication between the programming of the two; indeed, in an average week, WMHQ broadcasts only a few of the same programs broadcast by WMHT. WMHT broadcasts the core PBS program services; while WMHQ broadcasts primarily educational and cultural programs, including foreign language instruction, telecourses for college credit, GED lessons in English and Spanish, and programs spotlighting the arts and films.⁴⁶

⁴⁵ See Brugger Decl. ¶¶ 5-8 (Pub. Br. May 26 App., Vol. 1); Downey Decl. ¶¶ 13-16 (Pub. Br. May 26 App., Vol. 4).

⁴⁶ Rogosin Decl. ¶¶ 3-4. See also Fogarty Supp. Decl. ¶¶ 4-9 (Time Warner affidavit errs in stating that programming of WPTO duplicates programming of WCET, WCVN and WPTD); Ross Decl. ¶¶ 3-4 (Time Warner affidavit errs in stating that programming of WENH duplicates programming of WGBH and WGBX); Anderson Supp.

Mr. Rogosin's declaration also points up another significant flaw in the Time Warner claims of harm -- the failure to take account of increases in channel capacity. In some cases, Time Warner declarants state that, because a system had no excess activated channel capacity, it was necessary to drop, reposition, or reduce hours of a cable program service in order to add a public television station. In response to one of these claims -- that Time Warner's Albany system was forced to reduce the hours of C-SPAN II to carry WMHQ -- Mr. Rogosin reports that since January 1994 the Albany system has expanded its capacity, adding HBO II, HBO III, Cinemax II, Court TV, The Food Channel, and Value Vision. Notwithstanding the addition of capacity, Time Warner continues to carry C-SPAN II on only a part-time basis. Rogosin Decl. ¶ 6. Clearly the so-called "harm" to C-SPAN II is not due to must carry but to Time Warner's programming decisions.⁴⁷

Decl. ¶¶ 4-5 (Time Warner affidavit errs in stating that programming of WKYU duplicates the programming of WNIN and WKMA); McElroy Decl. ¶¶ 4-5 (Time Warner affidavit errs in stating that programming of WYBE duplicates programming of WNJS and WHYI); Furniss Decl. ¶¶ 3-5 (Time Warner affidavit errs in stating that KOCE offers duplicative programming). All of these declarations are included in the Appendix to this Memorandum in Opposition.

⁴⁷ By C-Span's own admission, there are several reasons other than must-carry that could explain why C-Span-II might be dropped from a cable lineup. See Deposition of Lisa Kerr (Rule 30(b)(6) designee of National Cable Satellite Corp.), DAE VOL. VI.B, Tab 10, pp. 29, 55.

In view of increases in channel capacity, Time Warner's other claims of harm are also likely to involve temporary

In sum, plaintiffs' anecdotal evidence of "harm" involving public television stations is, in many instances, speculative and unfounded and, at best, minimal. These isolated instances do not in any way call into question the conclusion dictated by the extensive statistical evidence -- that the actual effects of must-carry on cable are de minimis.

C. The Scope of Section 5 Is Not Unduly Broad.

The Turner plaintiffs' assertion (Brief, pp. 53-54) that the provisions of Section 5 are unduly broad in several respects is without merit.⁴⁸ The requirement that cable systems with more than 36 channels carry all local public television stations that request carriage involves little practical impact.

situations. The average channel capacity of Time Warner systems increased from 40.90 in 1992 to 43.70 in 1994. Time Warner's Third Supp. Resp. to Defendants' First Joint Set of Interrogs. No. 14 (Attach. E to DAE II.A, Tab 5, Shooshan Decl.). That trend is continuing. According to Paul Kagan & Associates, the average channel capacity for all systems is expected to increase from 43 channels in 1994 to 50 channels in 1995. See Attach. T to DAE III.A, Tab 5, Shooshan Decl.

⁴⁸ At another point in their brief, the Turner plaintiffs characterize the 1990 NCTA-APTS agreement as narrower than Section 5, asserting that the agreement created a cap of three public television stations to be carried by any cable system. See Turner Brief, p. 58 n.145. In fact, the agreement did not impose such a cap except where the programming of the additional stations duplicated that of stations already carried. See Turner App., Ex. R, item 6. As noted below, the agreement also provided that cable systems would continue to carry public television stations they were carrying as of March 29, 1990, without regard to any cap. See id., items 2, 6. In both respects, the provisions of Section 5 are identical to the provisions of the 1990 agreement. The Turner plaintiffs acknowledge that Section 5 "fundamentally adopted the terms" of the 1990 agreement. Turner Brief, p. 58 n.145.

First, not all stations must be carried. A system that already carries three public television stations need not add a station whose programming "substantially duplicates" the programming of an existing station. 1992 Cable Act § 5(e). Moreover, an analysis of the CDC data shows that there are no more than 55 cable systems (or less than .5% of the total number of systems) that have had to add public television stations pursuant to this requirement.⁴⁹

The requirement that cable systems continue to carry all local public television stations they carried on March 29, 1990, likewise involves little or no burden. These are stations the cable system itself had chosen to carry in the absence of must-carry, just a few years before enactment of Section 5. NCTA expressly agreed to this "grandfather" provision as part of the 1990 agreement with APTS. See Turner App., Ex. R, item 2. Moreover, the alleged increase in burden caused by carriage of grandfathered stations is truly negligible. Analysis of the CDC data shows that only two cable systems (less than .002% of all

⁴⁹ Analysis of Exhibit S to Mr. Meek's expert report shows that since 1992 there have been 55 instances of public television adds on 55 or fewer cable systems with capacity in excess of 36 channels that are carrying more than three public television stations. The average capacity on these systems was well above 36 channels. (Exhibit S to Mr. Meek's expert report is available to the Court on request.)

systems) added a public television station that they would not otherwise be required to carry under the statutory cap.⁵⁰

In short, plaintiffs' assertions that Section 5 is overly broad or unduly burdensome are completely meritless. If anything, the additional evidence confirms Congress' judgment that Section 5 -- a provision originally recommended by cable to Congress -- strikes an entirely reasonable balance.

IV. PLAINTIFFS HAVE NOT SHOWN THAT CONGRESS UNREASONABLY REJECTED "LESS RESTRICTIVE ALTERNATIVES" TO SECTION 5.

All plaintiffs argue that the must-carry provisions are unconstitutional because Congress could have enacted certain "less restrictive alternatives." This is not the correct legal standard. Under O'Brien, a regulation need not be the "least

⁵⁰ See Exhibit S to the expert report of Mr. Meek; Meek Decl. ¶ 107 (DAE VOL. II.A). This does not count the grandfathered public television stations that cable systems have carried continuously since 1990 that they now may wish to drop. However, if cable operators now conclude that they would prefer to drop these stations in order to make room for plaintiffs or other cable programmers, this merely confirms Congress' judgment that public television stations need must-carry protection.

The Turner plaintiffs also point out that Section 5 expanded the definition of "local" beyond a 50-mile radius. Turner Brief, p. 53. Under Section 5, a station is defined as "local" if the station and the cable system are within 50 miles or if the cable system headend is within the station's Grade B service contour. 1992 Cable Act § 5(1)(2). The Grade B contour is the area within which a station's signal is strong enough to be received by a rooftop antenna. Noll Rebuttal Decl. ¶ 26. As Dr. Noll explains, this is an entirely reasonable way to determine a local market for a public television station. Id. ¶¶ 26, 28. Plaintiffs offer no evidence that the Grade B contour is an unreasonable criterion for carriage.

restrictive" or "least intrusive" means available. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989); see also Turner, 114 S. Ct. at 2469. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest," the regulation will be upheld even if "a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward, 491 U.S. at 800; see also Turner, 114 S. Ct. at 2469. Congress has considerable discretion in choosing the method by which to promote significant government interests. See, e.g., United States v. Albertini, 472 U.S. 675, 689 (1985); Community for Creative Non-Violence v. Kerrigan, 865 F.2d 382, 390 (D.C. Cir. 1989).

In order to be seriously considered under an O'Brien analysis, a "less restrictive alternative" must achieve Congress' objective "as effectively as" Section 5. Alliance for Community Media v. FCC, No. 93-1169 (D.C. Cir. June 6, 1995) (en banc), slip op. at 35. Plaintiffs have proposed no alternative that is as well tailored to the problem it is intended to address as Section 5. The problem, as reported to Congress, was that public television stations were being dropped by cable systems or involuntarily shifted to less desirable channels. The solution provided by the must-carry statute is to prohibit precisely these sorts of actions. The statute does not sweep more broadly than necessary; if a cable operator carries a local public television

station and has avoided repositioning it, then the statute never comes into play. Thus, there is a good "fit" between the problem and the solution, and the solution is "not substantially broader than necessary" to address the problem. Ward, 491 U.S. at 800.⁵¹

Plaintiffs have not shown that any of the alternatives they suggest would serve the government's interests as effectively as Section 5. Indeed, some of their proposed alternatives would not serve those interests at all.⁵²

A/B Switch. The A/B switch alternative, discussed in Discovery's brief, is addressed at length in defendants' May 26 filings. See Government May 26 Brief, pp. 118-25; Haakinson Declaration (DAE VOL. II.B). See also Downey Decl. ¶¶ 17-19 (A/B switch is particularly ineffective in the case of public televi-

⁵¹ The provision of Section 5 that requires importation of a distant public television signal if no public television signal qualifies as "local" is entirely consistent with the interests underlying the statute. A cable system is required to import a distant signal only when its subscribers otherwise would lack access to any public television signal. 1992 Cable Act § 5(b)(2)(B)(i)&(ii), (3)(C). In these circumstances, distant signal importation clearly serves the government interests in universal access to public television services and dissemination of information from diverse sources.

⁵² Furthermore, plaintiffs appear to be engaging in something of a "shell game" with their "less restrictive alternatives." Each brief provides a somewhat different list of alternatives, and it is doubtful that all plaintiffs would agree that any of the alternatives is both acceptable and constitutional. If must-carry were invalidated, one or more of the plaintiffs would likely attack any alternative Congress might enact.

sion stations) (Pub. Br. May 26 App., Vol. 4). We refer the Court to those materials.

The Century Rules. Plaintiffs' discussion of the Century rules as a "less restrictive alternative" is largely inapplicable to public television.⁵³ Moreover, Century-type rules are most certainly an ineffective alternative for public television stations. The so-called "Joint Industry Agreement" that preceded the Century rules was developed without input from public television, and the public broadcasters strongly opposed application of the agreement to public television, arguing that it provided insufficient protection.⁵⁴ The public broadcasters

⁵³ A number of the differences between the Century rules and the must-carry statute that the Turner plaintiffs cite (Brief, pp. 50-54) do not apply to Section 5 at all. For example, the Turner plaintiffs particularly focus on the fact that the Century rules incorporated a 50-mile criterion, while Section 4, the commercial must-carry provision, employs an ADI criterion. See Turner Brief, pp. 51-52. The ADI criterion is entirely reasonable for carriage of commercial television stations, as explained in the opposition briefs of the federal defendants and the commercial broadcasters. However, Section 5 does not use that criterion; instead, it provides for carriage if the station and the cable system are within 50 miles or if the cable system headend is within the station's Grade B service contour. As explained at page 33 note 50 above, the Grade B contour is an appropriate measure for determining a local market for public television stations.

⁵⁴ See All Parties' Joint Statement of Undisputed Facts ¶¶ 9-11; Comments of CPB, APTS, and PBS on the Joint Industry Agreement, MM Docket 85-349 (Apr. 25, 1986), CR VOL. I.CC, EXH. 169, CR 16331-CR 16420.

also sought reconsideration of the Century rules after they were issued.⁵⁵

Under the Century rules, any cable system with less than 54 available channels was required to carry only a single public television station; systems with 54 or more available channels were required to carry only two public television stations.⁵⁶ Plaintiffs' expert Shapiro reports that fewer than 20 percent of cable systems had channel capacity of 54 or more as of late 1994. Shapiro Decl., Ex. 1, p. 8. Thus, under Century-type rules, subscribers to the great majority of cable systems would have access to only the primary public television station in a market. The second (or third) public television station in a market -- which generally focuses on telecourses, minority interest programming, or other "niche" programming -- would not be available to these subscribers.⁵⁷ As a result, such stations

⁵⁵ See Petition for Reconsideration of CPB, APTS and PBS, MM Docket 85-349 (Jan. 12, 1987), CR VOL. I.DD, EXH. 185, CR 16408-CR 16427.

⁵⁶ See Joint Statement of Undisputed Facts ¶¶ 15-16. (The Century rules are referred to as the "Post-Quincy Rules" in the Joint Statement of Undisputed Facts.) Public television stations were not subject to a viewership standard under the Century rules.

⁵⁷ For example, under the proposed Century alternative, cable subscribers in the San Francisco area could lose access to telecourses offered by KCSM, and cable subscribers in northeastern Oklahoma would likely lose the unique Oklahoma-oriented local programming offered by KRSC. See Hosley Decl. ¶¶ 13, 17-18 (Pub. Br. May 26 App., Vol. 2); Smith Decl. ¶¶ 3, 14 (Pub. Br. May 26 App., Vol. 3).

would lose the financial support that comes with access to cable viewers.

In effect, with Century-type rules, those public television stations most in need of must-carry protection would lose it. Clearly, such rules would not effectively achieve the government's interests in preserving the financial viability of those stations and encouraging the dissemination of diverse information sources.

The cable industry itself recognized that the Century rules were insufficient to protect public television stations. As described in the Public Broadcasters' May 26 Brief (pp. 51-52, 82-83), APTS and plaintiff NCTA agreed in 1990 on a legislative proposal that would expand the must-carry rights of public television stations beyond the narrow scope of the Century rules.⁵⁸ The NCTA endorsement of the 1990 agreement reflects both recognition that the Century rules did not provide adequate protection for public television and an acknowledgment that the cable industry did not regard the Section 5 provisions as unnecessarily burdensome.⁵⁹ In these circumstances, plaintiffs

⁵⁸ Brugger Decl. ¶¶ 29-31 & Exs. 9, 11 (Pub. Br. May 26 App., Vol. 1). The joint press release issued by APTS and NCTA noted that the agreement "would expand the FCC's previous must-carry rules." Id., Ex. 10, p. 2. See also Joint Statement of Undisputed Facts ¶¶ 18-34.

⁵⁹ See Brugger Decl., Ex. 10, p. 2 (NCTA President characterizes 1990 agreement as a "workable compromise") (Pub. Br. May 26 App., Vol. 1). See also Cable TV Consumer Protection Act of 1989; Hearings Before the Subcommittee on Communications

cannot argue that the First Amendment requires application of Century-type rules to public television.

A New Government Subsidy. The alternative of a new government subsidy is obviously insufficient, particularly in today's fiscal climate. As everyone in public television is painfully aware, reliance on government funding of any type is a highly risky proposition. It is most unlikely that Congress would grant additional funds to public television at a time when there is intense pressure to eliminate completely the basic federal grants public broadcast stations receive from CPB.

Even if Congress were willing to authorize a new subsidy to compensate for loss of must-carry rights, there is no guarantee that the new money would be appropriated from year to year. More importantly, money simply cannot replace access. The principle of universal access by all Americans is fundamental to public television.⁶⁰ Moreover, dissemination of information from multiple sources is one of the fundamental interests served by must-carry for public television. Turner, 114 S. Ct. at 2469. Because there can be no guarantee that money will necessarily translate to access, a subsidy is not an alternative that would

of the Senate Committee on Commerce, Science, and Transportation, 101st Cong., 2d Sess. 69-70 (1990) (NCTA President describes beneficial ways in which the 1990 agreement "would expand the FCC's previous must carry rules"), CR VOL. I.H, EXH. 15, CR 05643-CR 05644.

⁶⁰ See 47 U.S.C. § 396(a)(4); 1992 Cable Act § 2(a)(8); Public Broadcasters' May 26 Brief, pp. 18-20.

be "as effective[] as" mandatory carriage for achieving Congress' objectives. See Alliance for Community Media, slip op. at 35.⁶¹

Retransmission Consent. Other "less restrictive alternatives" listed by plaintiffs are simply not appropriate for public television. Subjecting public television stations to retransmission consent provisions would be inconsistent with Congress' longstanding interest in facilitating universal access to public television. (Congress recognized this when it excluded public television stations from the retransmission consent provisions of the 1992 Act.) Moreover, retransmission consent would offer no protection to the public television stations that are most at risk of being dropped or shifted. This "alternative" would do nothing to further the important government interests underlying must-carry.

Leased Access. The leased access alternative is also wholly impractical for public television. As non-profit entities, public television stations are not in a position to pay substantial sums of money to secure cable carriage. Even if some

⁶¹ Contrary to Time Warner's comments (Brief, pp. 79-80), representatives of the public broadcasters have not agreed that government subsidies would be a realistic substitute for must-carry (as opposed to a hypothetical remedy for financial harm resulting from lack of carriage). Indeed, they rejected the suggestion that such a scenario was at all consistent with reality. See, e.g., TW App. Ex. 35, p. 170 ("given [the] current climate the odds are . . . worse than dim"). No public broadcaster witness even suggested that a government subsidy could serve Congress' interest in universal access to public television services.

funds were available, there is no guarantee that a cable system would use a leased access channel to carry a public television station (as opposed to an unaffiliated cable service or another broadcast station in a position to offer more money). Again, this would be inconsistent with Congress' interest in universal access to public television services, as well as its interest in ensuring availability of diverse noncommercial services.⁶²

"Case-by-Case" Procedures. Finally, plaintiffs propose various "case-by-case" alternatives, all of which are inadequate. For example, they suggest use of some sort of FCC complaint procedure, but they do not propose any substantive standard by which the FCC would determine carriage rights. Thus, it is unclear how the Commission could resolve such complaints. Moreover, a complaint procedure would require a station to spend substantial amounts on legal fees to enforce its rights -- an expense most public television stations cannot afford. Indeed; even with the simple FCC enforcement procedure provided under the must-carry statute (in which the standard for cable conduct is stated clearly in the statute and implementing regulations), some public television stations have been unable to pursue their

⁶² Plaintiffs themselves obviously do not regard leased access as a serious alternative. In a brief filed with the D.C. Circuit several months ago, plaintiffs Time Warner and Discovery argued that the leased access provisions of the 1984 Cable Act (as amended by the 1992 Cable Act) are unconstitutional. Brief for Appellants, Time Warner Entertainment Co., L.P. v. FCC, No. 93-5349 and consolidated cases (D.C. Cir. filed Feb. 6, 1995), pp. 63-70.

rights due to lack of resources.⁶³ The vague, standardless FCC complaint procedure suggested by plaintiffs would not provide effective protection.

Enforcement of the antitrust laws would be even less effective as a response to the problem of adverse cable carriage actions. Public television stations simply are not in a position to engage in complex antitrust litigation, which typically involves extensive discovery, years of appeals, and high legal fees. This alternative would amount to no remedy at all for public television stations.

The further suggestion that must-carry requirements should be imposed on a community-by-community basis or on selected cable systems found to have engaged in improper conduct presents similar difficulties. The determination of which communities or which systems should be subject to must-carry rules would have to be made by the FCC or a court, raising all of the enforcement and cost problems described in connection with the FCC complaint and antitrust enforcement alternatives.

Ultimately, the difficulty with all of these "case-by-case" approaches is that they would require cumbersome and expensive procedures that would effectively preclude most public television stations from enforcing whatever rights they might have and at best would delay carriage of a station for months or

⁶³ See, e.g., Beabout Decl. ¶ 11 (Pub. Br. May 26 App., Vol. 2); Lewis Decl. ¶ 13 (Pub. Br. May 26 App., Vol. 3).

years. Because such schemes would not serve the government's interests, Congress acted reasonably in rejecting them. See Time Warner Entertainment Co., L.P. v. FCC, No. 93-1723 (D.C. Cir. June 6, 1995), slip op. at 16.

* * * * *

In short, even if plaintiffs had shown that Section 5 imposes a substantial burden on cable (which they clearly have not), they could not prevail, because none of the "less restrictive alternatives" they list would be as effective as must-carry in achieving the important government interests that underlie Section 5. Because it provides a remedy that effectively addresses the problem Congress identified, and because it imposes little or no burden on the cable industry, Section 5 unquestionably satisfies the "least restrictive alternatives" test. See Alliance for Community Media, slip op. at 36.

CONCLUSION

Plaintiffs have failed to demonstrate that they are entitled to judgment as a matter of law with respect to Section 5. Indeed, their disregard of most of the evidence in the legislative record, their presentation of additional evidence that confirms public television stations' need for must-carry protection, and their identification of numerous "material facts" that are disputed make it virtually impossible for the Court to

rule in plaintiffs' favor. Their motions for summary judgment must be denied.

Moreover, plaintiffs have not succeeded in countering the points made by the public broadcasters in their May 26 papers. Because the legislative record demonstrates convincingly that Congress drew "reasonable inferences based on substantial evidence" in enacting Section 5, the public broadcasters' summary judgment motion should be granted.

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Dated: June 16, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 1995, I caused copies of the Public Broadcaster Defendant-Intervenors' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motions for Summary Judgment, and Appendix thereto, to be sent by Federal Express to those named on the attached Service List.

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