ORIGINAL

**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

RECEIVED

OCT 1 3 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**Comments of the**
**National Association Of Broadcasters**

Lynn D. Claudy
Arthur W. Allison III
NAB Science & Technology

Mark R. Fratrik, Ph.D.
Gregory Guy
NAB Research & Planning

Holly Saurer
NAB Legal Intern

Henry L. Baumann
Jack N. Goodman
Valerie Schulte
COUNSEL

NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

October 13, 1998

No. of Copies rec'd 0+11
List ABCDE

Table of Contents

Executive Summary ..... i

I. Cable Carriage of the DTV Signals of Local Commercial Broadcasters is Required By Law. ..... 2

A. The Terms of the Cable Act Require Cable Carriage of the Signals of All Local Commercial Broadcasters. ..... 3

B. The Objectives of the Cable Act's Must Carry Requirements Would Be Frustrated Absent DTV Must Carry. ..... 6

II. The Swift, Successful DTV Transition (For All Broadcasters) and Early Return of Spectrum That Congress and the FCC Have Planned Cannot Be Achieved Without Consumer Access to All DTV Broadcasts. ..... 9

A. Without Must Carry, the Future of DTV is Uncertain – With it, DTV Should Succeed. ..... 9

1. Consumers Need to Know the DTV Sets They Might Buy Will Receive As Many DTV Broadcasts As Possible. ..... 10

2. To Enthusiastically Pursue the Digital Transition, Broadcasters Need the Certainty That They Can Reach the Entire Viewing Audience ..... 12

B. Without DTV Must Carry, Congress' Deadline Cannot Be Met, or Even Approached. ..... 14

1. Congress Wants the Transition Over As Soon As Possible ..... 14

2. Selling DTV Sets Is the Key to Swift Transition ..... 16

3. The More Digital Programming That Is Available, The Faster Receivers Will Sell ..... 16

4. Cable can Control the Speed of the Transition, And Even Control Its Fate. ..... 16

5. The FCC Can Hasten (or slow) The Transition ..... 17

C. Without DTV Must Carry, Not All Broadcasters Will Thrive and the Strength of Free Over-the-Air Broadcasting Will Be Diminished ..... 18

D. Without DTV Must Carry, Consumers Will Lose Out ..... 23

III. The Burden on Cable of DTV Must Carry Will Be Small (if not *de minimus*), Temporary and Not More Than Congress Deemed Appropriate ..... 25

A. Cable's Planned Upgrades Will Easily Accommodate DTV Signals As They Incrementally Come On Air ..... 27

1. Future Cable Capacity ..... 29

2. Digital Cable ..... 31

3. Future Services Are Driving Upgrades ..... 32

B. With Adequate Notice, Cable's Planned Upgrades Can Accommodate DTV Carriage At Virtually No Incremental Cost ..... 32

C. Cable's Planned Upgrades Will Actually *Reduce* the Overall Burden of Must Carry ..... 32

D. DTV Must Carry Will Not Threaten Carriage of Existing Cable Services: C-Span Will Not Be Dropped ..... 34

E. There Can Be Accommodations for Small Cable Systems ..... 35

IV. The Must Carry Rules Must Be Adapted for the DTV Context to Fulfill the Objectives of Congress and Those of the Transition ..... 36

V. DTV Must Carry Rules Will Be Constitutional ..... 42

VI. The Commission Must Address Digital Interfaces and Other Technical Problems Facing The Transition ..... 46

VII. Other Important Issues ..... 48

Conclusion ..... 52

Appendices

## Executive Summary

In 1992 Congress passed the cable television must carry law specifically to preserve this country's free, local television system and its multiplicity of programming sources. Its terms and intent were to prevent cable from exercising the expanding gate-keeping power of its local monopoly to exclude competing broadcasters from consumers, and vice versa.

Congress made specific findings in the must carry law that cable has the ability, the incentive and the record of refusing carriage to local broadcasters, primarily independents with whom cable competes for audience and local advertising. Congress therefore found it necessary to require mandatory cable carriage of local broadcasters, lest, over time, the vitality of free broadcasting service would be diminished.

The Supreme Court upheld the constitutionality of the must carry law, finding substantial evidence that the government interests are substantial and important, the harm to be prevented real and the remedy effective, reasonably tailored, and in fact de minimus, despite cable's claims to the contrary.

The must carry law, by its clear terms, encompasses the signals of local broadcasters, digital as well as analog, for as long as they are licensed to broadcast. The law makes no distinction that would exempt digital signals from its protection. In fact, one provision and its legislative history pointedly directs the FCC to conform its rules to ensure cable carriage of the new

advanced television signals, in conformance with the objectives of the law. Those objectives are the preservation of the vibrancy and structure of the free, over- the-air broadcasting system and its multiplicity of information sources.

It is precisely for the same reason -- enabling the future of free television -- that the FCC has developed and launched a plan to transition the over-the-air television broadcast system to a new competitive digital technology. The transition will take some years, as consumers trade over their television sets to the new DTV versions.

The key to success for a transition of such enormity and breadth (225 million TV sets, 100 million TV households and 1600 TV stations), and certainly to its length, is consumers' buying DTV sets quickly and in large numbers. But as the FCC has recognized in requiring 120 large broadcasters in large markets to go on air with DTV in 1999, having multiple available DTV offerings is necessary to entice consumers to buy DTV sets in large numbers. But the vast majority of consumers will never have available to them the many DTV signals in their markets without must carry. Thus, as to the vast majority of consumers, the early adopter DTV stations might as well not be on the air -- unless there is DTV must carry.

Congress' judgment, which the FCC must accept, was that cable was likely to disadvantage significant numbers of local broadcast competitors. Cable's incentives to be a gatekeeper will be even stronger with regard to

fledgling DTV competitors that will have few viewers but potentially bright futures, even perhaps as multi-channel competitors. Without DTV must carry, cable can and will affect the fate and speed of the DTV transition and, with it, the return of the analog spectrum.

But with DTV must carry, even in addition to NTSC carriage requirements, cable will not be substantially burdened, as is demonstrated in the Strategic Policy Research Study commissioned by NAB for this proceeding. Cable's plans for vastly expanded capacity, going digital and adding new services will more than accommodate the gradual addition of DTV stations over the next few years. Cable's own digital technology will enable it to carry two broadcast signals in one cable channel, which it uses today for the NTSC signal alone. The Commission however may fashion exceptions for small cable systems that have not upgraded their capacity or facilities. As was true before, C-Span and other cable programmers will not be hurt by DTV must carry. But free over-the-air broadcasting will be perpetuated, for both cable and non-cable consumers, as Congress and the FCC intended.

The FCC should adopt what the *Notice* calls the Immediate Carriage Proposal. That is, the Commission as soon as possible should adopt must carry rules to provide carriage obligations on cable systems as DTV stations gradually come on air and request carriage. Carriage obligations should require immediate carriage of the entire DTV signal (except for subscription

ancillary and supplementary services) up to one-third of the cable system's capacity. This will serve the goals of both the Cable Act's must carry provision and the DTV transition by ensuring all consumers access to all free, local DTV content and by ensuring access for local broadcasters' new DTV signals to all consumers' homes, thereby maximizing broadcasters' ability to garner advertising revenue and compete in a multichannel and digital environment. This is particularly important for smaller broadcasters, affiliates or independents, in all size markets and for those affiliated with emerging and niche networks, which particularly need access to the entire audience to grow and thrive.

The goals of a speedy transition and return of the analog spectrum will also be served by requiring carriage of the *entire* DTV signal, ensuring the maximum amount of digital programming is available to consumers, as an enticement for consumers to purchase DTV receivers. The Commission should interpret "no material degradation" in the digital world to mean that the cable operator cannot alter the bit stream of the DTV signal, and thus cannot degrade the picture quality or change the broadcaster's selected format, except by agreement.

As the Statement of Jenner & Block (Appendix A) makes clear, there is no doubt that mandatory carriage of both analog and digital signals during the transition would be constitutional. Nothing required by digital must carry would impose any greater requirements on cable systems than they

were required to face under the 1992 Cable Act, the must carry provisions of which were upheld by the Supreme Court. Moreover, the same rationale that the Supreme Court adopted in that case is fully applicable to DTV must carry.

Before the
Federal Communications Commission
Washington, DC 20554

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

**Comments of the**
**National Association Of Broadcasters**

> If you do not have must-carry, then everything you have discussed today is academic [about DTV public interest obligations]. So you either have must-carry for the digital spectrum or all of you should go home and forget about any further deliberations, because they will be meaningless. . . .
> it either happens or you don't happen. . . .
> I mean, for sure, without must-carry it's all toast."[1]

The National Association of Broadcasters ("NAB") submits these comments on the Commission's *Notice of Proposed Rulemaking* in the above-referenced proceeding. NAB urges the Commission to swiftly adopt must carry rules for digital television (DTV) broadcasts to make possible a rapid and successful transition to digital television for *all* broadcasters. For, without must carry rules (and the early certainty that there *will* be must carry during the DTV transition), the digital

[1] Comments of Barry Diller at Open Meeting of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, September 9, 1998, at 45.

transition and return of the analog spectrum that both Congress and the FCC have planned, will, in Mr. Diller's words, turn to "toast."

## I. Cable Carriage of the DTV Signals of Local Commercial Broadcasters is Required By Law.

In the 1992 Cable Act Congress adopted a mandatory cable television must carry requirement to ensure that all consumers' households be accessible to the entirety of free, local television broadcasting system of the country. Congress determined that, absent such a law, significant numbers of local stations would be blocked from access to the majority of television households by cable's exercising its gatekeeper power. Congress concluded that this law was necessary to preserve the *entirety* of the free over-the-air television system and its multiplicity of outlets. At the same time, Congress set an outside limit on the burden this carriage requirement might impose on cable operators.

The terms of Congress' must carry law apply, without distinction, to *every* local commercial television signal "licensed and operating on a channel regularly assigned to its community by the Commission." New DTV signals fit within these terms as surely as do new NTSC signals. The law sets forth no distinctions permitting a contrary result. Moreover, the objectives of the must carry provisions of the Cable Act would be frustrated and turned on their head were the new local DTV signals allowed to be interpreted out of the law's command by cable's legerdemain.

In applying the must carry law in this proceeding to the DTV context, the Commission is bound by Congress' findings and conclusions with regard to must

carry, and cannot re-consider the bases or need for must carry protections being extended to "new" signals that fit within the statutory terms. [2]

### A. The Terms of the Cable Act Require Cable Carriage of the Signals of All Local Commercial Broadcasters.

The clear language of the must carry provisions of Section 614 of the Communications Act[3] apply without distinction or exclusion to the new DTV signals of local commercial television stations that have been authorized by the Commission and which will begin to be licensed and become operational over the next four years.

Section 614(b)(1)(B), entitled "Signals Required," reads:

> A cable operator of a cable system with more than 12 usable activated channels shall carry *the signals of local commercial television stations*, up to one-third of the aggregate number of usable activated channels of such system. [Emphasis added.]

Section 614(h)(1)(A), in the definitional Section, reads:

> [T]he term 'local commercial television station' means *any* full power television broadcast station, other than a qualified noncommercial educational television station . . . , *licensed and operating on a channel regularly assigned to its community by the commission* that, with respect to a particular cable system, is within the same television market as the cable system. [emphasis added]

And the following paragraph, Section 614(h)(1)(B), containing "Exclusions" to the term "local commercial television station" does not reference, in any fashion, the (then expected) DTV signals of "local commercial television stations."

---

[2] *See* Statement of Jenner & Block, In Response to Notice of Proposed Rulemaking, October 13, 1998, (Jenner Statement), provided as Appendix A.
[3] *See* 47 U.S.C. § 534.

Thus, by its clear and unambiguous terms, Section 614 applies to *the signals* of *any* full power television broadcast station (other than noncommercial ones) *licensed and operating on a channel regularly assigned to its community by the Commission*, not otherwise excluded by the terms of Section 614. The new DTV *signals of full power television broadcast stations* here at issue were, at the time of the Cable Act, anticipated to be and will be *licensed and operating on a channel regularly assigned to its community by the Commission.*

If Congress intended to exclude from carriage requirements the (then expected) DTV signals of local stations for the transitional period when stations would be transmitting both NTSC and DTV signals, it would have so indicated here, or otherwise in Section 614. Nowhere is there such an exclusion.

But there is, in fact, reference to the anticipated DTV signals in Section 614 of the Communications Act. That section shows that Congress intended mandatory cable carriage of what then was known as "advanced television."[4] Section 614(b)(4)(B), provides

> (4)SIGNAL QUALITY
>
> * * *
>
> (B)ADVANCED TELEVISION.--
>
> Advanced television. --At such time as the Commission prescribes modifications of the standards for television broadcast signals, the *Commission shall* initiate a proceeding to *establish any changes* in the signal carriage requirements of cable television systems *necessary to ensure cable carriage* of such

[4] The Commission's nomenclature for what wound up as "digital television" or "DTV," evolved over the years of development of the technology, regulatory structure and policies from "High Definition Television" or "HDTV" to "Advanced Television" or "ATV" to the present usage of DTV.

broadcast signals of local commercial television stations which have been changed to conform with such modified standards. [Emphasis added.]

Thus, Congress anticipated the advent of "advanced television" signals (now known as digital television) and *directed the Commission* to make *any changes* in its cable carriage rules *necessary* to ensure cable carriage of the advanced television signals, the technical standards of which have been modified or changed from the standards that prescribe NTSC signals. Clearly, Congress intended that the new advanced television signals be covered by its cable carriage mandate, and specifically directed the FCC *to ensure* that its rules were adapted to this end.[5]

NAB commissioned an analysis of the Cable Act's must carry provisions and their implications for this proceeding from the lawyers who successfully represented NAB and other broadcaster parties in the constitutional challenge to the must carry law, including the appeal before the Supreme Court. That analysis, statement of Jenner & Block ("Jenner Statement"), is attached as Appendix A. It concludes that Section 614 unambiguously imposes mandatory cable carriage requirements with respect to all local commercial broadcast signals, that that command applies to the new digital television signals, and that nothing in Section 614 undermines or countermands application of the must carry requirement to DTV signals, even during the transitional period when local commercial stations will broadcast both NTSC and DTV signals. Put simply, a qualifying signal is a qualifying signal, unless Congress plainly directs otherwise.

---

[5] *See* H.R. Conf. Rep. No. 862, 102d Congress, 2d Sess. at 67 (1992).

The Jenner analysis reviews the relevant legislative history of the Cable Act as well as the statutory provisions and concludes that the FCC is left with no alternative but to apply the statute's must carry requirement to the broadcast DTV signals during and after the transition. It finds nothing in the statute, or in allowable statutory interpretation, to permit a contrary conclusion.

And, the Commission, in applying the must carry statute in the context of the DTV transition, is likewise bound to accept the findings and conclusions of Congress with regard to the objectives and rationale of must carry. In this proceeding, the Commission must accept as given what Congress has determined: its conclusions about the importance of the interests to be protected by must carry, about the need for must carry, about cable's power and incentives to disadvantage competing broadcast signals and its predictive judgments about the likelihood of cable's exercising its gatekeeper power to the detriment of some local broadcast signals.[6] And it must accept Congress' ultimate conclusion that, absent must carry, significant numbers of local broadcast stations and the structure and multiplicity of free, local broadcasting will be harmed. [7]

It is this outcome the must carry law was designed to prevent. The FCC cannot and should not substitute its judgments for those of Congress, nor should it otherwise undercut the objectives Congress sought in enacting the must carry law.

### B. The Objectives of the Cable Act's Must Carry Requirements Would Be Frustrated Absent DTV Must Carry.

---

[6] *See* Jenner Statement at 13-14.
[7] *See id.* at 17-18.

The objectives and policy underpinnings of the Cable Act's must carry provisions obtain with the same force to new digital signals of local broadcasters as they do to analog signals. That is, precluding cable's expected exercise of its gatekeeper power with regard to DTV signals is as necessary to preserve free over-the-air television service as it was with regard to NTSC.[8]

As is more fully described below, certainty is the watchword of a consumer-based transition such as the DTV transition that is about to begin. Congress' predictive judgements, binding on the Commission in this proceeding, foresee cable denying that *certainty of consumer access to all DTV signals.*

The scheme the FCC has adopted for the DTV transition is one premised on broadcast DTV signals *being available to consumers as an incentive for consumers to purchase DTV sets.* To this end, the Commission has required an early and mandatory DTV build-out schedule for affiliates of the top networks in the top thirty television markets (to seed and start the transition), followed by the mandatory DTV build-out by all stations. [9] Not requiring cable to carry DTV signals through its bottleneck to the 67% of television households it controls is, according to Congress' predictive findings that cable will block competing signals, tantamount to not requiring those signals to be on air, at least as to that 67% of the

---

[8] *See Turner Broadcasting Sys. Inc.* v. *FCC* , ("Turner II") 117 S.Ct. 1174 (1997) (emphasized the importance of this goal in particular for the then 40% of non-cable households.)

[9] *See Fifth Report and Order* in MM Docket 87-268, 12 FCC Rcd. 12809, 12840-41 (1997).

market. And without consumer access to the full variety of DTV signals, DTV receiver sales will not be as robust as needed.

And w1ithout consumer access to *its* DTV signal, any broadcaster's DTV future is in doubt. As with analog television, digital broadcast television is an advertising supported medium which depends on access to a mass audience to survive. Moreover, with digital television, there will be a huge capital investment that must be recouped (from advertising revenue) before any profit can be realized.[10] Without the certainty of consumer access to their digital signal via cable, broadcasters, whose analog days are numbered,[11] would view their digital future as bleak.[12]

It is precisely to provide a future path for free over-the-air broadcasting that the digital transition has been pursued by industry and the Commission.[13] Without successful individual transitions to digital operations, Congress' goal of preserving the multiplicity and vibrancy of free over-the-air broadcast outlets -- the goal it sought to achieve in the Cable Act -- will be frustrated.

---

[10] While there is a theoretical potential for digital broadcasters to provide subscription services along with their free television service and thus develop a non-advertising-based revenue stream, this potential remains speculative and uncertain. This is in any event not achievable in the early years of the transition period, due to the lack of completed technical standards to support such subscription services.

[11] Both the FCC and Congress intend to end analog broadcasting and reclaim that spectrum for other uses. *See Notice of Proposed Rulemaking* in Docket 98-153 (1998).

[12] *See* affidavits of broadcasters and discussion thereof, *infra* at 13 *et seq.*

[13] *See Fourth Further Notice of Proposed Rulemaking/Third Notice of Inquiry* in MM Docket No. 87-268, 10 FCC Rcd 10540 (1995).

## II. The Swift, Successful DTV Transition (For All Broadcasters) and Early Return of Spectrum That Congress and the FCC Have Planned Cannot Be Achieved Without Consumer Access to All DTV Broadcasts.

For the digital television transition to succeed at all, and surely for it to succeed by or close to Congress' deadline for return of the analog spectrum, and most surely for it to succeed for *all* broadcasters, consumers must have access to all DTV broadcasts, and all DTV broadcasters must have access to the 67% of households accessible only through cable. For the same reasons Congress predicted access would be denied to analog stations, full DTV required access will only occur with strong DTV must carry rules.

The needs of the DTV transition stand as a separate and sufficient government interest, in addition to the congressional rationale underlying the must carry law, for application of mandatory cable carriage requirements for DTV signals during the transition.[14]

### A. Without Must Carry, the Future of DTV is Uncertain – With it, DTV Should Succeed.

For more than a decade, the FCC, broadcasters, consumer electronics manufacturers and other affected industries, have labored to develop and deploy a planned transition for the entire over-the-air broadcasting industry to a new digital television future. These efforts have occupied many thousands of person-hours, involved many industries and manifold resources, and required the expenditure of substantial public resources by the FCC.

---

[14] *See* Jenner Statement *supra* at 18-19.

Now, digital television, DTV, is poised to enter the marketplace, with all but one critical component in place. That missing piece is assured access through cable systems and their equipment[15] to the 67% of consumer households that views television only over cable. This last critical piece of the DTV plan must be in place for the transition to have fighting a chance to succeed.

### 1. Consumers Need the Certainty That the DTV Sets They Might Buy Will Receive As Many DTV Broadcasts As Possible

As the Commission's Notice in this proceeding described it, "participation by the cable industry during the transition period is likely to be *essential to the successful introduction of digital broadcast television and the rapid return of the analog spectrum to the Commission.*"[16] [emphasis added]

For the transition to succeed, consumers must buy DTV sets. Without that, there will be no DTV transition. And for consumers to make a decision to buy a DTV set, which will be an expensive purchase in the first few years, they need the *certainty* that they will receive through their cable system the full complement of DTV signals available in their market, many of which will be stations and programs they watch at least some of the time.[17] Without this certainty, consumers will demur from early DTV purchases.

Giving consumers in the large markets the incentive of having many DTV signals available was precisely the reason the FCC mandated multiple broadcasters

---

[15] *See* discussion *infra* at Appendix G of technical impediments in the cable path to consumer households.
[16] *See Fourth Further Notice/Third Inquiry* at 10542.
[17] *See* discussion at fn. 53 *infra*.

to be on air with DTV by this next May.[18] And to fire up the DTV transition even more, the FCC cajoled stations in the top ten markets to be on air by this November, in time for this Christmas' "selling season."[19] Only when consumers start buying DTV sets and start the DTV transition snowballing will the transition have a chance of succeeding according to the FCC's planned timetable.

While broadcasters and consumer equipment retailers will encourage consumers to buy and install rooftop antennas to receive DTV signals over the air, history has shown and Congress concluded that consumers with cable will only use cable for viewing over-the-air broadcasters. While re-vitalizing the option of antenna-based over-the-air DTV service might have been a possibility with a long DTV transition, it will not be sufficient to complete a shortened transition. Moreover, for purposes of the instant proceeding, the FCC *is bound by the Congressional finding that consumers once connected to cable will use only cable to view broadcast stations.*[20] This rationale suggests that the DTV transition will be stillborn if DTV signals are not available to viewers over their cable systems.

And, history has shown that, in the period before must carry, cable did exercise its gatekeeping power by refusing to carry 19 to 31% of all broadcast stations, including network affiliates, and 39% of all UHF independents.[21] And, as we have said, the FCC here *is bound by the judgment of Congress, upheld by the*

---

[18] *See Fifth Report and Order* at 12849-51 (1997).
[19] *See Fifth Report and Order* at 12840-41.
[20] *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 54 (1992).
[21] *See* Besen Decl. Exhs. C-2 and C-3, J.A. II at 907,908 and 943-47.

*Supreme Court in Turner v. FCC, that cable will refuse to carry or otherwise disadvantage some broadcast signals, absent mandatory must carry.*[22]

Success of this transition requires consumers to have every incentive to buy DTV sets *and certainly no disincentive as fundamental as not receiving the local DTV signals over cable.* Moreover, having available to consumers *all* the free programming contained on a DTV signal, including multiple programs that may be multiplexed into one DTV signal at some point in the future,[23] will provide more of an incentive for consumers to buy sets. The needs of the transition require that cable carry all DTV broadcast signals, and the entirety of those signals (minus any subscription services), to provide this basic incentive of a selection of free programming to the consumer.

**2. To Enthusiastically Pursue the Digital Transition, Broadcasters Need the Certainty That They Can Reach the Entire Viewing Audience.**

Similarly, only if broadcasters, particularly medium and smaller-size broadcasters, in all size markets, have the *certainty* that their DTV broadcasts will get through to the 67% of the audience on cable, will those broadcasters have the incentive to aggressively continue their plans to borrow money, hire consultants, order DTV equipment and push ahead to their DTV future.[24] Absent such certainty, medium and smaller broadcasters well may pause to see how the transition is going, rather than move ahead as they otherwise would. Those who

---

[22] *See Turner II.*
[23] *See* Jenner Statement at 13-14.

were considering building or planning to build DTV earlier than their FCC deadline may pause and wait.[25]

An example of this point and these concerns is provided in the affidavit, appended hereto as Appendix B, of Harry J. Pappas, operator of eleven full power television stations in medium and smaller markets. Mr. Pappas attests to the fact that his lenders would be "extremely reluctant, if not absolutely opposed" to providing financing for construction of the DTV facilities for Mr. Pappas' stations *without the certainty that cable subscribers would have cost-effective access to those facilities*. Mr. Pappas further declares that *the sooner the certainty of cable subscriber access*, the easier and faster financing arrangements will be, *enabling his stations to begin DTV operation earlier than his FCC deadline* [of 2002].

Similar concerns about must carry for DTV broadcasters in smaller markets are expressed in the affidavit, appended hereto as Appendix B, of H. Dean Hinson, President and CEO of Morris Network, operator of four stations in one medium and three small markets. Mr. Hinson declares that he is "not sure whether smaller market stations, whether network affiliates or not, can survive the economics of the conversion to digital television unless there is a must carry requirement for the digital signals during the transition."[26] Mr. Hinson also avers that "[w]ithout the assurance of carriage that must carry will provide, it is likely that many small

---

[24] *See* affidavit of Harry J. Pappas, *infra,* and affidavit of H. Dean Hinson, *infra,* provided as Appendix B.
[25] *See id.,* affidavit of Harry J. Pappas.
[26] *See* affidavit of H. Dean Hinson, *supra* at 1.

market stations will have great difficulty in meeting the FCC's construction timetable."[27]

The last thing a transition of this complexity and breadth needs is uncertainty and hesitation. Instead, it needs the certainty of consumers' knowing that they can receive as many DTV broadcasts as possible, and as many flavors of program offerings as possible, to entice them to buy sets. It needs the certainty of consumers' knowing the DTV set they may buy will work with their cable set top box.[28] And needs the certainty of broadcasters' knowing that their DTV signals are accessible by the entire audience.

### B. Without DTV Must Carry, Congress' Deadline Cannot Be Met, or Even Approached.

In its Fifth Report & Order in the DTV proceeding, adopted in April 1997, the Commission set a new, earlier target date of 2006 for completion of the DTV transition, cessation of NTSC broadcasting and return by each broadcaster of one channel for recovery and re-use by the government.[29] The new "target" conversion date of 2006 is some six years earlier than the tentative target date that previously had been established by the Commission.[30] Meeting that deadline requires full must carry from the outset of the transition.

#### 1. Congress Wants the Transition Over As Soon As Possible.

---

[27] *See id.*, at 2.
[28] *See* discussion *infra* at Appendix G.
[29] *See Fifth Report and Order*. The return of one channel by each broadcaster had been required by the Telecommunications Act of 1996, 47 U.S.C. 336(c).
[30] *See Fifth Report and Order* at12848-51.

In the Balanced Budget Act of 1997, Congress codified the FCC's 2006 goal for the end of the transition and return of one channel for auction and re-use.[31] As Chairman McCain, the Senate author of this provision, remarked upon its introduction in the Senate, the reason for the provision was "to guarantee that this transition to digital takes place as quickly as conditions will reasonably allow."[32] The legislation itself acknowledges, as did the FCC in establishing a target end date for the transition, that the actual end of the transition will be determined by penetration of digital television into consumers' homes, measured (in the legislation) by either high penetration of DTV sets or converters (more than 85% of television households) or high subscription to cable (or other MVPD) that carries a DTV service of *each* local DTV broadcaster.

Congress thus will require cessation of NTSC broadcasting and reliance solely on DTV for perpetuation of this nation's free broadcasting service only when there is access by the vast majority of consumers to all DTV broadcasters, and vice versa.

And thus, having *most* consumers' purchasing DTV sets and/or having access to *all* DTV broadcasters through cable are the *sine qua non's* of a successful and sufficiently complete transition, in Congress' view. Clearly, the point of the digital transition is to replace the population of NTSC receivers with DTV receivers, as thoroughly and as fast as possible.

---

[31] *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3003, 11 Stat 251 (1997).
[32] *See* 143 Cong. Rec. S3977, S4006 (daily ed. May 6, 1997)(Statement of Senator McCain).

### 2. Selling DTV Sets Is the Key to Swift Transition.

To support Congress' mandate to speed along the transition towards a target 2006 end date, the touchstone for the Commission in setting regulatory policy must be reference to the question "what policies will best encourage the sale of DTV sets and what policies will deter the sale of sets?"

### 3. The More Digital Programming That Is Available, the Faster Receivers Will Sell.

Market studies have shown that availability of programming is a leading factor affecting the sale of receivers in transitions such as this.[33] With the introduction of color TV service, color set penetration languished until all three networks provided full primetime color programming.[34] This is the reason that the DTV plan the FCC has adopted, the early and mandatory broadcaster build-out schedule, is premised on multiple broadcast DTV signals *being available to consumers to seed and start the transition.*[35]

### 4. Cable Can Control the Speed of the Transition, And Even Control Its Fate.

Without cable's serving up the full panoply of DTV broadcasts to the two-thirds of consumer households that see television only through cable, those DTV

---

[33] *See* Planning Subcommittee of Working Party of Economic Factors and Market Penetration to the FCC Advisory Committee on Advanced Television Service (PS/WP-5) at 2.3. The Planning Subcommittee of Working Party of the Advisory Committee on Advanced Television studied the possible rate of penetration of (then--called) HDTV receivers in the consumer market. In its report to the Advisory Committee it pointed to the availability of programming for the new service as "a major factor" impacting the penetration of the HDTV market.

[34] *See id.*

[35] *See Fifth Report and Order* at para. 76.

broadcasts might as well not be on the air, at least for the more than two-thirds of the market that uses cable.

While the FCC must be guided by Congress' findings regarding cable's incentives to block or disadvantage some broadcast stations and the likelihood that they would do so,[36] one need not look far to see early cable statements balking at carrying all broadcasters' DTV signals, which confirm the validity of Congress' judgment. Representatives of cable interests have made various statements to the effect that cable will carry only the broadcast DTV offerings that their subscribers desire and/or demand.[37]

But the FCC transition plan is premised on broadcasters' signals first *being available* to consumers to tempt them to taste the transition and purchase DTV receivers. That plan should not now become dependent on cable operators' "waiting to see" what DTV signals or programming consumers want before providing them, nor should it be subject to the whim of cable operators who see little value in carrying all DTV broadcasts and all DTV "competitors."

**5. The FCC Can Hasten (or Slow) the Transition.**

As former Chairman Reed Hundt said about the role of the FCC upon the authorization of DTV:

> [T]he role of the FCC is clear: our threefold task is to implement Congress's decision [to help broadcasters retain this position (as the

---

[36] *See* Jenner Statement, *supra,* at 13-14.

[37] *See* Letter from Decker Anstrom, Pres. and CEO, NCTA, to Edward Fritts, Pres. and CEO, NAB (October 6, 1998) ("NCTA Letter"), provided in Appendix C; Comments of NCTA, MM Docket No. 87-268, Nov. 20, 1995, at 12; "Cable's Digital Efforts," Letter to the Editor, *Broadcasting & Cable*, Sept. 7, 1998, at 71, (Letter to Editor), provided in Appendix C.

> free, universally available communications medium) in the digital age] in a way *best designed* to promote the success of free, over-the-air digital television in a competitive marketplace, to recover spectrum as quickly as possible, and to ensure that broadcasters serve the public. . . . At stake is the viability of our free, over-the-air television system.[38] [emphasis added]

The FCC can *best* hasten the transition by adopting must carry requirements to ensure carriage *as each DTV signal goes on air*. In this way, the Commission would create an incentive for broadcasters to push up their DTV implementation schedules, and thus speed up the transition, even in smaller markets.[39] By *not* requiring immediate cable carriage of DTV broadcasts, as they come on air and are "available" to consumers, the FCC would thwart its own scheme, along with Congress' DTV timetable.

### C. Without DTV Must Carry, Not All Broadcasters Will Thrive and the Strength of Free Over-the-Air Broadcasting Will Be Diminished.

In adopting the 1992 Cable Act, Congress determined that cable *will* act to disadvantage or drop local broadcasters, in the absence of government preventive action. They will so act because they have a stranglehold on access to more than two-thirds of broadcasters' market and because they *are competitors* to local stations for that market's audience and advertising.[40] Congress found that cable *will* act in particular to disadvantage independent broadcasters. Independent and emerging network broadcasters are typically the less strong broadcasters in their

---

[38] Separate Statement of Chairman Reed E. Hundt, Adoption of Digital Television Allotment and Service Rules Reports and Orders, 12 FCC Rcd. 12953, 12960-61 (April 3, 1997).
[39] *See* affidavit of Henry Pappas, *supra*.

markets and thus more vulnerable if shut out from potential viewers.[41] But so too are network affiliates vulnerable to cable's anti-competitive actions, as evidenced by cable's actions in the period before must carry in refusing to carry 19-31% of *all* broadcast stations, including network affiliates (and 39% of all UHF affiliates).[42]

Cable's recent statements[43] themselves indicate that cable will not voluntarily carry *all* local broadcasters, but will wait to see what programming is presented by which broadcasters (thinly veiling suggestions that only HDTV and not multicast multiple programs will be acceptable for cable carriage).[44] Cable further suggests that negotiations with broadcasters about carriage are proceeding apace, so there is nothing to worry about.[45] While NAB is not privy to any such negotiations, cable's own words rule out that they include carriage for *all* local broadcasters.[46]

Cable's public comments about negotiations for carriage in fact imply that these negotiations are being conducted with the broadcast networks,[47] not with individual stations. Surely, the Commission will not place the fate of stations,

---

[40] *See Turner II.*
[41] *See Turner II; See also* affidavit of H. Dean Hinson, *supra,* at para 3.
[42] *See* Besen Decl. Exhs., *supra.*
[43] *See* fn. 37, *supra*
[44] *See* NCTA Letter, *supra.* The implication in the NCTA letter is that cable will carry programming of the "broadcast networks." NAB points out that the local broadcast system intended to be protected by Congress is far greater than network stations. *See also* Letter to the Editor, provided in Appendix C; *Cf.* "Legal Issues Head Digital Must-Carry," *Multichannel News*, May 4, 1998, at 195. (MCN Article) .
[45] *See id.* at NCTA Letter.
[46] *See id.*
[47] *See* Letter to Editor, *supra*, and MCN article, *supra*, ("We have discussions going with the broadcast networks . . . . ")

small and large, affiliate and not, emerging networks and niche networks, in all size markets, in the hands of the (presumably top) networks, who are after all competitors of other broadcasters and can be presumed to be negotiating on their own behalf and not on behalf of all other stations.

As tempting as it might be to the Commission to wait to adopt must carry requirements, hoping that private negotiations can avoid government mandates, NAB respectfully suggests that any such hope would obviously and clearly be misplaced.[48] Any delay in announcing must carry rules for this reason would work to the extreme detriment of smaller broadcasters in all markets that need the certainty of must carry as soon as possible.[49]

The affidavit of Dean Valentine, President and CEO of United Paramount Network (UPN), appended hereto as Appendix B, declares that, for many of UPN's affiliates, "it is highly unlikely that they would be able to use negotiations . . . to obtain carriage of their digital signals."

Those local broadcasters that cannot secure cable carriage and access to their markets will, as predicted by Congress, suffer severely. In the context of trying to develop new DTV operations, being blocked from the market can cripple a new operation most particularly when some stronger broadcast competitors are not so blocked.

As the Statement of Lowell W. Paxson, attached to the Comments of Paxson Communications Corporation today submitted in this docket, make clear, the DTV

---

[48] *See* discussion at pp. 5-7, SPR Study, *supra*.

transition poses substantial challenges, risks and large new investments, particularly for smaller broadcast operations and recent networks, and the added blow of being cut off from two-thirds of the audience can be expected to devastate many more vulnerable operations.[50] Those who make further investments to try to take advantage of digital opportunities such as multicasting and/or subscription services[51] will no doubt be crushed by the cable gatekeeper before they can get their foot in the door.[52]

And, as has been discussed above, without the incentive of the full panoply of DTV broadcast offerings,[53] cable consumers will not be tempted to buy DTV sets as

---

[49] *See* discussion *supra* at fn. 24-27 and accompanying text.

[50] *See also* Affidavit of Dean Valentine, *supra,* at para. 6; Affidavit of H. Dan Hinson, *supra*, at para. 3; *See also* Affidavit of Lucie Salhany, May 23, 1995, Turner Broadcasting System v. FCC, CA No. 92-2247, appended hereto at Appendix B, where Ms. Salhany, as the then President of the new UPN network makes several points relevant for issues in this proceeding, notably that the fact of must carry was a critical consideration in launching the new UPN network because the potential affiliate stations for UPN would be smaller, weaker or less established stations which were more likely to be dependent on must carry for cable carriage. Ms. Salhany declares that "[I]n a very real and material sense, 'must carry' . . . has encouraged the entry of the UPN network. *Id.* at para. 15. *See also* Affidavit of Lowell W. Paxson, *supra*, for similar points with regard to the critical importance of must carry to new network entry and the diversity of programming thereby added to the broadcasting system.

[51] *See* Comments of former Chairman Reed Hundt, *supra.*

[52] *See* NCTA Letter, for veiled threat to carry only HDTV and *not* multicast broadcast programming.

[53] While the small, independent and new network broadcasters are particularly vulnerable to not being carried by cable, in part because they cannot promise the ratings of the larger broadcasters, they do offer consumers new and varied choices of programming that would add to the enticement of DTV, were they viewable by cabled consumers. UPN, PAXNET and WB, all fledgling broadcast networks, have exciting, award winning and niche programming choices. So too are Spanish

surely or as quickly, and the transition itself will go slower.[54] With less robust set sales and a drawn-out transition, the cable-less local broadcasters will languish, perhaps for five to ten years or longer, with no cable carriage of their DTV signal, and with the lost opportunity to grow a DTV audience from the beginning of their DTV operation. For these broadcasters, cable carriage of their DTV signal *after the transition* well may be too late. Their broadcast competitors that did secure earlier DTV cable carriage would have at that point left them in the dust.

Small and independent broadcasters without cable carriage will be left with only their NTSC audience-produced revenue to support *both* operations *and* service the debt on their DTV construction loans for the entire length of the transition. Obviously these broadcasters *cannot thrive in such circumstances.* And without DTV cable carriage for a number of years, they will be so weakened that the overall vigor of local broadcasting, as Congress predicted, will be diminished.

Thus, the DTV transition that was intended by the Commission to transition *all* broadcasters to a competitive digital future will, instead, have led many smaller broadcasters to a digital desert and a greatly weakened situation. Congress' goal of preserving the vibrancy and multiplicity of the entire free, local broadcasting system, for both cable *and noncable* homes, will be lost.

---

networks and stations that attract substantial viewers but in many markets are not among the highest rated stations.

[54] In his affidavit, *supra,* at 1, H. Dean Hinson declares "[I]f there is no must carry rules for digital signals, that would stop development of DTV in small markets." He further attest that "[c]onsumers in the smaller market such as ours would have very little reason to consider purchasing a DTV receiver without a carriage rule that ensures that they will have digital signals to display on those receivers."

**B. Without DTV Must Carry, Consumers Will Lose Out.**

Without DTV must carry, the ultimate losers from a public policy point of view will of course be America's consumers. As Congress predicted, the vibrancy and strength of the entire free, local broadcasting system will be diminished. Non-cabled households will be particularly hurt by a weakened over-the-air broadcast system. Emerging broadcast networks will be slowed, snuffed out or transformed to cable networks. Many smaller broadcasters may *never* be able to afford full HDTV production equipment,[55] so their local programs and advertising will remain in the lower quality "upconverted" form, until the lessening advertising revenue spirals them into digital have-nots. Many smaller stations will be reduced to second-class providers, with the least expensive programming and the least compelling content.[56]

Consumers will also lose out by the DTV transition's taking far longer than it would with *all* DTV signals available to encourage set sales.[57] Multicasting as an option for noncable homes will also be slower to develop. Since stations that attempt multicasting multiple programs will likely be particularly disadvantaged by cable,[58] multicasting (and its increased programming choices) can be developed

---

[55] *See* Affidavits of Dean Valentine, *supra,* at para. 6 and Lowell W. Paxson, *supra,* at para. 5. The estimates for pass through digital facilities are in the range of $1 million, those for full HDTV production facilities range up to another $8 million.

[56] *See* affidavit of H. Dean Hinson, *supra,* at 2, declaring that, without must carry, the financial burden of DTV construction in smaller markets "may jeopardize the news, information, entertainment, and community service that free over-the-air television has provided to consumers".

[57] Add re enticement of new net br offerings to further set sales

[58] *See* NCTA Letter, *supra*, with veiled threat of no carriage for (the more competitive) multi-cast multiple programs. *See also* affidavit of Dean Valentine, *supra*, at para. 4.

as a digital option only by the stronger stations that can bring ratings and dollars to the cable negotiating table.

Smaller market consumers will be even more disadvantaged, without DTV must carry, and with a slower transition.[59] Smaller markets, which will be the last to see full digital development by their smaller and thus less capable broadcasters, may be the first to see broadcast outlets diminished and even destroyed by the inability to compete with cable and with their stronger broadcast competitors. The smaller stations in the smaller markets, which can least afford new digital facilities to begin with, can also least afford to continue the expense of dual broadcast transmissions over a longer transition. Smaller stations in smaller markets are also the most likely candidates to demur from a digital build-out at all[60], without strong signs of a successful DTV transition.

## III. The Burden on Cable of DTV Must Carry Will Be Small (if not *de minimus*), Temporary and Not More Than Congress Deemed Appropriate.

The Supreme Court, in upholding the constitutionality of the must carry law in 1997, found that "[the cable parties] say the burden of must carry is great, but the evidence . . . indicates the actual effects are modest. Significant evidence indicates the vast majority of cable operators have not been affected in a significant manner by must-carry."[61]

---

[59] *See* affidavit of H. Dean Hinson, *supra*.
[60] *See* affidavits of Dean Vallentine, *supra*, at para. 6 and Lowell W. Paxson at para. 5.
[61] *See Turner II* at 1198.

As the Commission considers application of the must carry mandate in the context of the DTV transition, cable parties no doubt once again will complain loudly that mandatory carriage of both the DTV and the NTSC signals during the transition will pose a significant burden on both operators and cable programmers. But as was the case with NTSC must carry, the burden on cable of adding the DTV signals for the length of the transition will be minimal.

Carriage of more than one signal of each local broadcaster will be, to begin with, temporary. It is only for the length of the transition that cable will be required to carry both the DTV and the NTSC signals. The transition is to begin in November, 1998, and is scheduled to end in 2006, if there is sufficient penetration of DTV into consumers' homes. After the transition, there will again be only one signal, the digital one.

To provide the Commission with a picture of the extent of the burden that DTV must carry would impose on cable systems, NAB commissioned a study from Strategic Policy Research, Inc. ("SPR"), a well-known communications consulting firm particularly familiar with the subject matter at hand.[62] The SPR Study, entitled "Cable System Capacity: Implications for Digital Television Must-Carry" is appended hereto as Appendix D.

The SPR Study concludes that, much as was the case with the existing must carry obligations, cable systems, on average, have adequate capacity to carry the digital signals as they begin to broadcast later this year, without jeopardizing

[62] Principals of SPR were expert witnesses cited in *Turner II*.

carriage of existing cable program services. It also concludes that the upgrades in capacity and technical capabilities that cable operators are widely and rapidly deploying, as well as those planned for the future, will easily accommodate the added DTV signals throughout the transition and permit the addition of *new* cable services as well. SPR concludes, in fact, that the greatly expanding capacity of cable systems will actually *reduce* the relative burden of dual signal must carry from that experienced with the addition of NTSC-only must carry.

Congress, moreover, in adopting the must carry law has already weighed the relative benefits and burdens of must carry and concluded that a mandatory carriage requirement *up to one-third* of a cable system's channel capacity struck the appropriate balance of interests (one of which was to require access for broadcasters *while allowing cable to grow*). The rule we seek, therefore, imposes no greater potential burden than the carriage rules that have been in place for more than five years.

And while for the vast majority of cable systems there will be no real burden from DTV must carry, for those cable systems that are not in line with the technical expansion of the rest of the cable industry, the Commission may find it appropriate to fashion rules to ease the burden those systems would otherwise experience or to delay carriage obligations to permit those systems to upgrade.

### A. Cable's Planned Upgrades Will Easily Accommodate DTV Signals As They Incrementally Come On Air.

The SPR Study examines the recent state of cable capacity and finds that cable channel capacity has been expanding significantly over time. The charts

depicted in Figures 1 and 2 of the SPR Study present a snapshot of the tremendous growth in channel capacity from 1985 to 1993 to 1997. The trend that SPR points to throughout its study is one of rapid, even exploding, capacity increases. Underscoring this is the comment just this month by the President of NCTA that cable companies "will invest over $12 billion over the past two years alone to upgrade their systems."[63]

The historical data on cable channel capacity that SPR examines (and considers conservative)[64] in assessing the recent state of capacity shows that "existing channel capacity is quite substantial" particularly in large markets where the Commission has required digital television service to be rolled out first, and that "significant unutilized channel capacity currently exists."[65]

In the large markets, the Warren Publishing database utilized by SPR (and by NCTA in many of their published statistics) shows that recent capacity exceeded 66 channels in the top 10 DMA markets and 54 channels in DMA markets 11 to 25.[66] It is in the largest 30 markets where the network affiliates will lead the DTV rollout in 1999.

---

[63] *See* NCTA letter, *supra*.
[64] *See* SPR Study at 20 and fn. 29. The data base utilized (which is widely considered the most reliable) utilizes data from as far back as the early 1990's to determine systems' current status. Considering that cable systems have been rapidly expanding, the estimates advanced are likely to be extremely low.
[65] *See id.* at 20. The unused capacity in the large markets where the vast majority of early DTV operations will begin also are markets where the large MSO's have been and are continuing to deploy digital capacity, which can accommodate *two digital broadcast channels in one 6 MHz cable channel.*
[66] *See* SPR Study at 14, Figure 3. The SPR Study provides both the weighted and unweighted averages for its various channel capacity analyses. The weighted

NCTA itself cites estimates that, as of April 1998, 55% of all cable homes were passed by 550 MHz-750 MHz+ plant (77-110+ channels) and by year-end 1998, 71% of all cable homes will be passed by at least 550 MHz (77+ channels). NCTA recites that the average cable customer received a weighted average of 78 channels in 1997, an increase of 14.7% more channels from one year before, and that by year-end 1998, the average cable customer is expected to receive 90 channels.[67]

SPR's analyses lead them to conclude that the historical data suggest that "there are no *technical* constraints limiting the carriage of digital broadcast signals as the digital transition commences. Existing unused capacity in most cases could easily support carriage of new digital broadcast signals when the initial stations begin operation later this year."[68] [Emphasis in original.]

**1. Future Cable Capacity**

Most revealing for the purposes of the instant proceeding is the extended discussion and examination of the future capacity of cable systems contained in the SPR Study. The study reviews the impact of technological changes on the capacity

---

averages use the relative value of each cable system's basic subscriber count in each group examined as the relative weights. As SPR indicates at 13, the weighted average provides the most revealing picture of the carrying capacity of the typical cable system within each grouping. The unweighted averages reveal that the smaller cable systems in all market size groupings tend to have more unused channels than the larger systems. SPR at 14.

[67] *See* NCTA website at "www.ncta.com/overview98_1.html." The lower figures *seen* in the SPR analyses are further indication of the conservative nature of the data used by SPR.

[68] *See* SPR Study at 20. SPR does discuss however the lack of market incentives for gatekeeper cable systems to carry all DTV signals in the government-directed, shortened transition where the point is to have the signals available to consumers *before* there is consumer demand. *supra,* at 5-7.

of cable systems in the future, including the ability to increase the bandwidth of coaxial cable systems, the introduction of fiber optics into terrestrial video distribution systems and improvements in video encoding and compression technology. It also discusses the implications of likely future uses of cable TV systems for non-TV telecommunications applications such as cable modems for Internet access and voicegrade telephony.

The SPR analysis shows that cable systems will be expanding capacity *substantially* over the course of the next five years during which time all broadcast stations will be going on air with their digital television signals.[69] SPR notes that currently there are a large number of 750 MHz systems in place and that industry forecasts indicate that the number of these high capacity systems will increase substantially in the next few years.[70]

NCTA estimates that from 1996 through 2001, the cable industry will spend an estimated $33 billion to upgrade its facilities.[71] Time Warner, serving 18.5% of all cable subscribers, recently announced that its $4 billion project to upgrade its cable systems to a 750 MHz, two-way plant had been accelerated and was on track for early completion by year end 2000.[72] TCI, serving 21.2% of cable subscribers, recently announced it was way ahead of schedule on upgrading its cable infrastructure that will give it two-way capability on more than 90 percent of its network by the end of the year 2000. Also by year end 2000, all TCI metropolitan

---

[69] *See id.* at 21.
[70] *See id.* at 22.
[71] *See id.* at 36.

areas are scheduled to have 750 MHz plant and the suburbs at least 550 MHz.[73] AT&T has also stated that it will invest even more in upgrading TCI's plant once the companies' merger is completed. Comcast, serving 7.6% of cable subscribers, estimates that, by year end 1998, approximately 80 percent of its physical plant would be upgraded, with a majority of its cable systems providing 750 MHz capacity (110 channels).[74]

These capacity upgrades are of the number of traditional 6 MHz channels that can be carried on a cable system, which has been increasing steadily and is expected to continue to increase for the foreseeable future. Paul Kagan Associates, Inc. has modeled cable channel capacity through the year 2004. Starting from a base of an average weighted 53 channels in 1996, Kagan predicted that cable channels would increase from 75 in 1998 to 140 in 2003 – an increase of 65 channels.[75]

**2. Digital Cable**

SPR discusses what it calls an even more significant development, the introduction of digital encoding and compression into video transmission and distribution. Current digital encoding methods allow up to 38 Mbps of digital information to be sent on a single 6 MHz channel through a cable system. This would enable cable systems to send over one 6 MHz cable channel *two* broadcast

---

[72] *See id.*
[73] *See id.*
[74] *See* SPR Study at 36.
[75] *See id.* at 37. *See* chart showing Kagan projections, provided as Appendix E.

DTV signals, *thereby cutting in half the bandwidth required to send two DTV signals down analog cable channels.*

As of May 1998, TCI digital cable was reported to be available to more than 11 million of its 14 million subscribers and Time Warner was preparing to launch 79 channels of digital on top of 75-80 channels of analog.[76] Cox Cable, serving another 5.5% of all cable subscribers, recently announced that by the end of 1999 almost all of its subscribers would have access to its broadband digital network.[77]

SPR cites digital compression techniques as perhaps even more important from the standpoint of television distribution.[78] This is because many analog cable television signals can be carried in a single 6 MHz cable channel. And "statistical multiplexing" can be employed to allow even more signals to be carried in a single 6 MHz channel. TCI's "Headend in the Sky" (HITS) system accommodates 18 digitized cable television signals in a single 6 MHz channel.[79]

SPR points to another aspect of the coming transformation of the cable industry, the rapid decline of costs, due to the use of digital integrated circuit chips and the application of Moore's law on rapidly declining cost of semi-conductor devices.[80] Thus even without, expanding the bandwidth of current coaxial plant, digitization will allow cable systems to dramatically increase their usable channel capacity.

---

[76] *See id.* at 40.
[77] *See* Hearings before the Senate Commerce Committee, 105th Cong., 2d Sess. (July 28, 1998)(Statement of James O. Robbins, Cox Communications).
[78] *See* SPR Study at 23-24.
[79] *See id.*

### 3. Future Services Are Driving Upgrades.

The SPR study also discusses the now very real potential additional service opportunities for cable systems in providing high speed Internet access and voicegrade telephony services, calling the continued very rapid growth in the next few years in the development and deployment of cable modems for Internet access "almost certain."[81] SPR points to the potential for cable to provide these services as the driver of rapid expansion of cable system capacity "such that the imposition of full digital television must carry can be expected to have only minimal impact."[82]

### B. With Adequate Notice, Cable's Planned Upgrades Can Accommodate DTV Carriage At Virtually No Incremental Cost.

The SPR Study concludes that the trends in cable system technology suggest that cable operators will be expanding both analog and digital capacity at an unprecedented rate in order to deploy their own digital television services and to win the race with telcos and others for the high speed Internet access business.[83] They can also be expected to add capacity in order to offer voice telephony and even position themselves for video telephone services.[84]

SPR further concludes that, given the cable industry's already announced progress towards and plans to expansively upgrade and restructure their systems, if the FCC promptly mandates DTV must carry, cable operators will incur virtually no

---

[80] *See id.* at 24-25.
[81] *See id.* at 30.
[82] *See id.* at 28.
[83] *See id.* at 34.
[84] *See* SPR Study at 34.

incremental cost in making certain adequate capacity is available when needed.[85] What is crucial is the FCC's putting cable on notice that they *will* have DTV must carry obligations as DTV signals come on the air.

### C. Cable's Planned Upgrades Will Actually *Reduce* the Overall Burden of Must Carry.

The SPR Study also concludes that the cable industry's upgrading and restructuring of its systems and utilization of digital encoding and compression techniques, *for its own reasons* (to deploy its own digital television services and offer telecommunications services), "should easily accommodate full DTV must carry and actually reduce the [overall] 'burden' of broadcast signal carriage (in relative terms)."[86]

In fact, SPR estimates that "a system capacity between 200 and 500 mixed digital and analog channels is readily within the reach of most operators within the next few years, and might be a reasonable number to use to estimate the "burden" of full digital TV must-carry."[87] Thus, it's reasonable for the Commission to conclude that cable capacity will have grown by such an extent that carriage of both analog and digital signals at the height of the transition will occupy a smaller percentage of cable capacity than did analog broadcast signals alone when must carry went into effect in 1993.

### D. DTV Must Carry Will Not Threaten Carriage of Existing Cable Services: C-Span Will Not Be Dropped.

---

[85] *See id.* at 34-35.
[86] *See id.* 34.
[87] *See id.* at 26. *See also id.* at 25-26.

The SPR Study concludes that "much as was the case with the existing must-carry rules, cable systems, on average, have adequate capacity to carry these [DTV] signals as they begin to be transmitted later this year without jeopardizing carriage of existing cable program services. This is particularly true since the number of digital television stations will be relatively small in the early years and concentrated in the large markets, where capacity is typically greater."[88]

Over the next few years, when the bulk of DTV signals begin to be broadcast, SPR predicts that cable systems will be expanding the capacity of their analog plant substantially and deploying their own digital capability. At that time, too, there should be few capacity problems necessitating the dropping of existing cable programs. Moreover, as cable continues its upgrading to exploit the potential for telecommunications services, the explosion in the numbers of channels will wipe out any concerns that full DTV must carry obligations would either threaten carriage of existing cable services or foreclose the addition of new cable services.[89]

C-Span, BET and other popular cable program services will not be dropped due to DTV must carry, but rather will retain their potential to grow as C-Span did following the imposition of NTSC must carry in June of 1993.[90] So too, with DTV must carry, will emerging broadcast networks such as UPN and PAXNET, along

---

[88] *See id.* at 35.

[89] *See id.* 21-35. *See also*, Comments of Jerry Wolfer, Senior Vice President - Engineering & Technology, Media One, in "Bandwidth Debate: Just How Much Will Enough?" to the effect that the modulation that efficiencies of cable's digital capabilities "effectively obliterat[e] the must-carry threat" at http://www.mediacentral.com/Magazines/CableWorld/News98/1998081003.htm.

with existing broadcast networks and stations such as Univision and its affiliates, have the opportunity to thrive and prosper, *to the benefit of both cable and noncable consumers.*

### E. There Can Be Accommodations for Small Cable Systems.

The SPR Study and the Kagan projections, *supra*, indicate that the vast majority of cable operators will not have capacity problems carrying the NTSC and new DTV signals and their existing cable programming. But, for those small or otherwise incapable cable systems that might have expanded along with the rest of the cable industry, the Commission may want to provide options for more gradual compliance with DTV must carry obligations.

Thus, perhaps for cable systems that have not upgraded their system capacity since the imposition of must carry requirements in 1993, or for cable systems that have not deployed digital capabilities, or for systems that have channel capacity less than, say, 36 channels, the Commission may consider fashioning temporary exceptions that would lesson a substantial burden in complying with DTV must carry obligations.

## IV. The Must Carry Rules Must Be Adapted for the DTV Context to Fulfill the Objectives of Congress and Those of the Transition.

Section 614(b)(4)(B) of the Cable Act directs the Commission to "establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television

---

[90] *See* Letter from Edward O. Fritts, President and CEO, NAB, to Brian Lamb, Chairman and CEO, C-SPAN (May 29, 1998), provided as Appendix F.

stations" which have been modified for the provision of advanced television. The Conference Report accompanying the Cable Act makes clear that the purpose of directing the Commission to adjust the must carry rules "when the FCC adopts new standards for broadcast television signals, such as the authorization of . . . HDTV" is to ensure that cable systems will carry the modified signals "in accordance with the objectives of this Section."[91]

The interrelated objectives of the must carry provisions of the Cable Act, as stated in *Turner I,* are (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the television programming market which cable increasingly controls.[92]

Adjustment of the Commission's must carry rules for digital television is also necessary to serve the goals of the DTV transition to preserve local broadcasting, foster an expeditious and orderly transition to digital technology, recover the analog spectrum for re-use and ensure use of the spectrum to best serve the public interest.[93]

All of these goals are served by the Commission's adjusting the must carry rules to require immediate cable carriage of the entire free DTV signal of each local broadcaster in addition to the NTSC signals already subject to must carry rules, up

---

[91] *See* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 67 (1992).
[92] *See Turner Broadcasting Sys., Inc. v. FCC, (Turner I)*, 512 U.S. 622 (1994); *Turner II, supra.*
[93] *See* FCC Press Release, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, July 28, 1995.

to the statutory one-third capacity limit, during the transition to digital service. Similarly, achievement of these goals would be retarded by anything less than full, immediate carriage of DTV signals.

Mandatory immediate carriage of the entire DTV signal, except for subscription ancillary and supplementary services denied must carry rights by the Telecommunications Act of 1996,[94] serves all of these goals by ensuring all consumers access to all free, local broadcast content, including the variety of programs, formats, services and other free information capable of being provided by the vastly flexible and dynamic DTV signal.

It also furthers these goals also by ensuring access for local broadcasters' new DTV signals to all consumers' homes, thereby maximizing broadcasters' ability to garner advertising revenue and compete in a multichannel environment. Carriage of the entire signal also will serve to speed up the transition and return of the spectrum by providing the maximum amount of digital programming as an enticement for consumers to purchase DTV receivers.

Carriage of the full DTV signal, minus subscription ancillary and supplementary services, further ensures that all the broadcast content responding to required (and voluntary) public interest obligations is received by all consumers.

The flexibility for broadcasters to use their digital bit stream to transmit HDTV programming is a centerpiece application of the digital broadcasting standard. The HDTV application, in either the 1080 line or 720 line mode, uses the

---

[94] *See* Telecommunications Act of 1996, 47 U.S.C. § 336 (b)(3)

available 19.4 Mbps data capacity of a DTV signal to the fullest extent. To insure that flexibility for HDTV service is maintained for cable delivery of over-the-air broadcast DTV signals, cable carriage must accommodate delivery of the broadcaster's entire 19.4 Mbps data stream, not just a fractional portion.[95]

Carriage of the full broadcast signal, including any multiplexed program streams, also makes practical sense since there is no "primary video" versus "VBI and subcarrier" distinction with digital technology. There also is flexibility with the digital signal to dynamically switch between one channel and several channels, even within one discrete program. Under a multicast scenario, for example, there can be one unified newscast which then splits into four "zoned" channels for separate reports on different regional areas included the broadcaster's overall service area. In that situation, there would not be one "primary" or "main" program, since each would be of equal importance. To restrict must carry to one program service would be a disincentive for broadcasters to take advantage of the potential of digital technology, which runs counter to the goals of maximizing the public and broadcaster benefits of the new technology.

Similarly, carriage of a multicast DTV signal would promote competition (with cable) in the local programming marketplace, in accordance with one goal of the must carry law. The competitive incentives of cable to restrict such direct

---

[95] Contrary to some rhetoric by misinformed parties, there is no substantial difference in channel bit rate requirements between use of the 1280 X 720 HDTV display format and the 1920 X 1080 HDTV display format. Each format generally requires availability of the full 19.4 Mbps data capacity of the DTV broadcast standard.

multichannel competition is precisely the type of behavior sought to be curbed by the Cable Act's must carry provisions.

While must carry of the entire DTV signal furthers the objectives of the must carry law, in accordance with the intent of Congress, it also complies with the direct command of the must carry provision in Section 614(b)(3)(B) of the Communications Act, which directs that

> "the cable operator shall carry the entirety of the program schedule of any television station carried on the cable system" unless prohibited by specific sections of the Commission's rules.

The House Report to the Cable Act indicates that this provision of the must carry law "prohibits 'cherry picking' of programs from television stations by requiring cable systems to carry the entirety of the program schedule of television stations they carry," except to the extent that FCC rules permit deletions to preserve local stations' exclusivity rights.[96]

What cable *may* block from carriage under the must carry rules are the "ancillary and supplementary" services excluded from application of must carry by the Telecommunications Act.[97] The FCC's Fifth Report & Order in the advanced television proceeding concludes that free, over-the-air services (including free, multiplexed program streams) provided over the DTV signal do not constitute 'ancillary and supplementary" services.[98] That R&O concludes that this distinction

---

[96] *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 93 (1992).
[97] *See* 47 U.S.C. § 336(b)(3).
[98] *See Fifth Report & Order* in MM Docket 87-268, 12 FCC Rcd. 12809, 12821 (1997).

follows precedent that has treated telecommunications services provided by an NTSC station other than the regular television program service as ancillary.[99]

Similarly, the must carry provisions' prohibition of "material degradation of broadcast signals" must be comported with the technology and utilization of digital signals. In the analog world, no material degradation was read to refer to pure signal quality, as delivered by the broadcaster to the cable headend and sent on to the subscriber. In the digital context, the term and its literal should mean preservation of the bit stream sent in the DTV signal. Alteration of this bit stream would "materially degrade" the picture quality sent by the broadcaster and could alter the format specifically selected by the broadcaster for particular programs. The criteria for satisfactory carriage of digital broadcast signals is not characterized by subjective picture quality, as it is in analog, but rather as reliable delivery of a packetized data stream.

"No material degradation" in the digital world implies that the broadcaster's data service packets are reliably delivered to consumers' DTV receivers in such a manner that the original data bits are unaltered within their packets. The exact scheme used to transport the data packets from the headend to the subscriber's house can vary. Cable systems can choose to carry those data service packets via QAM modulation (for efficiency), as long as the bit stream as delivered to the subscriber's DTV receiver is unaltered from the broadcaster's original bit stream.

---

[99] *See id.*

This updated interpretation of no "material degradation" will allow the cable operator flexibility in terms of the modulation used through the cable system (and allows doubling up of digital broadcast channels into one cable channel) while preserving the broadcasters' bits intended for reception by the consumer. The cable operator should not be allowed to alter the bits in the digital stream, thereby degrading the picture quality and changing the broadcaster's selected format, except by agreement with the broadcaster.

The Commission's rules as to channel position of the must carried signal comport with the mandate of the statute for on-channel carriage, unless otherwise agreed to by the broadcaster and the cable operator. In the digital context, the FCC's rules can allow the cable operator to satisfy the on-channel requirement by enabling proper use through the cable system, and the cable set top box, of the broadcasters' channel selection protocol contained in the digital bit stream.

DTV signals must be available to cable subscribers on a free tier of programming, consistent with the terms of the law and with treatment of NTSC signals.[100]

Finally, there should be separate elections under retransmission consent/must carry provisions for the NTSC and the DTV signal. There likely will be different bargaining power between the parties with regard to each signal election. Broadcasters, without audience and perhaps with separate programming on the early DTV signal (or not), should not be required to forego election of

[100] *See* 47 U.S.C. § 623 (b)(7)(A).

retransmission consent rights on the NTSC channel, in order to secure must carry for DTV.

## V. DTV Must Carry Rules Will Be Constitutional.

As the Statement of Jenner & Block (Appendix A) makes clear, there is no doubt that mandatory carriage of both analog and digital signals during the transition would be constitutional. In *Turner II*, the Supreme Court upheld the Cable Act's imposition of must carry requirements up to one third of a cable system' usable channel capacity. Nothing that we are suggesting for digital must carry would impose any greater requirements on cable systems than they were required to face under the 1992 Act. Moreover, since *Turner* involved a facial challenge to the must carry statute, the Court's decision clearly controls any carriage requirements within the limits established by the statute.

Moreover, as the Jenner & Block Statement makes clear, the same rationale that the Court adopted in *Turner II* is fully applicable to DTV must carry.[101] Appendix A at 11 *et seq.* A requirement that cable systems carry digital television signals is content neutral. Whether or not a digital signal is eligible for carriage does not depend in any respect on the content carried on that signal. Further, the Court held that the goal of preserving the diversity of a vibrant, free broadcasting system is content neutral.[102] Thus, any challenge to the Commission's rules implementing Congress' directive that digital signals be carried on cable systems

---

[101] *See* Jenner Statement at 11.
[102] *See Turner I* at 646.

would be judged under the intermediate review standard established in *United States v. O'Brien*.[103]

Under the *O'Brien* standard, digital must carry requirements will certainly be upheld. The Supreme Court concluded in its *Turner* decisions that the interests sought to be achieved by must carry were important governmental interests. As demonstrated above and in the Jenner & Block Statement,[104] those interests are fully applicable to digital television signals, and indeed the Commission is not allowed to reconsider the validity and importance of the interests determined by Congress. Digital must carry indeed is supported by an additional important governmental interest – the government's interest in furthering the transition away from analog broadcasting and the recovery of the spectrum used for analog television so that it can be auctioned for other purposes, stimulating new economic activity and providing additional revenues to the Government.

Nor could digital must carry requirements be viewed as burdening more speech than necessary. As the Jenner and Block Statement points out,[105] the government is afforded great flexibility in determining the means by which to further its important interests. Carriage of both analog and digital signals during the transition is certainly necessary to achieve all of Congress' goals. If only NTSC signals had to be carried, the Government's short-term interest in advancing the transition, and its long-term interest in strengthening broadcasting by converting it

---

[103] *See United States v. O'Brien*, 391 U.S. 367 (1968).
[104] *See* Jenner Statement at 13-19.
[105] *See id.* at 19-20.

to digital, would be delayed or frustrated. If only DTV signals were subject to must carry, stations whose NTSC signals were dropped would suffer a precipitous loss of audience, particularly in the early years of the transition. That would cause the very harm to the vibrancy and diversity of local free television that Congress sought to avoid in the first place.

Moreover, as shown above and in the Strategic Policy Research Study in Appendix D, the impact on cable systems and programmers of requiring carriage of both analog and digital signals will be small. The carrying capacity of cable systems has exploded since must carry was imposed in 1993. Thus, the burden of analog must carry which the Supreme Court held was negligible, has become even less over time as cable systems have grown. Moreover, cable system growth is continuing and, as the Strategic Policy Research study shows,[106] the conversion of cable capacity to digital, and the restructuring of cable systems to offer Internet and telephony services will make carriage of digital signals easy for cable. Furthermore, unlike the situation in 1993, when every single television station became eligible for must carry on the same day, digital signals will go on the air over a long period, paralleling cable system capacity growth. Thus, despite sometimes hysterical cable claims that digital must carry would swamp cable systems, the overwhelming weight of the evidence is that the net burden of carrying both analog and digital signals will not be significantly greater – and could very well be less – than the burden cable faced in having to carry all NTSC signals in 1993. And, of course, the

[106] *See* SPR Study at 21 *et seq.*

protection afforded cable systems by the one third capacity cap will continue during the transition.

Finally, as the Court held in *Turner II*, the must carry regime mandated by Congress is narrowly tailored. Although rules that would result in less carriage of digital signals were discussed in the *Notice*, none of those would achieve Congress' goals of preserving and strengthening local broadcasting and hastening the transition to digital as well as a requirement that both the analog and digital signals be carried during the transition. Further, if cable systems and broadcasters reach retransmission consent agreements for digital signals as they did for many NTSC signals, the remaining signals that will have to be carried under must carry will be those that would otherwise not be carried. In other words, the regime established by Congress which allows broadcasters to elect must carry or retransmission consent, inherently results in narrow tailoring of must carry requirements to those signals most in need of assistance.

The Commission, therefore, is required under the Communications Act to change its rules to extend must carry to digital broadcast signals. That action furthering Congress' goals would be readily upheld against any constitutional challenge.

## VI. The Commission Must Address Digital Interfaces and Other Technical Problems Facing The Transition.

The Commission's Notice in this proceeding addresses, and requests comment on, technical compatibility issues "recognizing that the introduction of DTV, and any carriage rules [the Commission] may implement, will be most successful if all

the components of the transmission path work together."[107] Those components, of course, are the DTV broadcast signal, the cable television system and the television receiver.

Cable can carry DTV signals in a variety of ways with varying degrees of efficiency. Cable operators should be required to achieve carriage of broadcast signals through to the cable system to consumers' DTV receivers, however they might accomplish this. A*long* with must carry rules, the Commission must take whatever steps are needed to ensure that cable system and digital television will work together. What is important for the Commission's purpose is to know cable carriage of DTV signals can be achieved on cable systems of today as well as those of tomorrow.

Of particular concern are possible technical impediments preventing or making difficult the reception of DTV signals by consumers who receive television through their cable systems. Experience thus far has shown that the FCC must play a critical "forcing function" role in requiring that the technical capabilities for smooth operation between and among digital television devices are standardized and employed in the most rapid time frame. History clearly shows that the resolution of certain issues if left to private industry standard setting can be a long process. The Commission now must stand ready to intervene if consensus and progress in the industry standards-setting efforts to explicitly define interoperability standards for DTV appear stalled, as they have in the recent past.

---

[107] *See NPRM* at para. 17.

Lately much has been heard about the lack of a standardized digital interface to allow broadcast DTV signals to be passed from the cable system digital set-top box to consumers' DTV sets.[108] The industry standards-setting process defining the characteristics for this interface (based on the IEEE-1394 standard) have languished and, as a result, the interface will not be universally present on DTV receivers being introduced this year and most of next year.

Chairman Kennard has stepped in and asked the parties to the standards-setting process to complete a specification for this interface by November 1, 1998. If this does not occur, NAB urges the Commission to play a strong role in forcing the completion of such a standard.

NAB has prepared a Technical Appendix, appended as Appendix G, that provides detailed discussion of the many technical issues critical to cable carriage of DTV signals to consumers. One important issue discussed in that Appendix is that of channel navigation with digital television. NAB urges the FCC to facilitate use of the industry standard for channel navigation, known as PSIP, as outlined in our Technical Appendix.

Time is of the essence to complete this work on an interface standard. Receiver manufacturers have indicated that it may take *as long as 12 months after a standard is set before it appears in products* to be shipped to retail stores. So

---

[108] *See* Letter from NAB and MSTV to William E. Kennard, Chairman, FCC 3 (June 4, 1998); Letter from William E. Kennard, Chairman, FCC, to CEMA and NCTA, (August 13, 1998); *see also* Testimony of Gregory M. Schmidt before the Senate Commerce, Science and Transportation Committee on The Transition to High Definition Television, July 8, 1998, pp. 7-10.

while 24 broadcast stations were urged by the FCC to "volunteer" to get on the air this fall, and at least 42 stations have announced that they will be broadcasting in digital in November,[109] the receivers that will be available to receive those transmissions will be lacking the means necessary for appropriate interface with future digital cable service. The sooner this is addressed, the fewer such sets will be in the market place.

## VII. Other Important Issues.

The *Notice* asks for comment on a large range of other issues that might be affected by the initiation of and transition to digital television service. Several of the questions raised by the Commission would be more properly addressed in separate proceedings since the issues they raise are not limited to digital television service. For others, it may be better to wait to make changes in the Commission's established rules until we have more experience with digital television in the marketplace.

### Television Market Changes

The *Notice* (¶¶ 83-85) asks how the Commission should apply the television market modification provisions of Section 614(h)(1)(C) of the Act to digital television stations, and in particular, on whether differing technical characteristics of digital television stations' should change the market area which may have been established for an analog signal.

---

[109] *See* NAB Press Release dated October 6, 1998.

Because digital television signals are intended to be replacements for stations' analog signals, and the Commission's goal – insofar as possible – was to replicate the service areas of analog television signals, there is no need to alter the criteria used for market modification for the must carry rules when applied to digital television stations. It is correct, as the Commission notes, that digital signals will not at first have a history of carriage or of a demonstrated audience. Because digital signals will be transmitted from existing stations, it would be inappropriate for the Commission to attempt to make separate market modification decisions for analog and digital signals. Instead, the television markets that have been defined for analog signals – either by statute or through an FCC decision – should be used as the markets for must carry purposes for those stations' digital signals as well.

Taking that approach would obviate the need to establish the differing technical standards for determining signal reach that are discussed in Paragraph 84 of the *Notice*. If a station's analog signal would be entitled to carriage on a cable system, the digital signal should have the same status. At the end of the transition, when digital signals are the only ones available in a community, the Commission could consider whether differing technical characteristics require any additional changes in its market modification standards.[110]

---

[110] Paragraph 85 of the *Notice* asks whether, for stations that begin digital service in 1998 or 1999 before the Commission changes from using ADIs to DMAs to determine markets for must carry purposes, there would be disruption in changing channel line-ups twice if cable systems began carriage of digital signals which were in their ADI but not in their DMA. Since only 45 counties out of the 633 in the 30

**Program Exclusivity Rules**

The Commission (*Notice* ¶¶ 95-98) asks how its rules guaranteeing program exclusivity, such as the network non-duplication (47 C.F.R. § 76.92), syndicated exclusivity (47 C.F.R. § 76.151), and sports programming (47 C.F.R. § 76.67) rules, should apply in a digital television environment. There is nothing inherent in the transition to digital television transmission that should result in any changes in these rules. They were adopted to help preserve local service by ensuring that program exclusivity which local stations obtain is not defeated through the introduction by cable systems of distant signals carrying the same programs. The identical concerns will apply to the programs carried on digital signals of television stations.[111] Indeed, because the transition to digital television will present significant financial challenges to local stations, the Commission should avoid taking other actions – such as reductions in protections against loss of program exclusivity – that would impair stations' ability to finance the digital transition.

Paragraph 96 of the *Notice* suggests that some of the protections afforded by these rules might now be obtained through retransmission consent negotiations.

---

largest markets (the markets where digital television service is required to begin in 1999) will be affected by the change from ADIs to DMAs, the amount of disruption that would be caused to cable systems and subscribers would be small, particularly since the counties that would change are generally rural. Alternatively, the Commission could require carriage of digital signals even in 1999 based on the DMAs in which cable systems operate.

[111] Paragraph 96 of the *Notice* asks whether cable operators would be able to accommodate black-out requests on signals of multiplexing digital broadcasters. If cable systems have the ability to strip subscription signals from the digital program stream, as the 1996 Telecommunications Act contemplated, that same technology

Since it is the importation of the distant signal that creates the problem, it will be difficult for local stations to prevent that from happening using their own negotiations with cable systems. Of course, for stations that are carried under must carry, they would have no ability to use retransmission consent agreements to ensure that they receive the exclusivity for which they bargained with program suppliers. In any event, the question of whether the existing program exclusivity rules should be altered in light of the 1992 amendment to Section 325 should be addressed, if at all, in a proceeding directed at that question for all stations, and not as part of a proceeding intended to address the regulatory needs of the digital transition.

To the extent that questions that are unique to the application of the program exclusivity rules to digital television signals do arise, the Commission correctly proposes in Paragraph 98 of the *Notice* to use the status of stations' analog signals to determine the rights associated with digital signals during the transition. Any adjustment to the application of the program exclusivity rules needed because of different signal propagation characteristics of digital signals can be made at the end of the transition when all consumers will be receiving digital signals.

---

surely would allow them to strip particular programs from distant digital signals if importation of those programs would violate local stations' exclusivity rights.

## Conclusion

For the fore-going reasons, the National Association of Broadcasters hereby respectfully urges the Commission to adopt as soon as possible must carry rules to ensure full and immediate cable carriage of DTV signals as they come on air during the DTV transition.

Respectfully submitted,

Henry L. Baumann
Jack N. Goodman
Valerie Schulte
COUNSEL

NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Lynn D. Claudy
Arthur W. Allison III
NAB Science & Technology

Mark R. Fratrik, Ph.D.
Gregory Guy
NAB Research & Planning

Holly Saurer
NAB Legal Intern

October 13, 1998