

APPENDICES

APPENDIX A

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**STATEMENT OF JENNER & BLOCK
IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING, ADOPTED JULY 9, 1998**

**Prepared for the
National Association of Broadcasters**

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TABLE OF CONTENTS

	<u>PAGE</u>
I. Introduction	1
II. Section 614 Unambiguously Imposes Mandatory Carriage Requirements With Respect to All Broadcast Signals Irrespective of the Manner of Transmission.	1
III. Nothing in the Remainder of § 614 Contravenes the Unambiguous Command of § 614(a) and (b).	2
A. Section 614(b)(5)'s non-duplication provision does not require a different result	2
B. Nothing in § 614(b)(4)(B) gives the Commission the authority to ignore the statutory command.	4
C. Subsequent legislative history fully supports this view.	8
IV. In Light of the Supreme Court's <u>Turner</u> decisions, the Mandatory Carriage of Both Analog And Digital Signals Dictated by the Statute Is Constitutional	10
A. The digital must carry obligations are content neutral.	10
B. The digital must carry obligations further important governmental interests	11
C. The digital must carry obligations do not burden substantially more speech than necessary to further those important governmental interests	17
1. The burden imposed by mandatory carriage of both digital and analog signals will be small.	18
2. Congress' mandatory carriage regime is narrowly tailored.	21
CONCLUSION	24

I. Introduction.

In its Notice of Proposed Rulemaking,^{1/} the Federal Communications Commission (the “Commission”) seeks comment on the implementation of must carry during “the transition to digital television.” NPRM ¶ 39. In particular, the Commission offers a number of possible implementation approaches, including an “Immediate Carriage Proposal,” a “No Must Carry Proposal,” and a range of intermediate options. NPRM ¶¶ 41-51. The language of the 1992 Cable Act, however, and in particular the language of § 614 of the Communications Act of 1934 (the “Act”), leaves the Commission no discretion: it must adopt rules that will guarantee carriage of both analog and digital signals. That is, the statutory text requires the conclusion that all cable systems must carry, in addition to the existing analog television signals, digital signals from commercial television stations up to the one-third capacity limit. See NPRM ¶ 41. Moreover, in light of the Supreme Court’s decision in Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174 (1997) (“Turner II”), this statutory scheme is constitutional.

II. Section 614 Unambiguously Imposes Mandatory Carriage Requirements with Respect to All Broadcast Signals Irrespective of the Manner of Transmission.

The language of § 614 is straightforward. Section 614(a) provides that “Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.” Section 614(b)(1)(B) provides that cable operators 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

^{1/} In re Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rulemaking, CS Docket No. 98-120 (rel. July 10, 1998) (“NPRM”).

of such system.” (Emphasis added.) Section 614 is absolute: it draws no distinctions between analog signals and digital signals, and permits none to be drawn by the Commission. Nor does the statutory language draw or permit any distinction between signals that are “transitional” and those that are more “permanent.” Instead, up to the caps established in § 614(b)(1), the Act requires that cable operators “shall carry” the signals of all local commercial television stations, regardless of the method of signal transmission or the level of market penetration.

III. Nothing in the Remainder of § 614 Contravenes the Unambiguous Command of § 614(a) and (b).

A. Section 614(b)(5)’s non-duplication provision does not require a different result.

The Commission seeks comment on whether -- contrary to the clear command of §§ 614(a) and (b) -- § 614(b)(5) precludes a cable operator from being required to carry both the digital and the analog version of identical program content broadcast from a single station. See NPRM ¶ 70. Nothing in § 614(b)(5) provides any justification for exempting cable operators in such circumstances from their obligation to carry both signals. Section 614(b)(5) states:

Notwithstanding [§ 614(b)(1)], a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation).

Section 614(b)(5) thus precludes a cable operator from being required to carry a signal of a local commercial television station only when that signal substantially duplicates the signal of “another local commercial television station.” Id. (emphasis added). Congress’ careful use of the term “another” cannot be ignored. By its own terms, § 614(b)(5) simply has no application when the two “substantially duplicat[ive]” signals come from the same station.

Nor does the Commission have discretion to circumvent the plain meaning of § 614(b)(5) by defining the word “station” so that a licensee’s broadcast of a digital signal and an analog signal results in two “stations” for the purposes of the Communications Act. Cf. NPRM ¶ 70. Section 614(h)(1)(A) of the Act defines the term “local commercial television station” as:

any full power television broadcast 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.

That definition accords with the common understanding of the term station, which is “[a]n establishment equipped for radio or television transmission.” Webster’s II New Riverside University Dictionary 1133 (1988). There can be no doubt that the same “establishment” is transmitting both the analog and the digital signal. The analog and digital broadcasts emanate from the same licensee.^{2/} The Act, therefore, forbids the conclusion that a single television station broadcasting an analog signal becomes “another” station simply by adding a digital signal. The language of the Act is clear, and the Commission may not rely upon a purported exercise of discretion to distort the unambiguous terms Congress used. See Southwestern Bell Corporation v. FCC, 43 F.3d 1515, 1521 (D.C. Cir. 1995) (rejecting FCC’s argument that because Congress had not explicitly defined term, Court should defer to FCC’s definition); see also id. (“an agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear”) (quoting MCI Telecommunications Corp. v. American Tel. & Tel Co., 512 U.S. 218 (1994)); Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985) (We “begin with the language employed by Congress and the

^{2/} Indeed, a determination that the separate broadcast of analog and digital signals created separate stations might result in a violation of the Commission’s duopoly rules, because those “stations” would be owned, operated, or controlled by the same party. See 47 C.F.R. § 73.3555(b).

assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”).^{3/}

B. Nothing in § 614(b)(4)(B) gives the Commission the authority to ignore the statutory command.

It is similarly clear that § 614(b)(4)(B) does not give the Commission discretion to deviate from the clear command of the statutory language, and that the Commission’s tentative reading of that provision as a broad grant of discretion to determine whether must-carry obligations for digital broadcast signals are needed during the transition to digital cannot be sustained. See NPRM ¶ 13. Section 614(b)(4)(B) requires the Commission to initiate a proceeding to change “signal carriage requirements” in response to “modifications of the standards for television broadcast signals” that are prescribed by the Commission. But the legislative history makes clear that § 614(b)(4)(B) was not intended to give the Commission broad license to disregard or redefine Congress’ articulation of the must carry obligations of cable operators. Commenting on the provision that eventually was passed, without modification, as § 614(b)(4)(B), the House Report states: “The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which

^{3/} Contrary to the Commission’s suggestion, see NPRM ¶ 34 n.93, nothing in the Broadcasters’ comments regarding separate retransmission consent elections “implicitly recognizes that there are two television stations at issue” for the purposes of retransmission consent or for signal duplication analysis. Section 325 does not even explicitly address the issue whether a single station can make separate elections for its analog and its digital signal, and it certainly does not foreclose the possibility that a single “station” could make a separate election for each of its broadcast signals. More important, the only reading of the statute that is consistent with the text, structure, and purpose of the Act is one that recognizes that Congress contemplated a single station broadcasting two signals and making separate elections for each one.

have been changed to conform to such modified signals.” H.R. Rep. 102-628, at 94 (1992) (emphasis added). The Committee’s understanding that the Commission’s proceedings under § 614(b)(4)(B) were designed to “establish technical standards” precludes any reliance on § 614(b)(4)(B) as a broad grant of discretion that might permit the Commission to ignore the statutory requirements and refuse to require carriage of both analog and digital signals during the transition to digital broadcast television.

The clear directive of the legislative history of § 614(b)(4)(B) is reinforced by the placement of the provision in the text. The advanced television provisions appear under the provision entitled “Signal quality” and are parallel to a provision entitled “Nondegradation; technical specifications.” See, e.g., INS v. National Center for Immigrants’ Rights, Inc., 502 U.S. 183, 189 (1991) (title of section can aid in resolving meaning of the statutory text); Southwestern Bell Corporation v. FCC, 43 F.3d at 1520-21 (relying on Congress’ “chosen title” to aid in statutory construction). The placement of the advanced television provisions on the same plane as technical specifications regarding nondegradation bolsters the clear directives in the legislative history and underscores that Congress intended § 614(b)(4)(B) primarily to authorize regulations regarding the technical aspects of mandatory carriage of digital signals. It is not plausible to assert that Congress enacted legislation to grant the Commission broad discretion to redefine must carry obligations and then placed that legislation under the same title as the provisions on technical specifications for nondegradation.

Section 614(g)(2) confirms that § 614(b)(4)(B) does not grant the Commission broad authority to determine what signals from which stations are eligible for must carry. Section 614(g)(2) requires the Commission to conduct proceedings to determine whether certain stations -- those like

Home Shopping Network that are “predominantly utilized for the transmission of sales presentations or program length commercials,” § 614(g)(2) -- are eligible for mandatory carriage. In providing direction to the Commission, however, the language of § 614(g)(2) is unambiguous. It requires the Commission to determine whether such stations are serving the public interest,^{4/} and then directs that if the Commission finds that they are serving the public interest, “the Commission shall qualify such stations as local commercial television stations for the purposes of subsection (a).” (Emphasis added.) The contrast between § 614(g)(2)’s explicit delegation of authority to determine eligibility for mandatory carriage and the absence of a similar delegation in § 614(b)(4)(B) could not be more stark. The Commission’s efforts to treat the two delegations as similar in scope violates the fundamental canon of statutory construction that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Bates v. United States, 118 S. Ct. 285, 290 (1997) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

This view of the limited nature of § 614(b)(4)(B) is shared by the cable operators. In filings with the Commission in response to the Commission’s Fourth Notice of Proposed Rulemaking and Third Notice of Inquiry, the National Cable Television Association (“NCTA”) stated: “The only provision in the Act that deals specifically with advanced television has nothing to do with increasing carriage obligation -- it simply instructs the Commission to alter its rules to ensure signal quality once stations have changed to conform to new standards.” Reply Comments of the National Cable

^{4/} See § 614(g)(2) (“[T]he Commission . . . shall complete a proceeding . . . to determine whether . . . [such stations] are serving the public interest, convenience, and necessity.”).

Television Association, Inc., at 6 (discussing § 614(b)(4)(B)) (emphasis in original).^{5/} In sum, there is broad agreement that § 614(b)(4)(B) is not a broad license for the Commission to alter the statutory scope of must carry obligations.

Moreover, even if § 614(b)(4)(B) could be read as a broader grant of discretion, the text of § 614(b)(4)(B) actually reinforces § 614(b)'s unambiguous and absolute must carry requirement. The section directs the Commission -- once it has "prescribe[d] modifications of the standards for television broadcast signals" -- to establish necessary changes to "ensure cable carriage of such broadcast signals." (Emphasis added.) Section 614(b)(4)(B) thus reiterates the statutory duty of cable operators to carry all digital and analog signals up to the cap, and it leaves no room for the Commission to exempt cable systems from that statutory duty.

Indeed, it would be absurd to posit that Congress -- which was aware that the Commission was contemplating a transition period in which two different types of signals would be transmitted -- would have contemplated carriage of only the new signals, thus eliminating the benefits it sought to achieve through must-carry in the first place. Such a reading of the Act would require the conclusion that Congress deliberately established a framework in which achieving one of the Act's purposes (transition to digital broadcasting) would necessarily come at the expense of the Act's other purposes of preserving the structure of free over-the-air broadcasting, preventing unfair competition, and maximizing broadcast programming diversity. It makes far more sense to read the Act so that

^{5/} Although starting from the proper premise that § 614(b)(4)(B) is a limited grant of authority to the Commission, the NCTA erroneously leaps to the conclusion that the Commission lacks power to order must carry in the transition. That leap, however, is ill-considered, because it ignores the fact that Congress itself, through § 614(a) and (b), directly imposed an obligation on cable operators to carry all broadcast signals up to the one-third cap. The limited scope of § 614(b)(4)(B) -- acknowledged by the NCTA -- simply confirms that the Commission lacks the power to alter that congressionally-imposed obligation.

all of Congress' purposes can be achieved harmoniously, rather than through a process that will sacrifice one objective for another.

C. Subsequent legislative history fully supports this view.

Since 1992, Congress has twice addressed issues relating to cable carriage of digital television signals. Both actions are fully consistent with the direction it gave the Commission in 1992 to ensure carriage of advanced television signals when they became available. In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq., Congress required the Commission to permit digital television broadcasters to offer multiple program services. It directed the Commission to collect fees from digital broadcasters if they provided ancillary and supplementary services on a subscription basis. And it provided that such ancillary and supplementary services would not be entitled to mandatory carriage under §§ 614 and 615 of the Communications Act. Viewed against this backdrop, the statement in the Conference Report that "that issue is to be the subject of a Commission proceeding under § 614(b)(4)(B) of the Communications Act," H. R. Conf. Rep. 104-458, at 161 (1996), if anything, reinforces the point that the 1996 Act was not intended to change the must carry status of digital television signals generally.

The language and legislative history of the Telecommunications Act are fully consistent with Congress' directive to the Commission in 1992. In the 1996 Act, Congress made clear that must carry rights would not be extended under §§ 614 and 615 to subscription services offered in conjunction with digital television service. By limiting the scope of must carry rights for digital signals, Congress demonstrated that it understood that §§ 614 and 615 would otherwise require their carriage, including carriage of subscription and other ancillary services. The Conference

Report is to the same effect -- Congress is only restricting the scope of digital must carry rights, because those rights generally are already addressed in the 1992 Act.

Indeed, the most logical reading of the must carry discussion in the Telecommunications Act is that Congress, understanding that digital television could involve more complex forms of programming than analog television signals, chose to allow broadcasters to use the full range of capabilities of the new digital technology, but recognized that the concept of “primary video [and] accompanying audio” in § 614(b)(3)(A) would have to be modified for the new environment, and directed that the parts of digital signals that would not be entitled to mandatory carriage would be ancillary and supplementary services that are provided on a non-advertiser supported basis. Since those services are also subject to fees, Congress consistently sought to set them apart from free digital services for disparate regulatory treatment.^{6/}

Congress again referred to digital must carry in the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). Congress there addressed the transition to digital television and set conditions for the return to the Government of the spectrum used for analog television service. It directed the Commission to allow stations to continue to offer analog service in markets where construction of digital facilities has been delayed, converter technology is not generally available, or where 15 percent or more of television households “do not subscribe to a multi-channel video programming distributor . . . that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market.”

^{6/} The fact that Congress exempted ancillary and supplementary services from the must carry requirements reinforces that Congress’ goal in enacting the must carry legislation was to preserve the benefits of free television, and further demonstrates that Congress expected those free broadcast signals -- both analog and digital -- to be subject to mandatory carriage .

111 Stat. at 265-66. This provision clearly contemplates that cable systems and other multi-channel distributors will carry digital television signals. Indeed, their failure to do so would delay the recapture of the analog spectrum the Budget Act sought to ensure.

IV. In Light of the Supreme Court's Turner decisions, the Mandatory Carriage of Both Analog And Digital Signals Dictated by the Statute Is Constitutional.

In Turner II, the Supreme Court upheld against a First Amendment challenge § 614's imposition on cable operators of must carry obligations. Turner II, 117 S. Ct. at 1183; id. at 1203 (Breyer, J., concurring). Applying the settled framework applicable to content-neutral restrictions articulated in United States v. O'Brien, 391 U.S. 367, 377 (1968), the Court determined that the must-carry provisions further important government interests, and that the provisions do not burden substantially more speech than necessary. Under the Court's analysis in the Turner decisions, a rule requiring carriage of both analog and digital signals up to the one-third cap would easily pass constitutional muster.

A. The digital must carry obligations are content neutral.

In Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) ("Turner I"), the Supreme Court determined that the must carry obligations imposed by § 614 with respect to analog signals are content neutral, and that intermediate scrutiny in the form of the O'Brien test is appropriate. Turner I, 512 U.S. at 661-62. In reaching that conclusion, the Court rejected numerous arguments articulated in Judge Williams' dissent in the district court and advanced by appellants in the Supreme Court. In particular, the Court concluded that "[i]nsofar as they pertain to the carriage of full-power broadcasters, the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech." Id. at 643. Further, the Court rejected the notion that Congress' purpose in enacting the provisions was to "promote speech of a favored content,"

concluding instead that “Congress’ overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable.” Id. at 646. Finally, the Court rejected a number of arguments for a stricter standard including that the must carry provisions (1) compel speech by cable operators, (2) favor broadcast programmers over cable programmers, and (3) single out certain members of the press -- i.e. cable operators -- for disfavored treatment. Id. at 653.

The Court’s conclusions in Turner I, which were reaffirmed in Turner II, control the standard of review of the digital must carry provisions. The statutory provisions -- principally § 614 -- that impose the digital must carry obligations are the same provisions that imposed the analog must carry obligations the Court addressed in Turner I and Turner II. Accordingly, the digital must-carry provisions must be evaluated under the O’Brien framework, and must therefore be upheld if they “advance[] important governmental interests unrelated to the suppression of free speech and do[] not burden substantially more speech than necessary to further those interests.” Turner II, 117 S. Ct. at 1186.

B. The digital must carry obligations further important governmental interests

In Turner I, the Supreme Court held that the must carry requirements of the 1992 Act advance three interrelated governmental interests of great importance:

- (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 market for television programming.

512 U.S. at 662. These governmental interests are also directly advanced by applying the provisions of the Act to carriage of digital signals. Indeed, that is the very reason why Congress instructed the

Commission to develop a plan for carriage of digital signals. For purposes of this proceeding, therefore, the importance of these interests must be taken as a given.

Indeed, to the extent the NPRM suggests that the Commission needs to reevaluate the factual underpinnings of Congress' decision to impose must-carry requirements, the Commission would exceed its authority. In light of the Court's decision in Turner II, further fact finding by the Commission cannot be justified as necessary to support the constitutionality of the must-carry provisions. Indeed, further fact finding would be irrelevant to any future court proceedings regarding the constitutionality of the must carry rules. Once the Supreme Court has determined that Congress' judgments, findings, and predictions were reasonable and based on substantial evidence, the courts may not reexamine those judgments, findings, and predictions to determine either whether a new Congress would make the same determinations today or whether it would be reasonable for a new Congress to do so.

The Supreme Court made this point emphatically in Turner II, holding that the role of the judiciary is not to determine in the first instance the correctness of the congressional predictions either at the time they were made, at the time of litigation, or at some later date. Instead, "[o]ur sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" Turner II, 117 S. Ct. at 1189 (emphasis added) (quoting Turner I, 512 U.S. at 666); see also id. at 1195 ("The issue before us is whether, given conflicting views of the probable development of the television industry, Congress had substantial evidence for making the judgment that it did"); Coolbaugh v. Louisiana, 136 F.3d 430, 436 (5th Cir. 1998) ("The Turner II Court instructs that the judiciary's sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.") (internal quotation

omitted), cert. denied, No. 97-1941, 1998 WL 289414 (U.S. Oct. 5, 1998). The Court's holding in this regard fits comfortably within the substantial line of First Amendment case law requiring such judicial deference to legislative determinations. See, e.g., City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 51-52 (1986) ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city address."); Excalibur Group, Inc. v. City of Minneapolis, 116 F.3d 1216, 1221 (8th Cir. 1997) ("this record, which includes studies of several cities and evidence obtained at the hearings held by the City of Minneapolis, indicates that the city had substantial evidence on which to base its conclusions about the secondary effects of adults-only businesses") (citing Turner II), cert. denied, 118 S. Ct. 855 (1998).

This is not to say, of course, that post-enactment evidence is always irrelevant to the constitutional inquiry. To the contrary, such evidence is clearly relevant to help to establish the reasonableness of the congressional inferences. For that reason, the additional evidence on remand was admissible to "support[] the reasonableness of Congress' predictive judgment." Turner II, 117 S. Ct. at 1193; see also id. at 1191 ("the reasonableness of Congress' conclusion was borne out by the evidence on remand"). But once the congressional judgment is found to have been reasonable at the time it was made and based on substantial evidence, subsequent developments can provide no basis to call the reasonableness of that judgment into question.

This deference to Congress flows from the courts' obligation -- born of respect for the particular fitness of a co-equal branch of government -- to avoid "infring[ing] on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy."

Turner II, 117 S. Ct. at 1189. That fitness flows not only from Congress' role in representing the interests of all the people of the Nation, but also from Congress' superior ability to "amass and evaluate the vast amounts of data," Walters v. National Association of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985), necessary to make predictive judgments, particularly in "industries undergoing rapid economic and technological change." Turner II, 117 S. Ct. at 1189. Of course, Congress' competence to make predictive judgments does not ensure the ultimate accuracy of those judgments. But the judiciary does not sit as a court of legislative appeals to review the ultimate accuracy of Congress' factual predictions. Instead, the courts fulfill their constitutional role when they determine -- following their own independent review -- that Congress' inferences were reasonable and "based on substantial evidence."^{7/}

Further, a contrary approach would result in a tidal wave of constitutional litigation. Loosed from the anchor of congressional reasonableness, courts and agencies would be obligated to review repeatedly the facial validity of a statute in light of the ebb and flow of changed circumstances. A statute that was constitutional when passed, might become unconstitutional five years later, only to be revived when circumstances changed yet again. Courts and agencies would endlessly evaluate the reasonableness of Congress' predictions against the backdrop of subsequent events. Indeed, the

^{7/} This approach is entirely consistent with the Supreme Court's frequent admonition that "deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" Turner I, 512 U.S. at 666 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989)). That "independent judgment" is not a license to review with 20/20 hindsight Congress' predictive judgments. Instead, that independent judgment is to assure that Congress' predictions and conclusions are reasonable and based on substantial evidence. See Rostker v. Goldberg, 453 U.S. 57, 82-83 (1981) (the district court erred in not "adopting an appropriately deferential examination of Congress' evaluation of that evidence") (emphasis in original).

current proceeding illustrates the dangers: the NPRM will no doubt be read by cable companies as the catalyst for another round of massive data gathering to evaluate the prescience of Congress' judgments. The First Amendment does not require such an effort. Indeed, deference to Congress and prudence in conserving limited government resources bars the Commission from permitting it.

Nor can efforts to renew the data collection and analysis be justified as necessary to inform the Commission's policymaking on this issue. As noted above, § 614(b) contains Congress' clear policy direction concerning must carry, and § 614(b)(4)(B) does not license the Commission to sit as an ongoing council of revision respecting the need for must-carry. To the contrary, § 614(b)(4)(B) simply instructs the Commission to extend the must-carry requirements of the 1992 Act to digital signals in an appropriate manner when advanced television begins. It does not delegate to the Commission sweeping authority to decide whether Congress' predictive judgments continue to be reasonable, nor does it give the Commission license to reconsider Congress' policy choices based on those judgments. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). A challenge to the reasonableness of those judgments must be addressed to the Congress itself.

In Turner II, the Supreme Court also affirmed, on the basis of the substantial record developed before Congress as well as the additional record developed in the district court proceedings in the case, that the must-carry requirements of the 1992 Act advanced the posited governmental interests in a direct and material way. The Court held that it was entirely reasonable for Congress to conclude that there are "systematic reasons" why cable operators would seek to disadvantage broadcasters: "Simply stated, cable has little interest in assisting, through carriage, a competing

medium of communication.” 117 S. Ct. at 1192. Further, the Court noted that the evidence showed that “cable systems have little incentive to carry, and a significant incentive to drop, broadcast stations that will only be strengthened by access to the 60% of the television market that cable typically controls.” *Id.* The Court also noted that the evidence supported Congress’ related conclusions that cable operators acted on these incentives to drop or otherwise disadvantage substantial numbers of broadcasters, *see id.* at 1192-93, and that broadcasters generally suffered serious harms as a result, *see id.* at 1195-96. On the basis of this evidence, the Court held that Congress had made a reasonable predictive judgment that “must-carry serves the Government’s interests in a direct and effective way.” *Id.* at 1197 (internal quotation omitted). Finally, the Court noted that these congressional judgments were entitled to substantial deference. *See id.* at 1196 (“the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress”). Such deference was particularly warranted in that Congress was making a predictive judgment about future harms. The Court made clear that “[a] fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it.” *Id.* at 1197. As noted, these congressional conclusions are binding on the Commission in this proceeding.

Furthermore, the application of the 1992 Act’s must-carry requirements to digital is supported by an additional interest that would be sufficient standing alone to satisfy the applicable standards of intermediate First Amendment scrutiny set forth in *Turner I* and applied in *Turner II*. Without cable carriage of broadcasters’ DTV signals to the 67 percent of households who see television only through cable, the entire DTV transition could falter, will certainly take years longer than Congress intended, and, quite possibly, could fail. Congress has identified the prompt transition to a digital broadcasting system as an important national interest in its own right. That is why

Congress provided for the carriage of digital television signals. The benefits of a digital broadcasting system are manifold: more efficient use of the spectrum, more programming options for consumers, better quality transmission, etc. Furthermore, a prompt transition to a digital broadcasting system will result in a faster return of analog spectrum to the Government, so that it may be used for other purposes and generate additional federal revenues. See Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

Precisely the same structural marketplace characteristics that placed analog broadcast television at risk without must-carry exist with respect to digital broadcasting. For the transition to digital television to be successful, consumers will need to make substantial investments in new television sets capable of receiving digital broadcast signals. Because the large majority of American consumers receive broadcast programming through their cable systems, they will need the certainty that they will receive digital broadcast signals before making the substantial investment required. By the same token, unless broadcasters know that their signals will be carried on cable (which is the means of access to at least two-thirds of their potential audience), they will lack meaningful incentives to incur the significant expense of converting to the digital format.

C. The digital must carry obligations do not burden substantially more speech than necessary to further those important governmental interests.

Because “[c]ontent-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do,” they are “subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution.” Turner II, 117 S. Ct. at 1198 (internal quotation and citation omitted). The Government retains substantial flexibility to choose the means to effect its important ends, “so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation and does not

burden substantially more speech than is necessary to further that interest.” Id. (internal quotations omitted). Under this prong of the O’Brien standard, the mandatory carriage of both analog and digital signals contemplated by the statute is constitutional both because the rapid past and expected future expansion in cable channel capacity ensures that the burden on cable operators will be small, and because the digital must carry provisions are narrowly tailored.

1. The burden imposed by mandatory carriage of both digital and analog signals will be small.

The mandatory carriage of both digital and analog signals will no doubt cause an increase in the number of broadcast channels subject to must-carry. But for the purpose of the First Amendment, this is the beginning, not the end, of the analysis. Even with this increased number of channels subject to must carry, and the protestations of the cable industry notwithstanding, “the actual effects [of must carry] are modest.” Turner II, 117 S. Ct at 1198.

First, for those cable systems that are already at their caps, the additional requirements imposed by the mandatory carriage of both analog and digital signals will cause no increased burden whatsoever. Those cable operators simply have more broadcast signals from which to choose as they fulfill their must-carry obligations.^{8/}

Second, the stations that will move to digital most quickly are the stations that are network affiliates in the largest markets, i.e., the ones most able to ensure carriage through

^{8/} Of course, in Turner, most cable systems were below the cap and were forced to carry broadcast stations that they would not have otherwise carried, and yet the Court found the must-carry scheme constitutional in its entirety.

retransmission consent and the least likely to rely upon must carry. Thus, in the early stages of the transition, the burden of digital must carry is likely to be minimal.^{9/}

Third, and most important, the continuing expansion of cable channel capacity, alluded to in Turner II, substantially mitigates any increased burden imposed by the mandatory carriage of both analog and digital signals prior to the return of the analog spectrum. Analog channel capacity, for example, has increased substantially since the passage of the 1992 Cable Act, and continues to increase. See The Transition to High Definition Television, Before the Senate Commerce, Science and Transportation Committee, 105th Cong., at 13 (July 8, 1998) (Written Testimony of Gregory M. Schmidt, Vice President, New Development, and General Counsel LIN Television Corporation) (“since the passage of the 1992 Cable Act, total U.S. cable channel capacity has grown every six weeks by the total number of stations that had to be added to cable systems because of must carry, and every six months by the total number of stations that are now carried under must carry”) (emphasis in original). In testimony before the Senate Commerce Committee, the CEO of Cox Communications noted that “Cox has increased its analog channel capacity by 75% since 1992, going to 95% percent by the end of 1998.” Hearings on Cable Rates Before the Senate Commerce Committee, 105th Cong. (July 28, 1998) (Testimony of James O. Robbins) (available at 1998 WL 12763225). And Cox’s experience is entirely consistent with broader industry trends toward increasing channel capacity by upgrading cable systems to 550 MHz (77 channels), 750 MHz (110 channels), and 1 GHz (150 channels). See Strategic Policy Research, Inc., Cable System Capacity:

^{9/} This fact provides no justification for the Commission to delay mandatory carriage obligations, because those obligations must be in place and effective as quickly as possible to encourage the substantial investment necessary to ensure the rapid and effective transition to digital television.

Implications for Digital Television Must-Carry, at 22 & n.36 (Oct. 13, 1998) (“SPR Report”) (noting NCTA claim that 71 percent of cable homes would be passed by 550 MHz-750 MHz plant by year-end 1998). Indeed, the major cable companies such as TCI, see SPR Report at 22 n.36 (by the end of the year 2000, “all TCI metropolitan areas are scheduled to have 750 MHz plant and the suburbs at least 550 MHz”); Time Warner, see id. (“Time Warner recently announced that its \$4 billion project to upgrade cable systems to a 750 MHz, two-way plant had been accelerated and was on track for early completion in year-end 2000”); and Comcast, see id. (noting Comcast’s claim 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”), have completed or will complete within the next year or two substantial capacity upgrades. See generally id. at 23 n.37 (noting estimates by Paul Kagan Associates, Inc., that average U.S. cable channel capacity will rise from 53 channels in 1996 to 75 channels in 1998 to 140 channels by 2003).

Moreover, as cable systems move to digital services, channel capacity will expand even more rapidly. See generally SPR Report at 23-26 (describing the impact of digital encoding and compression on channel capacity). For example, Cox has indicated that with the roll out of digital services, “Cox’s weighted average number of channels per system will increase from 56 to more than 200.” Hearings on Cable Rates Before the Senate Commerce Committee, 105th Cong. (July 28, 1998) (Testimony of James O. Robbins) (available at 1998 WL 12763225). And Comcast Cablevision’s digital cable offerings have caused comparable increases in capacity. See Michael Stroh, Plugged In, The Baltimore Sun, Aug. 10, 1998, at C1 (as part of a trial of its new digital cable service, “Comcast Cablevision last month quietly began offering some Baltimore County subscribers the opportunity to get as many as 102 new cable channels”). As the SPR Report demonstrates, this

rapid and continuing expansion in channel capacity will help to ensure that for digital must carry, as was true for analog must carry, the burden on most cable operators will be minimal. See SPR Report at 25-26; cf. Turner II, 117 S. Ct. 1198 (noting that “the vast majority of cable operators have not been affected in a significant manner by must-carry”).

2. Congress’ mandatory carriage regime is narrowly tailored.

For many of the same reasons adduced by the Court in Turner II, the provisions requiring mandatory carriage of both analog and digital signals are sufficiently narrowly tailored to withstand First Amendment scrutiny.

First, as in Turner II, the benefits are comparable to the burdens. That is, the channels occupied by added broadcasters “represent the added burden of the regulatory scheme,” and, because “most of those stations would be dropped in the absence of must-carry,” the number of such channels “approximates the benefits of must-carry as well.” Turner II, 117 S. Ct. at 1199; see also id. (“Because the burden imposed by must-carry is congruent to the benefits it affords, we conclude must carry is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable.”)

Second, as the Court noted in Turner II, the narrow tailoring is reflected in the steps Congress took to “confine the breadth and burden of the regulatory scheme.” Id. The broadcast stations carried by cable operators pursuant to retransmission consent can be used to satisfy the mandatory carriage obligations; the must-carry obligations are subject to caps proportionate to the capacity of the cable system; and cable operators retain discretion in choosing among qualified signals. Id.

Moreover, during the transition to digital, other elements of narrow tailoring are apparent. For example, despite the fact that (in theory) twice as many stations are eligible for mandatory carriage, the statutory caps remain constant. Further, the dual carriage requirements are temporary; cable operators are not required to carry both analog and digital signals indefinitely. Instead, at the end of the transition period, the analog spectrum will be returned to the government and the cable operators will be subject to mandatory carriage for digital signals only.^{10/} There is thus little doubt that under the Court's analysis in Turner II, the Act's dual carriage requirements are narrowly tailored.

Nor does the existence of alternative transition schemes, such as those proffered by the Commission in its NPRM, see NPRM ¶¶ 41-50, change the analysis. As the Court indicated in Turner II, the mere existence of less restrictive alternatives is insufficient to invalidate a congressional enactment under intermediate scrutiny. Because a statute will not be invalidated as long as “the means chosen are not substantially broader than necessary” (emphasis added), the courts will not “invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests.” Turner II, 117 S. Ct. at 1200. As the Court emphasized, “a regulation's validity ‘does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.’” Id.

^{10/} In light of Turner II, the mandatory carriage provisions after the transition will be constitutional a fortiori because there will be roughly the same number of stations eligible for mandatory carriage as there was in Turner II and there will be significantly more cable channel capacity.

With respect to the must-carry obligations during the transition to digital transmission, the other options proposed by the Commission are either only marginally less intrusive on First Amendment interests or are simply not “adequate alternative[s] to must carry for promoting the Government’s legitimate interests,” 117 S. Ct. at 1200, or both.

Most of the intermediate proposals offered by the Commission do not call into question the narrow tailoring of the mandatory carriage requirements because their impact on First Amendment interests is only marginally less intrusive. For example, in the “Phase-In Proposal,” the Commission proposes immediate carriage on cable systems with unused capacity, with gradual mandatory carriage (to limit disruptions to cable operators) for the remaining cable systems. But the Court has already rejected the notion that simply putting forth a scheme that results in fewer displaced channels is sufficient to show a substantial burden. As the Court noted in rejecting a similar argument in Turner II, “[i]n the final analysis this alternative represents nothing more than appellants’ disagreement with the responsible decisionmaker concerning the degree to which [the Government’s] interests should be promoted.” Id. (internal quotation omitted) (alteration in original). Indeed, the Court’s upholding of the must carry obligations in Turner II clearly rejected the idea that the mere possibility of a “phase-in proposal” would call into question the constitutionality of must-carry. For such a scheme was surely available as an alternative to the mandatory carriage at issue in Turner, yet the Court found the statutory scheme narrowly tailored.

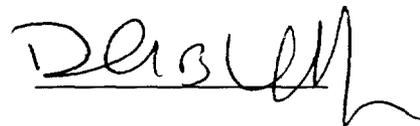
Other Commission proposals, while perhaps less intrusive on the rights of cable operators, are simply not adequate alternatives to the scheme Congress adopted. For example, the “Either-Or Proposal” would enable broadcasters to choose mandatory carriage for either the analog signal or the digital signal. NPRM ¶ 47. While such a system would reduce the disruptions to cable

interests, it would do so only at the cost of one of Congress' foremost goals, achieving a rapid transition to digital technology. See Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). Indeed, such a proposal would undoubtedly reduce the incentives for broadcasters to invest quickly in digital broadcast technology, making the purchase of digital receivers less attractive, reducing the potential audience for digital programming, thereby reducing incentive for broadcasters to invest in digital technology, completing the vicious cycle and guaranteeing a result that is completely at odds with congressional goals. Such a system is not a less restrictive means to achieve the Government's interests; rather, it is a rejection of the desirability of pursuing those interests at all.

CONCLUSION

For the reasons stated above, the Commission must require all cable systems to carry both the analog and digital broadcast signals up to the one-third cap, a result that is both dictated by the statute and consistent with the Constitution.

Respectfully submitted,



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