

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

RECEIVED

DEC 22 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF GTE

John F. Raposa
GTE Service Corporation
600 Hidden Ridge, HQE03J27
Irving, TX 75038
(972) 718-6969

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5214

Ross & Hardies
Stephen R. Ross
James A. Stenger
Amy L. Brett
888 16th Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 296-8600

December 22, 1998

Its Attorneys

No. of Copies rec'd 014
List ABCDE

GTE Service Corporation
December 22, 1998

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
SUMMARY	ii
I. INTRODUCTION	1
II. THE MUST CARRY STATUTE DOES NOT SUPPORT DUAL MUST CARRY	3
A. Section 614(a) and (h)(1)(A) Does Not Authorize Dual Must Carry	4
B. Dual Must Carry Is Inconsistent With Virtually Every Provision Of The Must Carry Statute	6
III. DUAL MUST CARRY WOULD BE UNCONSTITUTIONAL	10
A. The Burden Is Greater Than Countenanced In <i>Turner</i>	10
B. Changes In Circumstances Cannot Be Ignored	12
IV. EVEN IF CONSTITUTIONALLY AND STATUTORILY PERMISSIBLE, IMPOSITION OF DIGITAL MUST CARRY WOULD BE POOR PUBLIC POLICY	17
A. The Commission Should Not Deprive Cable Subscribers Of Free Choice In Cable Programming	18
B. There Is No Valid Policy Basis Upon Which To Establish A Dual -- And Constitutionally And Statutorily Impermissible -- Must Carry Scheme	19
C. Technological Issues Are Best Left To The Marketplace	21
V. CONCLUSION.	23

SUMMARY

GTE continues to support Option 7, no must carry for digital broadcast signals until the digital transition period is completed and broadcasters have returned their analog channels. The numerous policy and technical issues regarding cable carriage of DTV signals should be resolved by market-based solutions during the transition period.

Must carry means every subscriber must be able to receive the signal on every set, and on the basic tier. This means that as soon as the first DTV signal goes on the air in a market, cable would have to undertake a costly cable set top box procurement, not to mention the headend upgrade costs. Recognizing the sheer absurdity of this, broadcasters ask the Commission to rewrite the law to make it "fit" the dual must carry scheme. But the Commission must adhere to a plain reading of the Act, especially where constitutional doubt would be raised by an expansive reinvention.

The constitutional problems with dual must carry are far more serious than those considered in the *Turner* cases. The notion that the Commission or the Court could ignore the changes in circumstances since 1992 is fallacious. The use of must carry to launch fringe broadcast networks, the explosion of the Internet as an alternative source of information and diverse points of view, the growing competitive environment for multi-channel video services, all would have to be considered and the majority of the Court might well conclude that strict scrutiny would have to be applied, possibly invalidating the entire must carry law, not just dual digital and analog must carry.

Aside from the statutory and constitutional infirmities, imposition of digital must carry would be poor public policy. This is because imposition of dual analog and digital

must carry requirements would substantially favor new programming services initially delivered over the broadcast medium over those delivered over cable irrespective of relative qualities or consumer appeal. In addition, the complex technical issues presented by delivery of over-the-air digital signals are best left to resolution by the industry and the marketplace.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054**

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

REPLY COMMENTS OF GTE

GTE Service Corporation and GTE Media Ventures Incorporated (GTE) respectfully submit their Reply Comments in response to the Commission's *Notice of Proposed Rulemaking (NPRM)*. In these Reply Comments, GTE continues to support Option 7 and to oppose imposition of digital must carry requirements upon cable operators during the transition period between analog to digital broadcasting.

I. INTRODUCTION.

The record in this proceeding makes two points eminently clear: (1) imposition of digital must carry obligations would violate the statute, and (2) implicitly or explicitly recognizing this, broadcasters seek to have the Commission re-write the law. At the outset, the Commission is utterly without authority to rewrite the statute. It is unambiguous and to the extent that broadcasters cannot force their demands for digital must carry into the clear language of the statute — and, indeed, such demands are *contrary* to the clear language of the statute — they must seek relief from Congress, not the Commission.

Even if the broadcasters' demands were not *extra-statutory*, it is readily apparent that they represent only a limited constituency and therefore it would be poor public policy to accede to their demands. Specifically, two of the most important parties, cable and the major broadcast networks, prefer to work the matter out, rather than having the Commission impose a solution in a situation where most of the technical issues have yet to be resolved.

On the other hand, new networks (such as PAXtv) that seek to use must carry to gain access to cable through acquisition of mostly fringe UHF stations, have no more legitimate claim to cable carriage than competing new cable programmers. Under these circumstances, it would be arbitrary and capricious to attempt to utilize must carry regulations to favor certain new program services, i.e., those that acquire local broadcast stations, versus new program services that choose to launch via cable and other MVPD outlets.^{1/}

It is equally clear that the industry already is, and the marketplace will, address the carriage of digital broadcast signals during the transition period. As Chairman Kennard recently recognized, the Commission should be a facilitator of industry negotiations and not a dictator of regulatory solutions: “[u]ltimately it’s up to [the concerned industries] to define what the future of [the digital broadcast] medium will be.”^{2/}

^{1/} As discussed herein, changes in circumstances call into question the constitutionality of the existing must carry regime.

^{2/} *TR DAILY*, Nov. 16, 1998.

II. THE MUST CARRY STATUTE DOES NOT SUPPORT DUAL MUST CARRY.

A fundamental contradiction is presented by the broadcasters.^{3/} They assert that imposition of a dual digital must carry requirement during the transition period from analog to digital television ("the transition period") will speed the completion of the transition by encouraging consumers to buy new digital television receivers:

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 its length, is consumers buying DTV sets quickly and in large numbers.^{4/}

But the imposition of digital must carry would have exactly the opposite effect - the market for digital television receivers would be shrunken drastically, economies of scale would take far longer to develop, digital receivers would remain a luxury item, and broadcasters indefinitely would retain two television channels.

A clear reading of the must carry statute, if applied to digital channels during the transition period, would require cable operators to supply every subscriber with a set top box ("STB" or "cable box") capable of down converting DTV for reception on every existing NTSC receiver connected to cable.^{5/} Why would cable subscribers buy digital

^{3/} GTE refers to the commenters supporting must carry as "the broadcasters", but requests that the Commission note that the established networks did not comment in favor of must carry. The supporting commenters may include some "truly independent stations." (ALTS at 1.) GTE believes ALTS and others would admit that, with the proliferation of new broadcast networks, the number of independents is decreasing and the primary result of must carry would be to force cable carriage of new broadcast networks, rather than to perpetuate a declining number of "truly independent stations."

^{4/} NAB at ii.

^{5/} 47 U.S.C. §534(b)(6) and (7), 543(b)(7)(i).

television receivers if they receive free DTV down converters from their cable company under government imposed regulations? Only early adapters would do so to receive a true DTV signal, rather than a down converted signal. The FCC's goal of a timely transition to digital would be impeded, not expedited as the market for DTV receivers would be depressed and economies of scale would be delayed. And despite the fact that every cable subscriber would be provided with a free down converter for every NTSC television receiver, broadcasters would still be able to escape returning one of their two channels in any market where cable has less than 85% penetration.^{6/}

The cost to cable operators of providing every subscriber with a DTV down converter for every NTSC receiver would be enormous (NCTA estimates \$50 to 90 billion) and the burden would be placed upon the subscribers least able to afford it, *i.e.*, basic cable subscribers, as discussed further in the constitutional section of this Reply. What is significant here is that the terms of the must carry statute are incompatible with the goal of speeding the transition to digital.

A. Section 614(a) and (h)(1)(A) Does Not Authorize Dual Must Carry.

The broadcasters argue that Section 614(a) and (h)(1)(A) require dual carriage of both analog and digital signals of every commercial TV station and the Commission basically has no discretion in this rulemaking; in fact, Paxson argues the Commission

^{6/} 47 U.S.C. §309(j)(14)(B)(iii). Although the statute includes "a cable system or other MVPD", satellite MVPD's and other MVPD's not subject to must carry would not likely qualify as they would not be "carrying one of the digital television programming channels of each of the television stations broadcasting such a channel in such market." Thus, broadcasters would escape returning their second channel wherever franchised cable has less than 85% penetration, knowing full well that franchised cable is subject to increased competition that may lower penetration rates.

cannot even conduct this rulemaking.^{7/} These assertions are at odds with the plain and unambiguous language of the statute.

Section 614(a) requires carriage of “the signals of local commercial television stations.”^{8/} Although the term “signals” is used in the plural, this is not dispositive because the term “stations” also is used in the plural. In order to determine whether Congress intended for cable systems to carry multiple signals from a single station, Section 614(a) must be read together with the definition of a station.

Section 614(h)(1)(A) defines “a local commercial television station” for purposes of Section 614 as “any full power . . . station . . . licensed and operating on a channel **regularly assigned** to its community by the Commission”^{9/} Note two things: First, the statute refers to “a” channel - not dual or multiple channels; second, the statute refers to a channel “**regularly assigned.**” The assignment of two channels to each station is not “regular,” on the contrary, it is a temporary, transitional assignment only.^{10/}

Thus, the words of the must carry statute, read without need for any special administrative expertise, by their plain, simple and unambiguous meaning, only permit the Commission to require carriage of “a”, *i.e.* one, channel of each station, and only a

^{7/} *E.g.*, NAB at 3-6; Paxson Comments (hereafter “Paxson”) at 12.

^{8/} 47 U.S.C. §534(a).

^{9/} 47 U.S.C. §534(h)(1)(A)(emphasis added).

^{10/} GTE need not belabor the point that the assignment of two channels to each television station is an extraordinary, unprecedented circumstance in the history of this Commission - and not a “regular” channel assignment by any stretch of the imagination. The broadcasters’ attempted reading of this provision ignores not only its plain meaning, but the entire record of this Commission’s activities since 1934.

channel “regularly assigned” - not a dual channel specially assigned during a limited transition period. Not until the broadcasters have turned in one of their two transition channels will the remaining DTV channel be their “regularly assigned” channel entitled to must carry status under Section 614(a) and (h)(1)(A).

B. Dual Must Carry Is Inconsistent With Virtually Every Provision Of The Must Carry Statute.

Dual must carry of analog and digital signals during the transition period before consumers have replaced their NTSC receivers with new digital receivers would be inconsistent with virtually every provision of the must carry statute.

Signal availability - Section 614(b)(7) requires that must carry signals be provided to “every subscriber” and be viewable on “all television receivers.”^{11/} This would require cable to provide a down converter to every subscriber for every television set. It would undercut the market for digital receivers and delay the return of the analog spectrum. It would impose an immense financial burden compared to cable’s market place plan to roll-out digital STB’s only to those who subscribe to a new digital service tier.

Basic tier - Section 623(b)(7)(i) requires that the basic tier include “all signals carried in fulfillment of the requirements of Sections 614 and 615,” *i.e.*, all must-carry signals.^{12/} This would require cable to provide DTV signals on the basic tier, rather than

^{11/} 47 U.S.C. §534(b)(7).

^{12/} 47 U.S.C. §543(b)(7)(i).

cable's plan for a digital tier roll-out, with the cost imposed upon basic cable subscribers, rather than digital tier "early adapters".

Channel positioning - Section 614(b)(6) requires "each channel" carried under the must carry rule to be carried "on the cable system channel number on which the local commercial television station is broadcast over the air" ^{13/} This would severely disrupt cable channel line-ups, if applied according to its plain meaning. Broadcasters want to rewrite this and require carriage of digital channels at the same position as the existing analog channel, *i.e.*, Ch. 4 for analog, and 4.1, 4.2, 4.3 etc. for digital. ^{14/} No statutory basis exists for such channel shifting or linking, as the statute refers only to "the cable system channel number" ^{15/} that corresponds to the station's over the air channel number.

Primary signal - Section 614(b)(3)(A) only requires cable to carry a broadcaster's "primary video" signal. ^{16/} The broadcasters want to rewrite this provision to require carriage of the entire digital bit stream - except pay services. The broadcasters want headends and cable boxes to include complex navigation software that would allow broadcasters to:

1. Use cable channel numbers that may not in fact correspond to over the air numbers, as noted above;

^{13/} 47 U.S.C. §534(b)(6).

^{14/} ALTS at 73-75; MSTV at 32-35.

^{15/} The Commission should note that the provision refers to the "number" not "numbers".

^{16/} 47 U.S.C. §534(b)(3)(A).

2. pass through broadcaster generated program guides; and
3. allow broadcasters to switch at will between HDTV and multiplexed DTV signals.^{17/}

This wish list has nothing to do with “preserv[ing]...free, local television”.^{18/} It has everything to do with giving new programming and new program guides to be created by the broadcasters a competitive advantage *vis-a-vis* cable programmers and cable program guide creators - at the same time that broadcasters also will be launching subscription services that they presumably would link to and promote on their “free” channels - and with no assurance that any of these new services will be “local” in nature.^{19/}

A Plain Reading of the Statute as a Whole - Dual must carry of analog and digital signals is inconsistent with all of the above provisions of the must carry statute, as the broadcasters essentially admit by asking the Commission to rewrite the law to suit their preferences.^{20/} The only statutory basis for making revisions to the must carry

^{17/} *E.g.*, ALTS at 73; MSTV at 32-37.

^{18/} NAB at i.

^{19/} The request for carriage of broadcasters’ “program guides” is inconsistent with the statute. The statute requires carriage only of “program-related material” and specifically allows cable operators to exclude “other material...or other nonprogram related material (including teletext and other subscription and advertiser-supported information services).” 47 U.S.C. §534(b)(3). “Program-related material” means material related to the specific television program with which material is broadcast; it does not mean a general program guide covering other programs or signals of the broadcaster, and certainly not a guide covering channels of other parties.

^{20/} While the broadcasters ask the Commission liberally to rewrite several provisions of the statute, they urge a narrow reading of the non-duplication provision, 47 U.S.C.

rules is Section 614(b)(4), the "Signal Quality" provision that authorizes the Commission to commence a proceeding to revise the must carry rules as necessary to ensure cable carriage of signals, "which *have been* changed" to conform to the new DTV standards.^{21/}

Contrary to the language of the statute as a whole, the broadcasters attempt to rely upon this provision to rewrite the remainder of the statute. This is impermissible since the plain meaning of the statute requires that all of its provisions be given effect; namely, that must carry will apply only when broadcasters have returned their analog channels as stated in Option 7, and not during the transition period. After the transition period is over, broadcasters' signals will "have been changed" consistent with Section 614(b)(4)(B). At this stage, digital channels will be the primary video signals of the broadcaster and the channel position issues largely will be self-resolved, as broadcasters will have settled on one channel and returned the other. Thus, the statute only makes sense when read to apply *after* the transition is complete, in contrast to the broadcasters' attempt prematurely to apply it during the transition period in a manner that cannot be reconciled with its plain meaning.

§534(b)(5), arguing it applies only to two different stations, not to duplicative signals of the same station. Paxson at 29-30. But the policy behind non-duplication clearly is implicated where the transition scheme is premised upon increasing, and eventually 100% simulcasting. Multi-casting of other non-simulcast services is not an answer as it contradicts the statutory limitation of cable's obligation to carry only the "primary video". 47 U.S.C. §534(b)(3).

^{21/} 47 U.S.C. §543(b)(4)(B) (emphasis added, noting the *past* tense).

III. Dual Must Carry Would Be Unconstitutional.

None of the Options 1-6 can be reconciled with cable's constitutional rights. Dual must carry of digital and analog does not pass the *Turner*^{22/} balancing test.

A. The Burden Is Greater Than Countenanced In *Turner*.

The NAB submits an elaborate study intended to show that cable channel capacity is expanding and the burden of must carry is actually declining, including that one 6 MHz channel can carry two HDTV signals.^{23/} Whether intentionally so or not, what purports to be a scholarly study is entirely misleading.^{24/} Particularly objectionable is the attempt to suggest that digital must carry during the transition period would be gradual or reasonable in nature, allegedly because broadcast stations will begin DTV service over a staggered schedule, while cable will be adding new digital capacity. On the contrary, under must carry, a cable system would have to provide every subscriber with a digital converter box for every receiver and would have to add digital capacity to every basic tier **as soon as the first DTV channel was offered in a market.** Simply

^{22/} *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.C. Cir. 1994) ("*Turner I*"); *Turner Broadcasting System, Inc. v. FCC*, 910 F. Supp. 734 (D.C. Cir. 1995) *aff'd*, 117 S. Ct. 1174 (1997) ("*Turner II*").

^{23/} NAB, Appendix D.

^{24/} History has shown that as cable system capacity has expanded, the number of program services also has grown and, in fact, has continued to outstrip channel availability. Manipulation of statistical averages cannot overcome common sense and experience: numerous cable program services continue to seek carriage as any new cable channels become available and these services have equal merit with any of the program offerings of the broadcasters which may lack local content.

stated, the broadcaster channel capacity study is a red herring designed to distract attention from the real burdens on cable.

As shown above, cable operators would be required to provide a down converter for every receiver of every subscriber as soon as the first DTV channel was offered in a market, rather than rolling out digital STB's only to subscribers who choose to pay for a new digital tier of service, and allowing cable and its subscribers the choice not to include DTV down converters in cable boxes.^{25/} Cable operators also would be required to carry DTV signals on the basic tier, rather than rolling out digital cable only to subscribers who choose to add a new digital service tier^{26/}; and under the interpretation of various provisions of the statute urged by the broadcasters, cable operators would be required to provide every subscriber with an STB - and modify the headend - to permit broadcasters to control their channel position, provide their own navigator/program guide, *i.e.* act as "editor" of the entire cable system, and switch at will between HDTV/ multiple DTV/ other services (Internet, datacasting) so long as such services are advertiser supported. Yet these broadcast services may compete with cable services counted on in cable business plans to defer some of the cost of cable upgrades for digital TV, Internet and telephony.^{27/}

^{25/} Section 614(b)(7), 47 U.S.C. §534(b)(7).

^{26/} *Id.* and 623(b)(7)(A)(i), 47 U.S.C. §543(b)(7)(A)(i). NAB, for example, insists, "DTV signals must be available to cable subscribers on a free tier of programming...." NAB at 41. Of course, the basic tier is not required to be offered "free". But it must be the lowest priced tier and available to all subscribers. *Id.*

^{27/} *E.g.*, NAB at 35-42; MSTV at 26-36.

The Supreme Court in the *Turner* cases contemplated cable ready TV sets or use of existing analog converters to continue carriage of existing signal complements. The burden was limited to channel capacity only and involved in the Court's view the addition of very few stations not already carried.^{28/} A multi-billion dollar investment by cable in technology required to add to cable systems new broadcast service offerings was not contemplated in *Turner*.

B. Changes In Circumstances Cannot Be Ignored.

To follow the suggestion in the Statement of Jenner & Block ("J&B"),^{29/} that a legislative record cannot be revisited and the Commission must follow existing statutes and rules regardless of changed circumstances, is legally insupportable. Indeed, in the past such intentional blindness has led to reversal of Commission orders:

Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continuing operation. We hold that the Commission is statutorily bound to determine whether that linkage now exists.^{30/}

^{28/} *Turner II*, 117 S. Ct. 1174, 1198 (1997).

^{29/} NAB, Appendix A, at 12-15. Mischaracterization of a partisan legal argument as a "Statement" is inappropriate.

^{30/} *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979)(footnotes omitted). Notably absent from J&B's "Statement" is any citation to any case involving the Commission. J&B appears to rely solely upon two cases involving municipal regulation of sexually oriented businesses. *Id.* at 13.

The fundamental precepts of *Turner* would become subject to reconsideration, and analog must carry may be invalidated, in the event the Commission substantially revises the must carry rules as urged by the broadcasters.

A majority of the Court in *Turner II* did not find anti-competitive behavior on the part of cable as alleged by NAB, but based their decision upon the government's interest in preserving the content of over-the-air programming, as the four dissenters noted.^{31/} The dissenters believed that the content-based nature of must carry meant that the standard of intermediate scrutiny should not have been applied and strict scrutiny was the appropriate test: "Under these circumstances, the must-carry provisions should be subject to strict scrutiny, which they surely fail."^{32/}

A Federal Trade Commission 1991 Study found that "most cable systems voluntarily carried broadcast stations with any reportable ratings in non-cable households....", leading the Dissent to conclude:

When appellees are pressed to explain the Government's "substantial interest" in preserving noncable viewers' access to "vulnerable" or "marginal" stations with "relatively small" audiences, it becomes evident that the interest has nothing to do with anticompetitive conduct, but has everything to do with content - preserving "quality" local programming that is "responsive" to community needs.^{33/}

The concurring opinion of Justice Breyer was based upon an alleged need to preserve "a rich mix of over-the-air programming" in order to preserve "a multiplicity of

^{31/}*Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1208 (1997).

^{32/}*Id.* at 1208.

^{33/} *Id.* at 1212.

information sources.”^{34/} The four dissenting Justices therefore concluded that a majority of the Court would agree that, “[W]e [cannot] evaluate whether must-carry is necessary to serve an interest in preserving broadcast stations without examining the value of the stations protected....”^{35/}

At the risk of stating the obvious, the explosion in Internet usage since 1992 has proliferated the number of First Amendment voices and drastically reduced the barriers to entry in gaining wide dissemination of any particular point of view.^{36/} Also, since 1992, cable operators have become subject to increased competition from DBS and medium powered satellite and private cable as a result of developments in digital technology (DBS compression technology, for example, is digital), demonstrating that digital technology is making available “a multiplicity of information sources”, regardless of any DTV must carry requirement.

^{34/} *Id.* at 1204. Of course, Justice Breyer’s vote was the critical fifth vote in upholding the constitutionality of analog must carry.

^{35/} *Id.* at 1211.

^{36/} Congress so found in 1996. 47 U.S.C. §230(a). Increasing use of the Internet recently was described by Steve Case of America Online in the following terms. “*EM: Is AOL a rival to the broadcast networks as the new mass medium?* **Mr. Case:** It’s wrong to look at this new medium through the prism of technology or historical separation between industries. The most striking statistic about AOL is not that we have gone from 200,000 members when we went public six years ago to 13 million members today, but that we’ve gone from customers using us an average three hours a month to an average 25 hours a month. As people use more time on the Internet, they will devote less time to other things like television.” *Electronic Media*, Nov. 9, 1998, at 32 (“Still a cyber-pioneer”). The fact that non-cable households may obtain information from the Internet undercuts their need to rely upon broadcast media.

Changes in technology over the intervening years also would require reconsideration of the Court's view of the viability of the so-called "A/B" switch as an alternative, and less constitutionally intrusive, remedy. GTE supports the comments of several cable commenters who noted that multiple input ports and built in selector switches are now included even in moderately priced NTSC sets.^{37/} Therefore, consumers who are interested in receiving broadcast DTV can connect to their TV sets the necessary antenna and decoder inputs and switch seamlessly between those inputs and their cable service.^{38/} It is no answer to say that off air reception of DTV is inadequate. The justification for must carry was preservation of free television signals for non-cable subscribers. A non-cable subscriber who cannot receive an off-air DTV signal in a given location gains nothing by requiring cable to deliver the signal to his neighbor.

Since the passage of the must carry law, the number of "independent" stations has declined - not because of lack of cable carriage, but because of the acquisition of these stations by new broadcast networks, several of which have been launched since 1992. A new record on digital must carry would have to reflect that the new broadcast networks have used the acquisition of fringe stations, coupled with the must carry law, to gain an advantage over other programmers in launching their program services on cable.

^{37/} *E.g.*, Time Warner at 6; Discovery at 10 and 25.

^{38/} Notably the broadcasters have not regarded the inconvenience of switching between inputs as a justification to allow DBS to deliver out of market broadcast signals.

Although cable was characterized as engaging in “anti-competitive” conduct by the proponents of must carry and four of the Justices in *Turner II*, cable operators and programmers legitimately regard the broadcasters’ position as anti-competitive today. NAB essentially argues that must carry is necessary to guarantee the success of digital television. NAB asserts that only if broadcasters have “*certainty*” of cable carriage will they “have the incentive to aggressively continue their plans to borrow money, hire consultants, order DTV equipment and push ahead to their DTV future.”^{39/}

Cable program services have had to operate in a world without “certainty” and have had to assume entrepreneurial risk in borrowing money, hiring personnel, ordering equipment, and otherwise attempting to launch their services in a competitive environment for audience share and channel capacity. Similarly, cable operators must compete for subscribers against competitors such as DBS and private cable companies who are not subject to must carry and are free to design their channel line-ups without governmental intervention.

Also anti-competitive is the NAB's strident demand that the government intervene “*as an incentive for consumers to purchase DTV sets.*”^{40/} Government intervention in order to induce consumers to purchase DTV sets, as opposed to NTSC sets, or personal computers, washing machines, boats or motorcycles, appears improper and anti-consumer, extending the regulatory regime not only to what cable subscribers should watch, but also to what consumers should buy. The Commission’s

^{39/} NAB at 12 (emphasis in original).

^{40/} NAB at 7 (emphasis in original).

purpose is to allocate spectrum and adopt regulations to allow private industry to pursue new technologies and services, not to attempt to guarantee their success.^{41/}

In any reconsideration of the must carry law by Congress or the Court, the reality of what has occurred since 1992 cannot be ignored and it appears doubtful that even the current analog must carry law now would be countenanced under an intermediate scrutiny test. Certainly the broad expansion sought by the broadcasters is without question unconstitutional.

IV. EVEN IF CONSTITUTIONALLY AND STATUTORILY PERMISSIBLE, IMPOSITION OF DIGITAL MUST CARRY WOULD BE POOR PUBLIC POLICY.

Digital must carry is poor public policy because it favors new broadcast networks over new cable networks, it imposes restrictions on cable operators that are not imposed on their competitors, and it fails to allow the market to resolve complex technical issues.

^{41/} Broadcasters candidly admit that their original motivation in proposing HDTV was to prevent mobile communication use of vacant broadcast spectrum for as long as possible. **EM:** *Is it fair to say that this [HDTV] was generated primarily as a way to keep channels?* **Mr. [John] Able:** Yeah, keep channels. At the time, it was definitely political in the sense that we were losing the channels to land mobile in the top 10 markets. **EM:** *Is it too much to say it was a scam?* **Mr. Abel:** I don't think it was a scam. There was an FCC proposal to give the channels to land mobile in the top 10 markets." *Electronic Media*, Oct. 26, 1998, at 30 ("Father of digital ponders his baby's future"). In authorizing HDTV, DTV and the dual channel transition scheme, the Commission already has made a public interest judgement - that allegedly more or better television is of greater public benefit than more, better, and lowered priced mobile phone service. Yet many consumers might disagree with the Commission's premise and prefer that the spectrum had been allocated for mobile service, especially as mobile Internet access explodes in popularity.

A. The Commission Should Not Deprive Cable Subscribers Of Free Choice In Cable Programming.

While NAB/MSTV/ALTS contend that digital must carry is necessary to “preserve...free, local television” as broadcasters face an uncertain transition to new digital technology, the new must carry rights they seek fit none of those goals.^{42/} Broadcasters are not seeking to “preserve” existing services; rather they are seeking to gain a competitive advantage over cable networks in launching new broadcast networks and new digital broadcast services. The services they seek to launch are not “free”; only one digital program channel is required to be advertiser supported, all of the others can be pay channels. By gaining must carry for advertiser supported channels, incentive fees that otherwise would have been paid for cable carriage (and which are paid by some new cable networks) can be used to launch DTV subscription services, with the result that cable must carry is being used to cross-subsidize pay DTV. And the services they launch are not likely to be “local”.^{43/} Free, local television is not served by must carry under these circumstances.

On the other hand, the cable services that may be displaced may be preferred by cable subscribers. The cable services we now take for granted, such as CNN, the Weather Channel, C-Span, BET, Nickleodean, Discovery, and ESPN, as well as the newer cable channels launched over the past few years, such as History, Romance, Comedy Central, Home and Garden, TNN, America’s Voice, BET on Jazz, and the

^{42/} NAB at i.

^{43/} PAXtv promos tout the fact that PAXtv runs “counter-programming” during the time periods when other stations air local news.

myriad of cable local and regional news channels,^{44/} have at least as much "value", if any such concept is susceptible to determination by Congress or this Commission, as any of the newer broadcast networks. Beyond the constitutional impermissibility, it simply is not wise public policy for the Commission to make such choices.

B. There Is No Valid Policy Basis Upon Which To Establish A Dual -- and Constitutionally and Statutorily Impermissible -- Must Carry Scheme.

The alleged justification for depriving cable subscribers of free choice in cable programming is cable's alleged, "record of refusing carriage to local broadcasters, **primarily independents**", in other words, that even if cable subscribers wished to see independent stations carried, cable operators would refuse to carry the independents for anti-competitive reasons.^{45/}

In the first place, the number of so-called independent stations is declining; the reality is that must carry is being used to obtain cable carriage of new networks, not independents. The development of new broadcast networks beginning with FOX, continuing with UPN and WB (as well as Univision and Telemundo), and now including the newly launched PAXtv, and possibly some type of hybrid USA cable/broadcast network, appears to leave few stations that are not affiliated with a network. Candidly, ALTS admits that it represents, "stations not affiliated with the ABC, CBS, or NBC

^{44/} GTE Comments at 20.

^{45/} NAB Comments (hereafter "NAB") at i.

television network (sic), but only truly independent stations **and local television stations affiliated with the Fox, PAXtv, UPN and WB networks.**^{46/}

These new networks have substantial financial backing. The “David and Goliath” model of large cable companies depriving small independents of cable carriage is fallacious; well-financed new networks are using the acquisition of television stations coupled with the must carry rules to launch their networks without paying incentive fees, leased access fees, or other compensation to cable operators.

Broadcasters also have announced their intention to launch multi-channel subscription services, *i.e.* to become MVPD’s, in competition with cable operators. For example, NAB begins its comments with the assertion that must carry is necessary, “to prevent cable from exercising the expanding gate-keeper power of its local monopoly....”, but two pages later NAB asserts that “DTV competitors...will have... bright futures, **even perhaps as multi-channel competitors.**”^{47/}

Cable faces increasing, not decreasing competition, from a number of sources, including DBS^{48/}, and in the near future digital multi-channel service offerings of broadcasters themselves. Cable should be allowed to select its programming in order

^{46/} ALTS Comments (hereafter “ALTS”) at 1 (emphasis added). Although ALTS asserts its represents the interests of Fox affiliates, Fox appears not to have filed in support of must-carry.

^{47/} NAB at i and iii (emphasis added).

^{48/} DBS now is subscribed to by about 10% of MVPD households. *Fourth Annual Competition Report*, FCC 97-423 (Jan. 13, 1998), App. E.

to best compete in the marketplace, as DBS, private cable, and digital broadcasters are free to do.

C. Technological Issues Are Best Left To The Marketplace.

Apparently recognizing that a public interest justification does not exist for imposition of digital must carry, some broadcasters argue for an alleged middle ground regulatory scheme in which cable could add DTV signals on a "reasonably priced" new cable digital tier, rather than on the basic tier, and might pass through the signals without having to down convert them for all receivers of all subscribers, and various other options.^{49/} But these proposals are not middle ground solutions because they still urge the Commission to impose technological standards by regulation, rather than allowing the market place to determine what consumers want and when and how they want it. As a regulatory solution to be imposed by the Commission, Options 2-6 cannot escape the fatal statutory and constitutional defects of Option 1, as discussed above. On the other hand, the industry can reach negotiated solutions that would not be limited by the terms of the must carry statute, or the constitutional issues.

A key element that must be resolved by the parties is the technical compatibility between broadcast and cable DTV.^{50/} In this regard, GTE also supports Microsoft's Comments explaining the complex technical issues that must be worked out before cable systems could carry DTV signals: lack of end-to-end copyright protection, lack of Internet Protocol ("IP") standards for DTV needed to allow integrated service offerings,

^{49/} MSTV Comments (hereafter "MSTV") at 51-56.

^{50/}GTE Comments at 2-6.

and the inherent problems with either pass-through or re-modulation.^{51/} Because of such unresolved technical issues, as well as those discussed herein, the best course for the Commission is to forebear from any regulatory action and allow the industry dialog to continue and technology issues to be worked out, as suggested in Option 7.

^{51/} Pass through of the DTV signal would mean that only subscribers with a high end DTV set would be able to decode the signal, while a maximum amount of cable bandwidth would be taken away from other cable services that might be preferred by other subscribers. Re-modulation of DTV signals by the cable industry could provide in effect a down conversion to allow more subscribers to enjoy DTV, but cable and broadcasters would have to agree on standards for remodulation, and broadcasters' wish lists might conflict with cable, and cable subscribers, choice as to box costs and functions.

V. CONCLUSION.

For the reasons stated herein, GTE believes that Option 7 is the only constitutionally and statutorily permissible option. The Commission simply should allow broadcasters to transfer must carry rights from analog channels to digital channels when they return their analog channels to the Commission.

Dated: December 22, 1998

Respectfully submitted,

John F. Raposa
GTE Service Corporation
600 Hidden Ridge, HQE03J27
Irving, TX 75038
(972) 718-6969

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5214



Ross & Hardies
Stephen R. Ross
James A. Stenger
Amy L. Brett
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 296-8600

CERTIFICATE OF SERVICE

I, Magdalene Copp, a secretary of the law office of Ross & Hardies, do hereby certify that I have this 22nd day of December 1998, served by hand delivery or first-class mail, postage pre-paid, a copy of the foregoing "Reply Comments" to:

The Honorable William E. Kennard *
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Deborah Lathen *
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918A
Washington, D.C. 20554

The Honorable Susan Ness *
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

William H. Johnson *
Deputy Bureau Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918B
Washington, D.C. 20554

The Honorable Gloria Tristani *
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

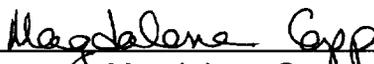
Roy J. Stewart *
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, D.C. 20554

The Honorable Harold Furchtgott-Roth *
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

John P. Wong, Division Chief*
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 201N
Washington, D.C. 20554

The Honorable Michael K. Powell *
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Ben Golant
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room
Washington, D.C. 20554



Magdalene Copp

* By hand delivery