

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Carriage of the Transmissions )  
of Digital Television Broadcast Stations )  
 )  
Amendments to Part 76 )  
of the Commission's Rules )

CS Docket No. 98-120

**RECEIVED**

DEC 22 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF**  
**THE NATIONAL CABLE TELEVISION ASSOCIATION**

Laurence H. Tribe  
Jonathan S. Massey  
1575 Massachusetts Avenue  
Cambridge, MA 02138  
(617) 661-6868

Daniel Brenner  
Diane B. Burstein  
Loretta P. Polk  
Michael S. Schooler  
1724 Massachusetts Avenue, NW  
Washington, DC 20036  
(202) 775-3664

Counsel for the National Cable  
Television Association

December 22, 1998

No. of Copies rec'd  
List A B C D E

0+9

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	1
I. THE FCC HAS NO STATUTORY AUTHORITY TO IMPOSE DIGITAL MUST CARRY DURING THE TRANSITION.....	7
A. Section 614 of the 1992 Cable Act Does Not Mandate Carriage of All Television Signals, Including Digital Signals, During the Transition. ....	7
B. Section 615 Does Not Authorize Mandatory Carriage of Digital Signals of Noncommercial Television Stations During the Transition.....	12
C. The “Substantially Duplicating” Exception Demonstrates that Congress Did Not Provide for Digital Must Carry During the Transition.....	15
D. Subsequent Legislative History Does Not Support Digital Must Carry. ..	20
E. The FCC Has No Authority To Require Carriage of Electronic Program Guides. ....	22
F. Broadcasters Are Not Entitled To Separate Elections For Their Digital Signals. ....	24
G. The FCC Must Interpret The Act to Avoid Serious Constitutional Concerns. ....	25
II. A DIGITAL MUST CARRY REQUIREMENT DURING THE TRANSITION WOULD BE UNCONSTITUTIONAL. ....	26
A. The Supreme Court Did Not Address, Much Less Resolve, the Constitutionality of Digital Must Carry Requirements.....	26
B. A Digital Must Carry Requirement During the Transition Would Serve No Important Government Interest. ....	29
C. A Digital Must Carry Requirement During the Transition Would Impose Substantial Additional Burdens on the Protected Speech of Cable Operators and Cable Program Networks.....	38
III. IMMEDIATE OR PHASED-IN CARRIAGE REQUIREMENTS FOR EVERY BROADCAST STATION’S ANALOG AND DIGITAL CHANNELS DURING THE TRANSITION WOULD NOT SERVE THE PUBLIC INTEREST. ....	43

A.	Broadcasters Demand for Double Carriage of Analog and Digital Signals During the Transition Is Anti-Consumer.....	43
1.	The Government’s digital television policies should not be dictated by the desire of broadcasters and set manufacturers to accelerate sales of DTV sets. ....	43
2.	Diversity in viewpoint and subject matter will suffer greatly under a dual analog/digital must carry regime. ....	48
B.	Contrary to NAB’s Claim, There Is No Widespread “Significant Unutilized Channel Capacity” On Cable Systems.....	51
C.	Phased-In Must Carry Based on System Upgrades is Equally Harmful and Would Result in the Loss of Programming and Other New Services that Consumers Would Prefer and the Loss of Operator Editorial Discretion.....	60
1.	Haring grossly overstates future cable channel capacity .....	61
2.	Cable program networks waiting for carriage and new telecommunications services will more than fill up new digital capacity.....	63
A.	Digital Must Carry Is Unfair to Cable Program Networks .....	65
1.	Broadcasters’ desire for an utterly risk-free transition will be a disincentive for others to invest in new programming services. ...	65
B.	The Broadcasters’ Supposedly Unique Role in Local News and Public Affairs Is Greatly Diminished.....	69
IV.	IT IS FAR TOO EARLY FOR THE COMMISSION TO DEFINE SPECIFIC STATUTORY TERMS IN THE MUST CARRY PROVISIONS OF THE ACT THAT WOULD APPLY ONLY AFTER THE TRANSITION.....	73
V.	NCTA IS COMMITTED TO CONTINUING TO WORK WITH CEMA TO DEVELOP VOLUNTARY INTER-INDUSTRY STANDARDS FOR DIGITAL CABLE-READY RECEIVERS BUT OPPOSES PROPOSALS THAT WOULD IMPEDE EFFICIENT, COST-EFFECTIVE AND HIGH QUALITY DELIVERY OF SERVICES TO CUSTOMERS. ....	76
	CONCLUSION .....	79

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

**REPLY COMMENTS OF  
THE NATIONAL CABLE TELEVISION ASSOCIATION**

The National Cable Television Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

**INTRODUCTION AND SUMMARY**

The issue in this proceeding is whether, during the transition from analog to digital broadcasting, the Commission should require cable television operators to carry both the analog and digital signals of all local broadcasters – and conclude, in effect, that every local broadcaster's analog and digital signals are more valuable than any cable program network.

The Commission has a clear choice:

- It can let the marketplace determine when and whether carriage of particular broadcasters' digital signals best serves the needs and interests of the public, knowing that existing rules require carriage of analog signals throughout the transition. (This is the choice urged by cable operators, cable program networks, and public interest groups in this proceeding); or
- It can agree with some broadcasters (but not the broadcast networks, who are conspicuously silent) that "the touchstone for the Commission in setting regulatory policy must be reference to the question 'what policies will best encourage the sale of DTV sets and what policies will deter the sale of sets,'"<sup>1</sup>

---

<sup>1</sup> National Association of Broadcasters ("NAB") Comments at 12 (emphasis added).

– without regard to the quality of the programming, the needs and interests of television viewers, or the First and Fifth Amendment rights of cable operators and program networks.

We again urge the Commission to rely on the marketplace – and not impose an unconstitutional double dose of must carry, which would harm consumers, cable operators and cable networks.

Having asked for and received free additional spectrum to develop and provide digital broadcasting, broadcasters now contend that only if they “have the certainty that their DTV broadcasts will get through to the 67% of the audience on cable will . . . broadcasters have the incentive to aggressively continue their plans to borrow money, hire consultants, order DTV equipment and push ahead to their DTV future.”<sup>2</sup> But the government cannot guarantee the success of broadcasters in reaching cable subscribers without adversely affecting non-broadcast cable program networks.

Broadcasters contend that digital must carry could be imposed during the transition without any significant displacement of cable networks – but this is factually untrue. The evidence shows that most cable customers’ systems could not add the digital signals without bumping non-broadcast program services:

- Data from Warren Publishing’s Television & Cable Factbook shows that more than 70 percent of cable customers are served by systems with fewer than four available channels, and half of all customers are served by systems with no available channels.
- A.C. Nielsen’s Cable On-Line Data Exchange data indicates that more than 83 percent of cable customers are served by systems with fewer than four available channels, and more than two-thirds are served by cable systems with no available channels.

---

<sup>2</sup> NAB Comments at 12 (emphasis in original).

Even as capacity expands, available satellite programming will exceed available capacity for the foreseeable future.

In competing for scarce channel capacity, cable program networks have no “certainty” – no government guarantee – that they will be carried on all cable systems. Their investment decisions must take into account the risk that consumers and cable operators may not find their programming attractive. And cable operators must take similar factors into account in making carriage and investment decisions aimed at increasing the value of their service to subscribers.

This is how the marketplace metes out success and failure in a manner that best reflects the interests of consumers. Not all program networks succeed. But all are driven by competition to develop and provide programming that meets the needs and interests of cable subscribers. As a result, cable networks continue to attract more viewers every year – more, now, than the broadcast networks during prime time.

There is no reason that consumers would, during the transition, choose to receive broadcasters’ digital signals instead of the cable networks that would be displaced --and the broadcasters concede as much. But in their view, consumer preferences and marketplace competition are secondary to the primary goal of expediting the purchase of digital sets. Thus, they contend that the Commission’s plan should be “premised on broadcasters’ signals first being available to consumers to tempt them to taste the transition and purchase DTV receivers. That plan should not now become dependent on cable operators ‘waiting to see’ what DTV signals or programming consumers want before providing them. . . .”<sup>3</sup>

---

<sup>3</sup> Id. at 17 (emphasis in original).

Commissioner Powell has warned of the dangers of forcing a transition to digital television without pausing to consider the preferences of consumers, noting that “[a] change this dramatic and fundamental needs to be done right.”<sup>4</sup> But in the broadcasters’ view, pausing to consider the preferences of consumers (especially if those preferences do not include the carriage of the broadcasters’ digital channels) is exactly the wrong thing to do: “[T]he last thing a transition of this complexity and breadth needs is uncertainty and hesitation.”<sup>5</sup>

No wonder, then, that the consumer organizations and public interest groups participating in this proceeding universally oppose the broadcasters’ “damn the torpedoes, full speed ahead” approach – and oppose digital must carry during the transition. These groups, which include Media Access Project, the Center for Media Education, the Benton Foundation, the Civil Rights Forum, and the Office of Communications of the United Church of Christ, agree that promoting the sale of digital sets (some of which retail at more than \$7000) and insulating broadcasters from the risks of the marketplace without regard for consumer preferences should not be the “touchstones” of the Commission’s determinations in this proceeding. In particular, the public interest groups recognize that a digital must carry requirement during the transition would be likely to diminish the diversity of voices available to cable subscribers by replacing unique cable program networks with duplicative and simulcast broadcast programming.

---

<sup>4</sup> “Powell Raises Red Flag Over DTV Switch,” Broadcasting & Cable, Sept. 14, 1998, p. 14.

<sup>5</sup> NAB Comments at 14.

Policy issues aside, the broadcasters contend that the Commission is required by statute to impose a double dose of analog and digital must carry throughout the open-ended transition period. But their strained construction ignores statutory language that limits mandatory carriage to signals “which have been changed” to a new advanced television format. These statutory words do not permit must carry of digital signals while analog broadcasts continue. The broadcasters also misconstrue the “duplicating signal” and “primary video” exceptions to the must carry requirements, exceptions which are consistent with Congress’s rejection of a dual carriage obligation during the transition.

Even if the statute were ambiguous as to digital must carry during the transition, the Commission is required to avoid any construction that raised serious constitutional issues. As we showed in our initial comments, mandatory carriage of digital and analog signals during the transition would be impermissible under the First and Fifth Amendments. The Broadcasters contend that the Supreme Court’s decision in the Turner Broadcasting case resolved the constitutionality of the must carry provisions of Title VI, for all time and in all circumstances. But this misstates both the precedent and the nature of constitutional review. To the contrary, if the circumstances that once justified an intrusion on constitutional rights have changed, the constitutionality of the intrusion must be reassessed.

Broadcasters argue that digital must carry would, like the analog rules, promote Congress’s interest in thwarting the supposed anticompetitive incentives of cable operators to exclude local broadcast stations. But they fail to point out that a majority of the Supreme Court rejected this interest as a justification for analog must carry

obligations. And it is no more valid with respect to digital must carry during (or after) the transition.

Broadcasters also argue that must carry is justified by a supposed governmental interest in expediting the completion of the transition. But Congress did not assert any such interest as a basis for the must carry requirements of Title VI. And the 1997 Budget Act, far from seeking to expedite the transition, effectively extended it indefinitely, in order not to force consumers to purchase digital sets.

Broadcasters contend that the burdens imposed by a digital must carry requirement would be minimal and that there would be no significant displacement of cable networks. But, as noted, forcing operators to make room for every broadcaster's second must carry channel will not only severely intrude on the editorial discretion of cable operators. It will also unfairly bump cable networks that are being carried and prevent others from gaining carriage.

In addition, we showed that digital must carry would impermissibly result in a taking of cable operators' property without just compensation. The broadcasters do not, in their initial comments address this Fifth Amendment issue.

As digital television evolves, marketplace forces will ensure that cable operators carry digital programming when it enhances the value of cable service to their customers, whether such programming is provided by broadcasters or by cable program networks. Time Warner Cable's recent agreement regarding carriage of CBS digital channels is an example and a harbinger.

But the legal and policy case for the mandatory carriage of every broadcaster's analog and digital signals during the transition has not been -- and cannot be -- made.

**I. THE FCC HAS NO STATUTORY AUTHORITY TO IMPOSE DIGITAL MUST CARRY DURING THE TRANSITION.**

The broadcasters create a revisionist history of the 1992 Act to argue that Congress required cable operators to carry every digital signal, along with every analog signal, transmitted by every television station in the United States. And they contend that Congress imposed this supposed obligation in order to promote the rapid purchase by the American viewing public of new television sets that currently retail, in many cases, for over \$7000.

As NCTA's initial comments demonstrated, Congress did no such thing. Congress provided the FCC with no authority – express or otherwise – to require mandatory carriage of both analog and digital television signals during the multiyear transition to a fully-digital environment. And as we show below, the broadcasters' attempt to manufacture this digital must carry mandate is not supported by the language, structure or purposes of the 1992 Cable Act.

**A. Section 614 of the 1992 Cable Act Does Not Mandate Carriage of All Television Signals, Including Digital Signals, During the Transition.**

NAB alleges that "Sec. 614 unambiguously imposes mandatory carriage requirements with respect to all broadcast signals, that that command applies to the new digital television signals, and that nothing in Sec. 614 undermines or countermands application of the must carry requirement to DTV signals, even during the transitional period when local commercial stations will broadcast both NTSC and DTV signals."<sup>6</sup> The broadcasters argue that Sec. 614(a) includes a mandate that cable operators carry the

---

<sup>6</sup> NAB Comments, Appendix A at 5.

“signals of local commercial television stations,” and that because Congress supposedly did not distinguish “between signals that are ‘transitional’ and those that are more ‘permanent,’” all transitional digital signals of every television station must be carried, up to the one-third cap, along with every analog signal.<sup>7</sup>

This simplistic analysis flies in the face of what Congress actually said about cable carriage obligations. Contrary to NAB’s suggestion, there is no implicit obligation in the overall carriage requirements of Sec. 614 to carry every conceivable broadcast transmission, bounded only by the one-third cap. As our initial comments explained, Congress specifically addressed the issue of digital television signal carriage and made clear that these signals need not be carried during the transition.

The only mention of advanced television is found in Sec. 614(b)(4)(B). There, Congress directed the FCC to initiate a proceeding to “establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.”<sup>8</sup> No matter how long the NAB gazes at the words of Sec. 614 (a), the specific language of Sec. 614 (b)(4)(B) overrides any supposed general grant of must carry rights to local commercial stations. “Under long-standing principles of statutory construction, a general section of a statute must give way to a

---

<sup>7</sup> Id., Appendix A at 2. See also MSTV Comments at 13 (“By its terms, the Act applies the cable carriage rules to the ‘signals’ of authorized full power (and, to some extent, low power) television stations, regardless of whether these signals are in the DTV or NTSC format.”)

<sup>8</sup> Emphasis supplied.

specific one.”<sup>9</sup> Whatever general directive may be found in Sec. 614(a) is qualified by the specific directive in subsection 614(b)(4)(B), which contains the critical phrase “have been changed.”

The broadcasters allege that subsection 614(b)(4)(B) deals only with issues of technical standards and therefore cannot be relied on “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.”<sup>10</sup> But NAB’s argument suffers from several flaws. The plain language of the provision is not limited to technical standards. As NAB’s submission points out, it “requires the Commission to initiate a proceeding to change ‘signal carriage requirements’ in response to ‘modification of the standards for television broadcast signals’ that are prescribed by the Commission.”<sup>11</sup> This language differs completely from the language of subsection (b)(4)(A) immediately preceding the “Advanced Television” subsection, which addresses nondegradation and technical standards in the analog environment.<sup>12</sup>

Even NAB’s comments interpret Sec. 614(b)(4)(B) more broadly, citing to it as the authority by which the FCC must “adjust the must carry rules to require immediate cable carriage of the entire free DTV signal of each local broadcaster in addition to the

---

<sup>9</sup> U.S. v. LaPorta, 46 F.3d 152, 156 (2d Cir. 1994). See also Westlands Water Dist. v. National Resources Defense Council, 43 F.3d 457, 461-62 (9<sup>th</sup> Cir. 1994) (“The usual rule is that ‘the specific governs the general.’ ”)

<sup>10</sup> NAB Comments, Appendix A at 4.

<sup>11</sup> NAB Comments at 4 (emphasis supplied).

<sup>12</sup> Subsection (b)(4)(B) contemplates an FCC proceeding “to establish any changes in the signal carriage requirements”, while subsection (b)(4)(A) addresses issues relating to “carri[age] without material degradation” and the “quality of signal processing and carriage provided”.

NTSC signals already subject to must carry rules up to the statutory one-third capacity limit, during the transition to digital service.”<sup>13</sup> Thus, despite their earlier Sec. 614(a) “that’s that” declarations, NAB agrees that the answer to the question of the FCC’s authority to impose digital signal carriage obligations resides in this subsection.

Subsection (b)(4)(B) reveals that the FCC lacks any authority to order carriage of digital signals during the transition. Only after the transition will signals of analog television stations have been changed to digital, and not before. NAB offers no alternative explanation – indeed, it offers no explanation at all – as to why, if Congress had directed the FCC to mandate immediate digital signal carriage, it limited the FCC’s authority to rules governing signals that “have been changed.”<sup>14</sup> But while the NAB can try to ignore this critical language in order to render it meaningless, the agency, under well-settled principles of statutory construction, may not do so.<sup>15</sup>

---

<sup>13</sup> Id. at 36-37.

<sup>14</sup> ALTV’s Comments also cite to this subsection, and argue that “such a proceeding would be unnecessary if Congress had not contemplated a must carry requirement applicable to DTV as well as analog signals.” ALTV Comments at 8. ALTV, too, ignores the critical distinction between the absence of carriage obligations prior to the change-over and rules that might apply after the change-over in a fully digital environment.

<sup>15</sup> See e.g., Platt v. Union Pacific R. Co., 99 U.S. 48, 58 (1879); National Insulation Transp. Committee v. I.C.C., 683 F.2d 533, 537 (D.C. Cir. 1982) (if possible, court must “give effect to every phrase of a statute so that no part is rendered superfluous.”)

Even assuming the words “have been changed” can be read out of the statute, Section (b)(4)(B) only requires the Commission to establish changes “necessary to ensure cable carriage of such broadcast signals of local commercial television stations....” Sec. 614 (b)(4)(B) (emphasis supplied). The broadcasters provide no evidence that must carry rules are “necessary to ensure” cable carriage of digital signals – because those signals may well be voluntarily carried by cable systems without government mandate. Indeed, the marketplace already has provided evidence that agreements between cable systems and broadcasters governing signal carriage have begun to take hold. Other commenters demonstrate that negotiations over carriage are taking place. Even assuming the statute gives the FCC any power to step in, it is not “necessary” to do so to ensure that digital signal carriage occurs.

Even apart from its conflict with subsection (b)(4)(B), the broadcasters' reading of the supposed broad grant of must carry rights in Sec. 614(a) is not supported by that language, either. In order to qualify for carriage, a station must be a qualified "local commercial television station," defined 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."<sup>16</sup> This confirms that Congress meant must carry obligations to be limited to one channel per station – not that two 6 MHz channels would be entitled to carriage.

The broadcasters' theory also must fail because of the definitional requirement that both channels must be "regularly assigned" in order to qualify for carriage. In this case, only one channel qualifies as regularly assigned. In making a second channel available for DTV service, the Commission made clear its "committ[ment] to recovery of the channels temporarily assigned for the transition..."<sup>17</sup> Thus, as even the Association of Maximum Service Telecasters' Comments recognize, the second channels provided for DTV transmissions are "loaner" channels.<sup>18</sup> These "loaner channels" can hardly be considered "permanently assigned," as ALTV claims.<sup>19</sup> Indeed, ALTV's testimony to Congress makes that perfectly plain: "Assignment of HDTV channels to local television stations is not a spectrum give-away. We are not asking for a permanent grant of an

---

<sup>16</sup> 47 U.S.C. §534(h)(1)(A) (emphasis supplied).

<sup>17</sup> Sixth Report and Order, 12 FCC Red. 14588, 14608 (1997) (emphasis supplied).

<sup>18</sup> MSTV Comments at 7.

<sup>19</sup> ALTV Comments at 7 n.23.

additional channel. According to the FCC's original plan, local stations will use the additional channel on a **temporary** basis."<sup>20</sup>

In short, only one channel is regularly assigned to each broadcaster during the transition – and, after the “loaner” channel has been recovered by the FCC, there will remain a single station on a single regularly assigned channel. Double carriage is not contemplated by the terms of Sec. 614.

**B. Section 615 Does Not Authorize Mandatory Carriage of Digital Signals of Noncommercial Television Stations During the Transition.**

The public television stations, led by the Association of America's Public Television Stations, The Public Broadcasting Service, and the Corporation for Public Broadcasting (“AAPTS Comments”), allege that noncommercial stations, too, are entitled to double carriage of their stations during the transition. AAPTS claims that:

Sections 4 and 5 of the Cable Act require cable carriage of commercial and public television signals respectively and give the Commission authority to promulgate regulations to implement those requirements. On their face, the carriage requirements are not confined to analog signals; they apply to any signal broadcast by commercial and public television stations. Thus, the terms of Sections 4 and 5, standing alone, provide the Commission with authority to regulate cable carriage of both analog and digital broadcast signals.<sup>21</sup>

But AAPTS can only reach this conclusion by ignoring the very specific statutory language that details a cable operator's obligation to carry public television stations.

---

<sup>20</sup> Statement of Kevin O'Brien, Chairman of the Board, The Association of Local Television Stations, Before the Committee on Commerce, U.S. House of Representatives (March 21, 1996) at 3 (emphasis supplied; bold as in original).

<sup>21</sup> Comments of the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting at 11-12 (“AAPTS Comments”).

Sec. 615 by its terms applies only to carriage of qualified noncommercial television stations. The Act defines those stations to mean:

Any television broadcast station which

(A)(I) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association ....<sup>22</sup>

The Commission's digital television rules were not in effect on March 29, 1990. In fact, the rules lending public television stations an additional channel on which to transmit digital signals during the transition were not adopted until 7 years later.

Sec. 615(l)'s cataloging of those noncommercial stations that fall within the statutory definition provides further evidence that the 1992 Act did not grant mandatory carriage of noncommercial stations' transitional digital signals. The subsection provides that a "qualified noncommercial television station" includes "a full-service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to Sec. 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto..."<sup>23</sup> Sec. 73.606 of the Commission's rules contains the Table of Allotments for analog television service. Public television stations' digital channels are located in a separate regulation altogether, found in Sec. 73.622 ("digital television table of allotments".)

This plain language reveals that Congress had no intention of providing forced carriage of noncommercial stations' digital and analog stations during the transition. But

---

<sup>22</sup> 47 U.S.C. § 535(l)(1) (emphasis supplied).

<sup>23</sup> Id. (emphasis supplied).

even if the statute were at all ambiguous, the legislative history makes perfectly clear that dual carriage was not contemplated. The House Report, for example, relied on evidence submitted by the public broadcasters detailing the specific number of noncommercial stations that would be required to be carried in characterizing Sec. 615 as imposing only a “minimal” burden on the cable industry.<sup>24</sup> That evidence showed that:

Mandatory carriage of all qualified local public television stations whose programming is substantially unduplicated would have the following effect on the cable industry:

84 percent of the nation’s cable systems would be required to carry one public television service;

13 percent could be required to carry two public television services; and,

3 percent of all systems could be required to carry more than two services. All of these systems are found in seven television markets; New York, Los Angeles, Chicago, San Francisco, Boston, Washington (D.C.), and New Orleans.

Thus, a requirement for carriage of all qualified, substantially unduplicated local public television stations would, in the overwhelming majority of cases, mandate that only one cable channel be devoted to a public television station.<sup>25</sup>

The legislative history thus confirms what is plain from the language of the Act – public stations have no right to mandatory carriage of their digital signal during the transition. Contrary to APTS’s claim, Congress simply made no provision in the 1992 Act or elsewhere<sup>26</sup> for each public television station to be entitled to two berths on every cable system in the United States.

---

<sup>24</sup> House Report at 71.

<sup>25</sup> Id. (emphasis supplied).

<sup>26</sup> APTS claims that the 1996 Telecommunications Act, by explicitly referring to Sec. 615 as not applying to ancillary and supplementary services, somehow “makes it plain that,

**C. The “Substantially Duplicating” Exception Demonstrates that Congress Did Not Provide for Digital Must Carry During the Transition.**

NCTA’s initial comments demonstrated that the must carry obligations as a whole indicated that Sec. 614 does not impose a digital must carry requirement during the transition. In particular, NCTA explained that the exceptions to the overall must carry obligations showed Congress’s intent to limit an operator’s must carry requirement to stations airing programming that was not duplicative of the programming aired on another station already carried on the cable system. Interpreting the 1992 Cable Act to impose a digital must carry obligation during the transition--when digital signals would be airing virtually the identical programming to that shown on their analog counterpart-- makes no sense, given Congress’s interest in avoiding forced carriage of duplicative program content.

The broadcasters try to creatively interpret the “substantial duplication” restriction in a way that would force double carriage of their digital and analog signals. But their interpretation has no basis in the language of the exception or its purpose.

NAB’s comments go to great lengths to attempt to rewrite the “substantially duplicating” exception completely. They argue that the exception applies only where a “signal substantially duplicates the signal of ‘another local commercial television station,’” and does not apply when “the two ‘substantially duplicative’ signals come

---

apart from the case of ancillary or supplementary service, Congress anticipated that the requirements of Sec. 5 would apply to digital signals.” APTS Comments at 14. But Congress did nothing to confer must carry rights in the 1996 Act. Rather, it expressly denied must carry rights to new services. As the Conference Report put it, “[t]he conferees do not intend this paragraph to confer must carry status on advanced television or other video services offered on designated frequencies.” Conf. Rep. at 161.

from the same station.”<sup>27</sup> The digital television service its members will provide, NAB states, does not constitute another station.

NAB’s reading is totally fanciful. Even assuming, arguendo, that a broadcaster’s digital facility is not technically considered to be another station, requiring duplicative carriage of programming simply because it is presented by the same station makes no sense in light of this provision’s purpose. As MediaOne’s comments explain, “the effect of the duplication on program diversity is not at all dependent on whether one or two broadcast stations are involved.”<sup>28</sup> Congress intended through this exception to limit the burdens that must carry would impose. The legislative history explained that this provision “is intended to preserve the cable operator’s discretion while ensuring access by the public to diverse local signals.”<sup>29</sup> The Senate Report reasoned that carriage of duplicate signals “would do little to increase the diversity of local voices.”<sup>30</sup> Carriage of the identical programming provided by the same licensee does nothing to increase the diversity of local voices that Congress sought.

Indeed, by permitting duplicating digital signals to crowd out other voices – such as those of cable program networks – a digital must carry requirement during the transition would be wholly contrary to the purpose of this provision. As the United Church of Christ comments describe, “where a broadcaster’s digital programming merely duplicates its analog programming (which is required to be carried during the transition), mandatory carriage of the duplicative digital programming not only results in no increase

---

<sup>27</sup> Id.

<sup>28</sup> MediaOne Comments at 31.

<sup>29</sup> House Report at 94; Senate Report at 85 (emphasis supplied).

<sup>30</sup> Senate Report at 61.

in diversity, it decreases diversity and choice to the extent that valued cable programming must be dropped to make space for the extra digital signal.”<sup>31</sup>

Moreover, the broadcasters offer no explanation as to why, under their reading, Congress would have given operators discretion to choose not to carry a different duplicating station when programmed by a different “voice”, but would have denied that discretion where the duplicating programming is presented by the same voice. At least a separately owned station might provide some distinctive programming from a different voice, even if most programming were identical to that provided by a different station the operator already carried. But even under those circumstances, Congress decided that cable operator editorial discretion should be preserved. Under NAB’s absurd reading, however, Congress would have denied that flexibility where identical programming was provided by the same licensee. Such redundancy does nothing to increase the diversity of viewpoints in a community, and the broadcasters can cite nothing to support this ridiculous statutory interpretation.

Furthermore, if only one station is transmitting two signals, NAB’s theory runs headlong into the provision found in Sec. 614(b)(3)(A) that permits operators only to carry one video signal – the primary video. As Time Warner Cable’s Comments explain, “[O]nly when a broadcaster surrenders its analog frequency and engages exclusively in DTV transmissions will its DTV signal become the ‘primary video’ transmission and thus eligible for any post-transition must-carry requirements adopted by the Commission in accordance with Sec. 614(b)(4)(B).”<sup>32</sup>

---

<sup>31</sup> UCC Comments at 8.

<sup>32</sup> Time Warner Cable Comments at 50-51; See also MediaOne Comments at 33 n.53.

Sec. 615 also includes protection against carriage of duplicating noncommercial television stations. A cable operator of a system with more than 36 channels

shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage. Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.<sup>33</sup>

AAPTS claims that “these provisions do not affect cable operators’ obligations to carry both analog and digital signals of the same station.”<sup>34</sup> AAPTS argues that Congress was concerned about duplication only where it was presented on an “additional” station, and further claims that this exception would never apply to transitional digital signals: “even in cases of simulcasting, the analog and digital signals cannot be considered duplicative.”<sup>35</sup>

This Alice in Wonderland-like reading is based on its unsubstantiated claim that Congress somewhere – no citations provided – concluded that digital technology was somehow “distinctive” enough to warrant forcing operators to carry the same programming twice. But the language of the statute does not support this revision of the congressional purpose. There is not the slightest evidence that Congress wished to promote use of a particular transmission technology by mandating must carry. The

---

<sup>33</sup> 47 U.S.C. §615(e).

<sup>34</sup> AAPTS Comments at 33.

<sup>35</sup> *Id.* at 34. ALTV makes a similar argument, claiming that “analog and DTV signals should never be considered duplicative, even if the programming on those signals is duplicative, as defined in the rules.” ALTV Comments at 65. ALTV goes so far as to claim that “beyond picture quality, digital signals may include enhanced features such as on screen program guides and menus and sophisticated remote navigation systems.” ALTV Comments at 64. These enhanced features, carriage of which is not required, cannot form a basis for interpreting the statute to impose a dual carriage obligation for identical programming content.

language Congress chose looks to programming content and “distinctive noncommercial television services” – not the quality or technical characteristics of the signal by which identical (or virtually identical) programming content is transmitted into the home. If the same program is aired in an analog and digital format, then it is duplicating programming – Congress’ sole concern in this area.

In any event, contrary to the broadcasters’ assertion, two stations, not one, will be broadcasting during the transition. Therefore, the “substantially duplicating” provision stands guard against the reading that double carriage was intended.

A “local commercial television station” under Sec. 614 is “any full power television broadcast station ... licensed and operating on a channel regularly assigned to its community...” There is no doubt that the digital transmission takes place on a channel separate from the analog channel – and therefore two stations, not one, are in operation during the transition.<sup>36</sup> Indeed, the FCC’s rules contain a separate Digital Table of Allotments and a stand-alone section, entitled “Digital Television Broadcast Stations,” which provides that “Digital television (“DTV”) broadcast stations are assigned channels 6 MHz wide.”<sup>37</sup> That results in two, duplicative stations.

NAB’s alternative theory as to why there is but a “single station” fares no better. The broadcasters argue that “[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

---

<sup>36</sup> Even ALTV would agree. ALTV Comments at 21 (“Digital facilities are in fact new stations within the definition of the Communications Act.”)

<sup>37</sup> 47 C.F.R. §73.624(a) (emphasis supplied).

same party.”<sup>38</sup> It is precisely because the digital and analog facilities are considered to be separate stations that the FCC did grant a waiver of its multiple ownership rules, including the duopoly rule, explaining:

We will suspend application of the television multiple ownership rules, 47 C.F.R. § 73.3555, for ATV stations on a limited basis. Most parties commenting on the issue agree that such suspension is necessary. We will thus permit existing licensees that are awarded an additional ATV channel to hold both their NTSC and ATV licenses, even though their signals overlap... until such time as existing licensees are required to convert to ATV service exclusively.<sup>39</sup>

In short, the claim that the substantial duplication provision would not apply to broadcasters’ digital signals is wholly unpersuasive. And it demonstrates that Congress specifically rejected the very concept of forced carriage of identical program content that broadcasters now claim Congress intended.

**D. Subsequent Legislative History Does Not Support Digital Must Carry.**

NAB attempts to find support for Congress’s supposed interest in digital must carry from subsequent legislative developments. It points to the Telecommunications Act of 1996, where Congress made clear that ancillary and supplementary services offered on broadcasters’ new spectrum would never be subject to the must carry provisions of Sec. 614 and 615, as confirmation that, by negative implication, Congress intended must carry status for all other digital television signals.<sup>40</sup>

As our initial comments explained, Congress’s action in 1996 proves nothing about whether digital signals that do not include services considered ancillary or

---

<sup>38</sup> NAB Comments, App. A at 3 n.2.

<sup>39</sup> Second Report and Order/Further Notice of Proposed Rule Making, 7 FCC Rcd 3340, 3345 (1992).

<sup>40</sup> NAB Comments, App. A at 8.

supplementary are entitled to must carry during the transition. Congress obviously had the opportunity to state that must carry was required for those services – but it did not do so. That Congress felt no need to specifically address digital transmissions used to provide something other than ancillary or supplementary service is not surprising, given that in 1992 it had already determined that those signals were not entitled to carriage during the transition.<sup>41</sup>

The Balanced Budget Act of 1997 does not support broadcasters' broad claim to transitional digital must carry, either. NAB alleges that "this provision clearly contemplates that cable systems and other multi-channel distributors will carry digital television signals."<sup>42</sup> It alleges that the 1997 action "sought to ensure" recapture of the analog spectrum. But as NAB is well aware, the point of that provision was not to ensure but to avoid a return date for the analog spectrum in order to protect viewers who have not made the transition to digital. NAB's President touted the Senate version of this legislation for "preventing adoption of onerous spectrum fees and for opposing analog spectrum give-backs in communities that have not yet reached an acceptable level of

---

<sup>41</sup> NAB's alternative explanation for why Congress adopted this provision has no basis in the statute. NAB claims 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." NAB Comments, App. A at 9. That NAB can cite to nothing to support this interpretation is unsurprising – because Congress had no such thing in mind. There is not the slightest evidence that Congress intended to expand the breadth of the 1992 Act's "primary video" limitation when it permanently excluded ancillary and supplementary services from any must carry rights.

<sup>42</sup> NAB Comments, App. A at 10.

digital signal acceptability...”<sup>43</sup> To argue now, as NAB does, that this provision evidences a congressional purpose to ensure an early spectrum return date is at odds with the facts.

**E. The FCC Has No Authority To Require Carriage of Electronic Program Guides.**

Several commenters, including NBC and Gemstar/Starsight, try to hijack this proceeding to force carriage of a totally unrelated service – their electronic program guide (EPG). But their comments provide no evidence the Congress intended, through the 1992 Cable Act or otherwise, to force cable operators to deliver any non-programming information that might be transmitted in the broadcasters’ digital signal. In fact, the whole thrust of Sec. 614(b)(3) was to limit cable operators’ must carry obligation to material that is integrally related to a broadcast program otherwise subject to must carry; that subsection provides that operators must carry, “to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers.”<sup>44</sup> Congress made clear that “retransmission of other material in the vertical blanking interval or other nonprogram related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator.”<sup>45</sup> This limitation and preservation of discretion can hardly form the basis of an entirely new category of forced carriage obligations in the digital environment for electronic program guides. And absent that express authority in Sections 614 and 615, the Commission under the terms of Sec. 624 is barred from regulating in this area.

---

<sup>43</sup> “Statement by NAB President and CEO Edward O. Fritts on Senate Commerce Action on Budget Package”, (June 17, 1997) <[www.nab.org/statements/s1897.htm](http://www.nab.org/statements/s1897.htm)>

<sup>44</sup> 47 U.S.C. §534(b)(3).

<sup>45</sup> Id. (emphasis added).

Gemstar/Starsight nevertheless maintains that the “Commission should require simply the undisturbed pass-through of EPG-related megabits as part of the entire 6 MHz digital signal being retransmitted, and prohibit any interference with competing EPGs.”<sup>46</sup> But competition in the provision of electronic program guides is not a purpose of the must carry obligation of the 1992 Act, and Gemstar’s forced carriage argument has no basis in the language of the statute. In a digital environment, moreover, it will be difficult if not impossible to distinguish among EPGs, web browsers, Internet “portal” sites -- or any of the other navigational services, systems, or interfaces rapidly propagating in the industry.<sup>47</sup> Providers of these services would merely have to characterize themselves as “electronic program guides” to demand carriage. Such a result would lack any constitutional or statutory basis.

NBC and other broadcasters urge the FCC to adopt rules “similar to those applicable to OVS operators which prohibit discrimination in the design and configuration of electronic program guides or similar navigation devices.”<sup>48</sup> These comments, of course, provide no evidence that cable operators have engaged in any discrimination against unaffiliated programmers in the design of their program guides. But in any event, the regulations that these broadcasters seek are outside the bounds of the FCC’s authority. While Congress directed the Commission to adopt certain non-discrimination rules with respect to Open Video Systems (“OVS”),<sup>49</sup> there is no

---

<sup>46</sup> Gemstar/Starsight Comments at 6.

<sup>47</sup> America Online, for example, plans to roll out “AOL TV,” which is designed to display and allow viewers to navigate through television and Internet content on a TV screen. See “AOL Seeks Boost Via Phone, TV,” Washington Post, December 8, 1998, at B1.

<sup>48</sup> NBC Comments at 6.

<sup>49</sup> 47 U.S.C. §573(b)(1)(E)(i).

analogous provision with respect to traditional cable systems. OVS, in short, provides no template for must carry here.

**F. Broadcasters Are Not Entitled To Separate Elections For Their Digital Signals.**

Several broadcasters claim that the Act permits them to make a retransmission consent/must carry election for their digital signal separate from that made for their analog signal.<sup>50</sup> ALTV, too, adds this “separate election” to its digital wish list, stating that “we would permit a local station to assert must carry rights for its digital signal, while at the same time asserting retransmission consent for its analog signal. The reverse should also be permitted. Finally, at the discretion of the station, a local broadcaster would also be permitted to make the same election for both stations.”<sup>51</sup>

ALTV acknowledges that the analog and digital facilities are “legally recognized to be an indivisible part of the same license...”<sup>52</sup> It alleges, though, that “if two signals are being provided, it makes perfect sense to permit each signal the opportunity to select either retransmission consent or must carry. The fact that each signal falls under the same license would appear to be irrelevant.”<sup>53</sup>

But this interpretation hardly makes “perfect sense;” it makes no sense at all. Congress permitted a limited class of local stations – analog commercial broadcast stations – to choose between must carry and retransmission consent. It did not extend

---

<sup>50</sup> See, e.g., MSTV Comments at 39; Comments of Benedek Broadcasting Corp. et. al. at 24-25.

<sup>51</sup> ALTV Comments at 16.

<sup>52</sup> Id.

<sup>53</sup> Id.

this choice to every signal of every broadcast station. And it certainly did not extend the election to an analog station's transitional digital counterpart.

As we described above, a broadcaster's digital signal is not entitled to must carry rights during the transition. Therefore, so long as a licensee is transmitting an analog signal (for which it may elect either must carry or retransmission consent), its digital signal can only be carried pursuant to retransmission consent. In this respect, the digital signal is no different than any other signal, such as a distant television signal, that has no must carry rights. For those signals, as well as the transitional digital signal, the Act simply does not provide an election.

**G. The FCC Must Interpret The Act to Avoid Serious Constitutional Concerns.**

As our comments make clear, the FCC has no authority to impose any digital must carry requirements during the transition. But even if the Commission were to view the broadcasters' statutory interpretation as injecting a measure of ambiguity into its reading of Congress's intent, the Commission still must refrain from adopting digital must carry.

The FCC must construe the statute to avoid raising grave doubts about its constitutionality.<sup>54</sup> The broadcasters' attempt to hide behind the Turner decision does nothing to dispel those doubts. Any new digital must carry obligation would most assuredly raise serious constitutional questions, as we showed in our initial comments and we now demonstrate again.

---

<sup>54</sup> NCTA Comments at 20-21.

## II. A DIGITAL MUST CARRY REQUIREMENT DURING THE TRANSITION WOULD BE UNCONSTITUTIONAL.

### A. The Supreme Court Did Not Address, Much Less Resolve, the Constitutionality of Digital Must Carry Requirements.

According to the broadcasters, the constitutionality of requiring cable operators to carry each local broadcaster's digital signal in addition to its analog signal was effectively decided by the Supreme Court in Turner Broadcasting System, Inc. v. FCC. In their view, the Commission has no authority to consider whether construing Sections 614 and 615 to impose a digital must carry requirement during the transition would further any important government interest underlying those provisions or would impose a disproportionate burden on cable operators. Indeed, they contend that even the courts may not consider such questions, and that once the must carry provisions of the Act were upheld, they became immune from further constitutional challenge in any circumstances – including circumstances that were not present and not addressed in Turner.

Thus, the Statement of Jenner & Block, submitted with NAB's comments, asserts that

[i]n 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.<sup>55</sup>

---

<sup>55</sup> Jenner & Block Statement at 12. See also MST Comments at 46-47 ("The Commission should not, indeed it lacks the authority to, second guess the judgment of Congress and the Supreme Court by developing a new record to support the constitutionality of

There is no authority for this astonishing “once and for all” theory of constitutional adjudication. To the contrary, “[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations . . . .” Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833, 864 (1992). Thus, as the Supreme Court noted more than 60 years ago, “[a] statute [constitutionally] valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied.” Nashville C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935) (emphasis added). See also Baker v. Carr, 369 U.S. 186, 254 n.6 (1962) (Clark, J., concurring); Chastleton Corp. v. Sinclair, 264 U.S. 543, 546-45 (1924) (Holmes, J.).

This principle is particularly salient here because the Supreme Court’s balancing of constitutionally relevant factors in Turner did not take into account whether requiring carriage of both analog and digital channels during the transition would further any of the government interests set forth by Congress in support of the requirements of Sections 614 and 615. Nor did it consider the potential adverse effects of such a requirement on the First Amendment rights of cable operators and cable program networks.

How could it have? The evidence in the case did not address the prospect of a dual carriage requirement during the transition. And when the broadcasters’ counsel told the Court, during oral argument, that the must carry burden was “modest indeed” because “[o]nly 1 percent of the channel capacity in this Nation is occupied by new, must-carry

---

implementing the Communications Act’s must carry provisions in the DTV environment.”)

stations cable operators were forced to add,”<sup>56</sup> he gave no indication that cable operators would, under his reading of the statute, soon be required to carry the second, digital channel of each of those newly added stations, plus the second channel of all those broadcasters whose analog channels were already being carried before enactment of Sections 614 and 615.

Neither the Commission nor the courts are foreclosed from assessing the constitutionality of new burdens and requirements that may result from changed circumstances merely because the statute that supposedly imposes these burdens and requirements previously survived constitutional scrutiny. Indeed, even the standard of scrutiny is subject to change if warranted by changed circumstances.

For example, the Supreme Court’s decision to apply “intermediate scrutiny” to the must carry requirements of Sections 614 and 615 – instead of the “strict scrutiny” that it applied to the mandatory access provisions applicable to newspapers in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) – was based, in part, on the Court’s view that “the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home.”<sup>57</sup> If this “important technological difference between newspapers and cable television” were substantially diminished (by, for example, the increasing prevalence of A/B inputs and selection devices in analog and digital television sets and remote controls, along with improvements in rooftop antenna technology, and/or legislation that allowed DBS to

---

<sup>56</sup> Official Transcript, Turner Broadcasting System, Inc. v. FCC, Oct. 7, 1996, p. 45 (argument of Bruce J. Ennis, Jr.).

<sup>57</sup> Turner I, 512 U.S. at 656.

retransmit local broadcast signals),<sup>58</sup> strict scrutiny might apply to future must carry cases. Intrusions on the fundamental speech rights of cable operators and program networks cannot be justified in perpetuity on the basis of technological conditions that no longer exist.<sup>59</sup>

But a digital must carry requirement during the transition could not survive even the same standards of intermediate scrutiny that the Court applied to the analog must carry requirements in Turner. As NCTA and others showed in their initial comments, such a requirement would advance none of the important government interests identified by Congress and the Supreme Court as the bases for Sections 614 and 615. And its adverse impact on the speech rights of cable operators and program networks would substantially exceed the harm inflicted by the analog requirements.

**B. A Digital Must Carry Requirement During the Transition Would Serve No Important Government Interest.**

The Jenner & Block analysis submitted by the broadcasters relies principally on two government interests as justification for a digital must carry requirement – neither of which was relied upon by a majority of the Supreme Court in Turner. First, Jenner & Block contends that “[t]he Court held that it was entirely reasonable for Congress to conclude that there are ‘systematic reasons’ why cable operators would seek to disadvantage broadcasters;” that “the Court noted that the evidence showed that ‘cable systems have little incentive to carry, and a significant incentive to drop, broadcast

---

<sup>58</sup> See, e.g., Time Warner Cable Comments at 21-22.

<sup>59</sup> The broadcasters have themselves argued, for example, that to the extent that regulations that limit their own First Amendment rights have been justified by the Supreme Court on the basis of spectrum scarcity, technological developments that undermine this scarcity rationale should affect the constitutionality of such regulations, notwithstanding their prior validity. And the Supreme Court has indicated that this is, in fact, the case. See, e.g., FCC v. League of Women Voters of California, 468 U.S. 364, 376 n.11 (1984).

stations that will only be strengthened by access to the 60% of the television market that cable typically controls;” and that “[t]he 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.”<sup>60</sup>

The problem with this argument is that “the Court” made no such findings. The language cited by Jenner & Block comes from the one portion of Justice Kennedy’s opinion that did not represent the opinion of the Court. Justice Breyer specifically did not join that section of the opinion that “relied on an anticompetitive rationale,” and the four dissenting Justices also explicitly rejected and rebutted the findings and conclusions of that section. In short, a majority of the Court rejected Jenner & Block’s claim of anticompetitive incentives and conduct. And it is certainly no more likely that cable operators would refuse, during the transition, to carry broadcasters’ digital signals for anticompetitive reasons than that they would have refused to carry analog signals for such reasons.

It is hard to imagine that carriage of digital signals would pose any greater significant competitive threat to the viewership of cable systems’ vertically integrated programming or to cable operators’ local advertising revenues. Especially at the outset, when there are few households capable of receiving digital programming even in converted analog format, and even fewer capable of watching such programming in high-

---

<sup>60</sup> Jenner & Block Statement at 15-16 (quoting Turner II, 117 S. Ct. at 1192-93). Numerous other broadcast parties similarly cite the government’s asserted – and supposedly reasonable – interest in preventing anticompetitive conduct by cable operators. See, e.g., Association for Maximum Service Television, Inc. Comments at 45; Association of Local Television Stations, Inc. Comments at 13.

definition, it is hard to see how carriage of digital signals would pose any competitive threat at all.

Second, Jenner & Block contends that “Congress has identified the prompt transition to a digital broadcasting system as an important national interest in its own right” and that this “an additional interest that would be sufficient standing alone to satisfy the applicable standards of intermediate scrutiny.”<sup>61</sup> But this argument is wrong on many counts. First, as we noted earlier, Congress simply has not identified an overriding interest in expediting the transition to digital broadcasting. Second, it certainly has not identified such an interest as a reason for imposing the must carry requirements of Title VI. Third, even if Congress had identified such a government interest, a digital must carry requirement would do little if anything to advance that interest.

When Congress enacted the Balanced Budget Act of 1997, its purpose was not to hasten the transition to all-digital broadcasting, or even to confirm the Commission’s established timetable for that transition. To the contrary, the principal effect of its action was to eliminate – at the broadcasters’ urging – the Commission’s fixed deadline for the cessation of analog broadcasting and the return of the analog spectrum. Congress determined that broadcasters should not be required to return their analog spectrum while even a small number of households were incapable of viewing digital broadcasts.

As the executive vice president of NAB told the New York Times, “Instead of focusing exclusively on issues of broadcasters and the transition, [Congress] decided also to look at consumers and not disenfranchise a whole group of consumers who continue to

---

<sup>61</sup> Jenner & Block Statement at 16.

rely on over-the-air analog TV.”<sup>62</sup> Thus, Rep. Tauzin acknowledged that the legislation would allow the transition to continue until only a “low number” of households were incapable of receiving digital broadcasts, but stated that “it’s designed that way on purpose so that, as we enter this new world, we don’t leave some people behind.”<sup>63</sup> The Times reported that “numerous executives of television stations, as well as lobbyists from the broadcasters’ association and other trade groups, had urged the two committees to pass” such a provision, which, according to the newspaper, “could allow broadcasters to evade the most significant commitments they accepted in exchange for the additional channels.”<sup>64</sup>

As noted earlier, it takes considerable nerve for the broadcasters now to argue with a straight face that the Balanced Budget Act embodies a Congressional interest in expediting the transition and in promoting, above all, the purchase of expensive digital sets by consumers. As the contemporaneous evidence shows – and as everyone understood --the interest underlying that statute was precisely the opposite.

In any event, whatever interests underlay the Balanced Budget Act of 1997 were not intended by Congress to provide additional basis for must carry rules to supplement those government interests in the 1992 Cable Act. Congress specifically made clear in 1997 that it did not mean to be addressing or affecting must carry considerations in any way.<sup>65</sup> And, as we explained in our initial comments, the Commission has no authority to adopt must carry rules except in furtherance of the specific requirements and statutory

---

<sup>62</sup> “Lobbyists for TV Try to Avoid Returning Free Channels,” New York Times, June 25, 1997, p. A1 (quoting James May) (emphasis added).

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> See H.R. Rep. No. 105-217, 105<sup>th</sup> Congress, 1<sup>st</sup> Sess. 8 (1997).

objectives of Title VI of the Communications Act. It has no residual authority under Sec. 4(i) or elsewhere to impose content regulations based on a general “public interest” mandate, or based upon the requirements or statutory objectives of any provisions in Title III – which is where the relevant provisions of the Balanced Budget Act of 1997 appear.

Furthermore, even if Congress had intended the must carry requirements of Title VI to apply to digital signals in order to promote a rapid transition to digital television (and it did not), it is hard to see how they would have such an effect. There can be no quarreling with NAB’s proposition that consumers will not purchase digital television sets unless there is digital programming for them to watch. But it does not follow that merely because the broadcasters’ digital programming is available, a significant number of consumers will purchase digital sets.

First, there is no assurance that the broadcasters’ digital programming will look significantly different, even on a digital set, than the over-the-air and cable programming that cable customers can view today on their analog sets. Broadcasters successfully urged Congress not to require them to use their digital channels to provide high definition (HDTV) programming; they may choose to provide one or more channels of standard-format programming that is hardly distinguishable – or indistinguishable – from the multitude of channels already available to cable customers. These channels will provide scant inducement to cable customers or others to spend thousands of dollars on a new, digital set.

Nothing in the broadcasters’ comments provides any assurance that digital channels will be used primarily for HDTV. To the contrary, only one paragraph in

NAB's 52-page comments even mentions HDTV.<sup>66</sup> And it does so not to extol the unique attractiveness of HDTV to consumers or to suggest that all broadcasters will provide HDTV, but only to urge that cable operators be required to accommodate each broadcaster's entire 19.4 Mbps data stream in case the broadcaster chooses to provide HDTV.

Broadcasters that have begun using their digital channels are already taking advantage of their option not to provide HDTV. For example, one Boston broadcaster "is planning to provide two programming streams on its digital signal. The station is currently broadcasting Home Shopping Network programming, and next week it will add programming of America's Store."<sup>67</sup> Would the digital availability of these two shopping channels in standard (non-HDTV) format tempt any cable customer -- or of that matter any consumer -- to rush out to buy new digital television sets anytime soon?

If broadcasters do provide HDTV or other digital programming that would, in fact, be more attractive when viewed on a digital set, that programming is likely to join similar HDTV and digital programming that will also be available from cable program networks. There is no reason at all to believe that the broadcasters' digital programming will be any more attractive, or any more likely to induce customers to purchase digital sets, than the cable networks' high definition or other digital programming -- especially in light of recent trends in the relative rating shares of broadcast and cable network programming.

The indiscriminate mandatory carriage of all the broadcasters' digital channels during the transition period, without regard to quality, uniqueness or attractiveness to

---

<sup>66</sup> See NAB Comments at 38.

customers, will do nothing to promote the sale of digital sets or hasten the completion of the transition. Nor is such indiscriminate carriage in any way useful or necessary to preserve a multiplicity of over-the-air voices for viewers who do not subscribe to cable or other MVPDs – the only government interest that a majority of the Supreme Court found to be promoted by the analog must carry rules cite our comments. The broadcasters argue that a digital must carry requirement during the transition is somehow necessary to guarantee the success of their digital stations. In fact, the broadcasters' ultimate success in providing over-the-air service to non-cable customers has nothing to do with whether or not digital channels are required to be carried on cable systems during the transition.

Congress has, of course, significantly limited the broadcasters' risks associated with the transition to digital. First, it has given them the spectrum that they requested for the provision of digital television at no charge, even though other potential licensees might have been willing to pay for the spectrum notwithstanding the risks. None of the broadcasters' competitors in the provision of video programming are given such free use of facilities and rights-of-way to transmit their programming to viewers. Second, Congress has allowed them to continue using their analog channels indefinitely, until digital television has succeeded in persuading virtually all television households to purchase digital sets or converters. Third, it has required cable operators to carry the broadcasters' analog channels -- i.e., their primary channels -- throughout the transition.

In short, Congress has virtually eliminated any risk that non-cable customers will somehow be deprived of the multiplicity of over-the-air voices now available to them if cable operators are not required, during the transition, to carry the broadcasters' digital

---

<sup>67</sup> EM Online, November 3, 1998.

and analog channels. It may be that, for reasons that have absolutely nothing to do with cable carriage, digital broadcasting will not provide viewers with much early incentive to purchase expensive digital sets to watch additional channels of standard-format programming or high-definition simulcasts of analog programming. But, meanwhile, broadcasters can continue to attract viewers and advertisers to their (must carry) analog channels, to the same extent as is currently the case -- and this ensures the continuing availability of broadcast programming to non-cable customers.

The broadcasters don't really want to extend must carry protection to their digital channels during the transition to protect the continued availability of programming to non-cable customers. Their real aim is to have the FCC reduce still further the marketplace risks of digital broadcasting. In a paper prepared for and submitted by ALTV, economist John Haring points out the economic uncertainties surrounding the transition to digital broadcasting:

No matter the particular course adopted in any given case, a broadcaster is looking at a substantial investment with little prospect of any immediate payoff. Indeed, there are those who question whether there will ever prove to be a sufficient payoff to warrant all the investment expense and trouble that is being gone to – certainly the considered view of some is that there may ultimately “be no there, there” when it comes to digital broadcasting.<sup>68</sup>

Congress might reasonably have assumed, when it granted broadcasters the free spectrum that they requested, that the broadcasters were willing at least to incur “all the investment expense and trouble that is being gone to” in order to make use of that spectrum. Even if, as the U.S. Supreme Court determined, the analog must carry

---

<sup>68</sup> J. Haring, “The Economic Case for Digital Broadcast Carriage Requirements” (attachment to ALTV Comments) at 14 (“Haring I”).

provisions of Title VI can be justified to protect the availability of over-the-air channels for non-cable customers, those provisions were not meant to force cable operators, programmers and customers to, in effect, further subsidize and make risk-free the broadcasters' investment in their digital transmitters and programming.

Indeed, the broadcasters appear to be seeking digital must carry primarily in order to ensure their success in competing with cable program networks for cable subscriber viewership – without much concern for the availability of those signals for non-subscribers who rely on over-the-air reception. Thus, Haring argues that digital signals need to be carried on cable systems precisely because they may not be viewable over the air. Haring notes that “[u]nlike analog broadcasts which may suffer a variety of degradations diminishing reception quality but nevertheless remain viewable, partial loss of digital program information may result in complete loss of reception on an intermittent basis -- the so-called ‘cliff effect.’”<sup>69</sup> Because “an outdoor antenna is a hassle for consumers,” Haring suggests that “these reception difficulties [should] be addressed through a cable carriage requirement.”<sup>70</sup>

A better solution for the purported beneficiaries of the statutory must carry provisions (*i.e.*, non-cable customers) would be for the broadcasters to reduce any “hassle” associated with outdoor antennas by developing, promoting the use of, or even subsidizing the purchase of more effective and more attractive antennas -- much as the DBS industry has done to facilitate reception of over-the-air signals by their customers.<sup>71</sup>

---

<sup>69</sup> Id. at 13.

<sup>70</sup> Id. (emphasis added).

<sup>71</sup> See, e.g., “Antennae Attract Viewers to Satellite TV,” Wall Street Journal, December 1, 1998, p. B-1.

But the true intended beneficiaries of the broadcasters' digital must carry proposal are not over-the-air viewers; they are the broadcasters themselves, who seek only a competitive advantage in reaching cable customers.

Non-broadcast cable networks have no over-the-air access to viewers and must rely solely on multichannel video programming distributors. They have no guaranteed access to any television homes -- cable or non-cable to mitigate their investment risks. The only legitimate reason, according to the U.S. Supreme Court, for giving broadcasters such a competitive advantage with respect to their analog channels was to preserve the availability of such channels for non-cable customers. A digital must carry requirement during the transition would do absolutely nothing to promote this objective.

**C. A Digital Must Carry Requirement During the Transition Would Impose Substantial Additional Burdens on the Protected Speech of Cable Operators and Cable Program Networks.**

Because a digital must carry requirement during the transition would serve no important government interest, it would fail to survive First Amendment scrutiny even if its adverse effects on protected speech were less severe than the effects of the analog rules upheld in Turner. But, as we showed in our initial comments, the adverse effects of such a requirement on cable operators and program networks would be much more severe than the analog rules.

First, such a requirement would be in addition to the existing rules and would, therefore, necessarily and dramatically compound the magnitude of the burden on constitutional rights. Second, the effects of the analog rules were mitigated because cable operators were already voluntarily carrying most local broadcast stations before the rules

took effect; by contrast, no cable channels are currently used to carry local broadcasters' second, digital channels.

The broadcasters seek to portray the set-aside on every cable system of an additional channel for every local broadcaster as a "minimal" burden.<sup>72</sup> They argue, first, that the burden is "temporary," lasting only for the duration of the transition from analog to digital broadcasting, and that "cable operators are not required to carry both analog and digital signals indefinitely."<sup>73</sup> This limitation might apply if the Commission and Congress had established a firm deadline to complete the transition and return of the analog spectrum.

But the Balanced Budget Act of 1997 removed any prospect of such a deadline. Broadcasters are permitted to keep both their channels until 85% of the households in their communities have digital sets or converters or subscribe to a cable system or MVPD that carries the broadcasters' digital signals. Nobody knows when this will occur, and nobody believes it will occur soon -- whether or not the signals are carried by cable systems.<sup>74</sup> In other words, if there were a digital must carry requirement during the transition, cable operators would be required to carry both analog and digital signals indefinitely.

In any event, even if the fixed deadline of 2006 for the return of analog channels had not been vitiated by the Balanced Budget Act of 1997, that the requirements would

---

<sup>72</sup> NAB Comments at 25.

<sup>73</sup> Jenner & Block Statement at 22.

<sup>74</sup> Thus, at a hearing of the Senate Commerce Committee, Senator McCain expressed his view that the broadcasters "will keep the spectrum for -- certainly for my lifetime. You will never give it back." McCain Hits DTV Giveback," Electronic Media, July 13, 1998, p.50. Representatives of NAB and the Association of Maximum Service Telecasters agreed that return of the spectrum by 20006 was not "realistic." Id.

someday end -- and would be in effect for “only” seven years -- would hardly mitigate their unconstitutional burden. Since when does the suppression of protected speech, or the favoring of one group of speakers at the expense of another, become permissible merely because it is of finite duration? Jenner & Block offers no authority for this remarkable proposition, which is directly at odds with the well-stated rule that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”<sup>75</sup>

The broadcasters also argue that the burden of being forced to carry two channels for each local broadcaster is minimal because operators generally have -- or will eventually have -- sufficient channel capacity to do so “without jeopardizing carriage of existing cable program services.”<sup>76</sup> This argument is wrong as a matter of law and as a matter of fact. As a matter of law, requiring newspapers, cable operators or broadcasters to carry material that they would not otherwise choose to carry constitutes a serious -- not a de minimis -- burden on protected speech, whether or not such compelled material can be carried without excluding other material that those media would rather carry.<sup>77</sup>

---

<sup>75</sup> Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion). See also Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 128-31 (1989); Century Communications Corp. v. FCC, 835 F.2d at 292, 304-305 (D.C. Cir. 1987); Quincy Cable TV, Inc. v. FCC, 768 F.2d at 1434, 1463 (D.C. Cir. 1985).

<sup>76</sup> NAB Comments at 25-26.

<sup>77</sup> See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Pacific Gas Electric Co. v. Public Utilities Commission of California, 475 U.S. (1986). The broadcasters themselves have historically resisted and challenged regulations and statutes that require them to carry particular programs or categories of programs. Is their resistance to accepting public interest obligations, such as the carriage of children’s programming or the provision of free time to political candidates, based entirely on the fact that they have no available, unused time for such programming? If so, does the fact that they are not yet carrying anything on their digital channels and therefore would not have to bump any programming mean that forcing them to carry certain programming on those channels would impose only a de minimis burden?

Furthermore, even if it were true that cable operators had sufficient capacity to carry all analog and digital broadcast signals without having to remove existing cable program services, the effect of such mandatory carriage on new cable services and other cable services not currently being carried on all systems would also be severe. The expansion of cable's channel capacity has always been, and will no doubt continue to be, accompanied by a growth in the number of non-broadcast program networks -- a wide range of diverse voices -- competing to be carried on those channels. The number of available program services has always exceeded available channels. And moving broadcasters to the front of the line for the channels that are available -- or that become available -- constitutes a serious burden on the editorial discretion of cable operators and the First Amendment rights of the others left standing in line, even if no currently carried cable program networks are removed.

But, as we showed in our initial comments and as we discuss more fully in Part III, infra, it simply is not the case that cable operators would be able to carry all broadcasters' analog and digital channels throughout the transition without removing currently carried non-broadcast services. The evidence shows that a majority of customers are served by systems with no available channels, and that a substantial majority are served by systems with three or fewer available channels. This situation applies to systems in markets of all sizes, from the top ten DMAs to the smallest. Those systems would have to drop services to carry new, digital must carry stations, no matter what the "average" data may purport to show.

The broadcasters also attempt to show that channel capacity will expand so rapidly during the transition that any current scarcity will be eliminated in time to

accommodate new digital must carry channels as they go on the air. In Part III, infra, we highlight some of the technical flaws in the broadcasters' analysis, which lead to an overly optimistic assessment of channels available for broadcasters' HDTV and other digital channels. Their analysis, as we show, also fails to account for the effects a digital must carry requirement could have on the packaging and tiering of services. This is especially the case if the broadcasters' channels must, for technical or legal reasons, be placed on systems' analog channels, forcing the retiering of existing services to digital tiers. And while their analysis emphasizes projected increases in channel capacity, it completely ignores the likely increases in available non-broadcast services competing to fill that increased capacity.

In the end, one fact is certain and obvious: A digital must carry requirement during the transition will double the number of channels that cable operators will have to set aside for local broadcasters. For every local broadcaster, cable systems will have to set aside another channel -- a channel that, for most systems, is currently occupied by some other program service. That was not the case in Turner, where the Court found that most must-carry stations were already occupying their channels on cable systems before the analog rules took effect.

This is a substantial First Amendment burden on cable operators, on currently carried program networks that will be removed or retiered, or on existing or future program networks that will be hampered in their efforts to obtain carriage, regardless of any expected increases in available capacity. And especially since the intrusion on First Amendment rights serves none of the government interests identified by Congress or the

Supreme Court, a digital must carry requirement during the open-ended transition cannot survive even the intermediate scrutiny that was applied in Turner.<sup>78</sup>

**III. IMMEDIATE OR PHASED-IN CARRIAGE REQUIREMENTS FOR EVERY BROADCAST STATION'S ANALOG AND DIGITAL CHANNELS DURING THE TRANSITION WOULD NOT SERVE THE PUBLIC INTEREST.**

**A. Broadcasters Demand for Double Carriage of Analog and Digital Signals During the Transition Is Anti-Consumer.**

**1. The Government's digital television policies should not be dictated by the desire of broadcasters and set manufacturers to accelerate sales of DTV sets.**

NAB asserts that "the touchstone for the Commission in setting regulatory policy must be reference to the question 'what policies will best encourage the sale of DTV sets and what policies will deter the sale of sets.'"<sup>79</sup> Over and over again NAB emphasizes that the digital transition is premised on mandating carriage of every broadcast station's analog and digital signal "as an incentive for consumers to purchase DTV sets."<sup>80</sup>

Does it make sense for government policy to be driven by whatever it takes to increase sales of new television sets, regardless of the cost to consumers? Is there any reason to believe that the must carry policies urged by NAB will, in any event, have any significant effect on consumer willingness to purchase expensive digital sets? There is precious little evidence at this point as to how consumers will respond. NAB simply

---

<sup>78</sup> In our initial comments, we also showed that a digital must carry requirement during the transition would be impermissible under the Fifth Amendment, insofar as it would constitute a taking of property -- indeed, a permanent physical occupation of cable operators' capacity -- for which no compensation would be available. The broadcasters are likely to address this issue in their reply comments, but they did not raise or address it in the initial round.

<sup>79</sup> NAB Comments at 16.

assumes that foisting all DTV signals on consumers through mandatory carriage rules will motivate them to make the conversion to the new technology.<sup>81</sup> But the harm attendant to a double dose of must carry – lost programming and unnecessary additional equipment costs -- could actually turn consumers off.

We believe that whatever a dual analog/digital carriage regime might do to spur TV set sales for a small percentage of the population in the early years, it does not justify imposing financial costs on the vast majority of cable customers, denying tens of millions of consumers programming choice, and stifling the development of new networks. A host of factors, including compelling content and lower receiver costs, may accelerate the transition by encouraging viewers to purchase digital sets. But it is dubious that receiving a second primarily standard definition channel of programming already available on an analog channel will have any such effect.

But it is on such a dubious conclusion that the broadcasters have staked their all and invite the FCC to do the same. The question is: where is the consumer in all of this? NAB chastises cable operators for “waiting to see” what DTV programming consumers prefer in deciding what mix of programming and services, analog or digital, are provided to them.<sup>82</sup> In its view, “the point is to make signals available to consumers” through rigid digital must carry requirements “before there is consumer demand.”<sup>83</sup>

---

<sup>80</sup> Id. at 7 (emphasis in original); Id. at ii, 12, 15. (“the point of the digital transition is to replace the population of NTSC receivers with DTV receivers, as thoroughly and as fast as possible.”); Id. at 37.

<sup>81</sup> See also ALTV Comments at 32.

<sup>82</sup> Comments of NAB at 17. (NAB criticizes the cable industry for indicating that it will carry the broadcast DTV offerings that its subscribers demand, citing letter from Decker Anstrom, President & CEO, NCTA, to Eddie Fritts, President & CEO, NAB, October 6, 1998).

<sup>83</sup> Id. at 28 (emphasis in original).

Consumers would not only be ignored but would be ill-served by such an industrial planning approach to the transition to digital television. Allowing the television industry to test the marketplace for this new technology is the surest way to facilitate a transition that serves the public interest and not just the interests of broadcasters and set manufacturers. This view, however, is antithetical to the broadcasters' fundamental premise that their parochial interests should be first and foremost in all carriage decisions; and that they should be guaranteed success, regardless of what consumers want and regardless of cost. They believe that the government should pre-empt the evolving marketplace for digital television and pick winners and losers. That view, as Chairman Kennard recently observed, is profoundly misguided.<sup>84</sup>

As NCTA and other commenters made clear, consumers will have plenty of opportunity to see digital programming on both broadcast and non-broadcast channels throughout the transition. Time Warner Cable and CBS recently announced a digital carriage agreement under which all 14 of CBS's owned stations will be carried on Time Warner cable systems in CBS markets across the nation.<sup>85</sup> According to the press release, the agreement provides a model framework for the carriage of digital signals of other CBS affiliates by Time Warner systems. Under the agreement, Time Warner Cable will provide the CBS 6 MHz digital signal to its customers on upgraded systems as soon

---

<sup>84</sup> In noting the "serious First Amendment implications of full analog and digital must carry, Chairman Kennard stated: "fundamentally, I think that it's not appropriate for the industry to expect the FCC to basically write the business plan for digital must-carry, or for the digital conversion generally. . . . So my message is: Don't expect the FCC to pre-emptively dictate how this technology should be rolled out." Multichannel News, November 30, 1998.

<sup>85</sup> "CBS and Time Warner Announce Digital Carriage Agreement," CBS Corporation Press Release, December 8, 1998 ("CBS Press Release"); Communications Daily, December 9, 1998.

as the station begins transmitting in digital. And the company has committed to make best efforts to resolve any technical issues associated with customers' reception of the digital signals.<sup>86</sup> Other cable operators are negotiating with broadcast companies to introduce digital broadcast signals to cable customers in their areas.<sup>87</sup>

MediaOne's comments disclose that it has already negotiated a digital carriage provision in retransmission consent agreements with eight broadcasters within MediaOne's franchise areas.<sup>88</sup> Nearly one-third of its retransmission agreements contain digital carriage provisions.<sup>89</sup> Other cable companies' agreements are likely to implement similar arrangements that they are not prepared to disclose at this time given on-going negotiations with broadcasters over carriage. NAB and ALTV express ire over the fact that cable-broadcast negotiations appear to be centered on the major broadcast network affiliates.<sup>90</sup> But it makes business sense for cable operators to negotiate with these stations first because they are the first stations to transmit in digital.

In addition to broadcast stations, new digitally-delivered cable networks, such as Lifetime Movie Network and HBO high definition and multiplexed services, will help drive consumer demand for digital content.<sup>91</sup> Cable operators are experimenting with

---

<sup>86</sup> CBS Press Release.

<sup>87</sup> See, e.g., "TW to CBS: Will Carry, Time Warner agreement to carry CBS's digital TV signals may be first of many," Broadcasting & Cable, December 14, 1998.

<sup>88</sup> MediaOne Comments at 1.

<sup>89</sup> Id. We note that the four major broadcast networks, NBC, CBS, ABC and Fox, are not seeking to expand the must carry rules to cover digital broadcast signals. The E. W. Scripps Company, the licensee of nine network-affiliated broadcast stations and owner of Home & Garden Television and the Food Network, "strongly" opposes digital must carry. Comments of Home & Garden Television at ii, 1.

<sup>90</sup> See NAB Comments at 19-20.

<sup>91</sup> See, e.g., Time Warner Comments at 6-7; Home Box Office and Turner Broadcasting Comments at 5; Discovery Communications Comments at 4. Discovery plans to launch

digital tiers in various markets and have every incentive to maximize these new offerings with bandwidth-efficient digital technology.

Thus, contrary to NAB's claims, digital must carry for all television stations is not necessary to "tempt [consumers] to taste the transition and purchase DTV receivers."<sup>92</sup> No one knows yet how quickly consumers will take to the new service. It makes sense to see if there is consumer acceptance based on what broadcasters bring to the viewing experience, and to work out the many implementation issues before acting in false homage to meeting a switchover date, which, at the broadcasters' behest, was essentially abandoned in the 1997 Budget Act.<sup>93</sup>

The digital carriage agreements reached to date are a strong indication that the marketplace will work and there is no need for government-mandated digital must carry regulation.

As discussed below, Commission restraint in the face of broadcasters' demand for immediate carriage during the transition is all the more compelling because of the well-documented detrimental effects that double must carry requirements will have on millions of cable customers just to benefit a small number of people who may purchase very expensive DTV receivers.

---

an HDTV service in 1999 but sees an "uphill struggle" to secure carriage if its broadcast competitors are given automatic digital carriage rights. *Id.* at 6.

<sup>92</sup> NAB Comments at 17.

<sup>93</sup> According to a recent study by Strategy Analytics, the government target date for switching off analog TV, 2006, is off by nearly 20 years. The report's findings predict that only 7 million DTV sets will be sold by the end of 2005, peaking at 2.4 million a year in 2005. Unless the government changes policy, the report concludes that broadcasters will occupy analog channels until the year 2025. See "Selling Off the

**2. Diversity in viewpoint and subject matter will suffer greatly under a dual analog/digital must carry regime.**

The Association of Maximum Service Telecasters (“MSTV”) believes that a dual carriage regime is necessary to further the goal of localism and diversity.<sup>94</sup> And, as we have seen, NAB argues that consumers must have the “full panoply” of DTV broadcasts in “as many flavors as possible” through mandatory carriage rules to get them to buy sets.<sup>95</sup> The record demonstrates that requiring cable operators to carry the redundant programming on every broadcast station’s analog and digital signal will reduce, not enhance, diversity in programming and the multiplicity of voices on cable both now and in the future.<sup>96</sup> As explained by the International Channel and various ethnic program networks:

there is a danger, in short, that the Commission could inadvertently sacrifice its long-held goal of diversity in programming – which is finally on the verge of being realistically fulfilled with the development of program networks such as the Commenters – for no better reason than to ease the transition of the already-profitable broadcast networks.<sup>97</sup>

---

Airwaves: Strategies for the Transition to Digital Broadcasting,” Strategy Analytics, November 1998; Communications Daily, December 3, 1998.

<sup>94</sup> MSTV Comments at iii.

<sup>95</sup> NAB Comments at 14, 16.

<sup>96</sup> See, e.g., Comments of A&E Television Networks; BET Holdings II, Inc.; International Channel, TV 5, TV Asia, RAI International, the Filipino Channel and Arab Radio and TV; Ovation, Inc., Lifetime Entertainment Services; the Weather Channel, Courtroom Television Network; Discovery Communications, ZDTV; Home and Garden Television and Food Network; Encore Media Group; Michigan Government Television; Pennsylvania Cable Network; C-SPAN Networks; America’s Health Network, Great American Country, Knowledge TV, Outdoor Life Network, Speedvision Network and the Golf Channel (“America’s Health Network et al”). See also Discovery Comments at 23; MediaOne Comments at 3.

<sup>97</sup> International Channel Comments at 2; See also BET Comments at 4.

The wide range of cable program networks that filed in this proceeding, large and small, established and emerging, shows the diversity that could be lost to consumers under expanded must carry rules. Unique networks, such as Ovation, America's Health Network and Knowledge TV are striving to provide programming otherwise not available on broadcast television. And as A&E Networks, owner of the History Channel, pointed out, "the emergence of cable television programming networks has been responsible for a rebirth of the concept of public interest programming."<sup>98</sup>

There are over 220 national and regional cable program networks vying for carriage on cable systems, many for the first time.<sup>99</sup> These networks are providing a wide variety of high quality programming designed to serve the needs and interests of many different kinds of viewers. These networks are making significant contributions to programming diversity, often targeting unserved or underserved segments of the population. And viewers are choosing the diversity in cable's news, public affairs, children's, health, science, arts, history, sports, and original movies and entertainment programs. In the last year, such new services as Noggin, a joint venture of Nickelodeon and the Children's Television Workshop, and Discovery Science and Discovery Kids, have been created. Under a dual must carry regime, there will be fewer opportunities for this kind of innovative cable programming to reach an audience.

As Time Warner points out, these cable programming services have "no alternate, government-subsidized, distribution outlet: being dropped from cable usually means

---

<sup>98</sup> A&E Networks Comments at 6-7 (citing recent study by Professor Eli Noam of Columbia University finding growth of public interest programming available on cable systems.) Public interest programming is defined as programming that goes beyond pure entertainment and provides a cultural, civic, informational or educational function.

<sup>99</sup> NCTA Comments at 42, 48. See Appendix A.