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December 22, 1998

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OFFICE OF THE SECRETARY

By Hand

Ms. Magalie Salas, Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, NW, Room 239
Washington, D.C. 20554

Re: Carriage of the Transmissions of Digital Television
Broadcast Stations; Amendments to Part 76 of the
Commission's Rules, CS Docket No. 98-120

Dear Ms. Salas:

Please find enclosed for filing an original and nine copies
of Time Warner Cable's Reply Comments.

Also enclosed is one extra copy; please date-stamp and
return this copy in the self-addressed envelope provided.

Very truly yours,


Henk Brands

Enc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF
TIME WARNER CABLE

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Summary

Requiring cable operators to carry digital signals during the transition period would not be in the public interest. The traditional rationale for must-carry, that carriage is necessary to preserve access to free television for consumers who cannot afford cable, cannot justify digital must-carry. For one thing, consumers who cannot afford cable can certainly not afford digital TV sets. For another thing, broadcasting is now lucrative by any measure; broadcasters hardly need additional must-carry rights to preserve their viability.

The alternative rationale proposed by broadcasters, that digital must-carry is necessary to drive the sale of digital TV sets, makes no sense either. This theory's premise (that broadcasters will not invest in digital transmission facilities unless consumers first buy digital TV sets) is contradicted by the facts, and there is certainly no reason to believe that carriage of all digital broadcast signals is necessary to drive the sale of digital TV sets.

In any event, whatever one may think of these rationales, consumers could access digital signals just as easily off air: no commenter provides a reasoned basis for believing that input-selection switches do not make it easy and convenient for consumers to switch from cable to off-air signals. Broadcasters do argue that digital signals are difficult to receive with off-air antennas. If that is true, this destroys whatever is left of the rationale that must-carry is necessary to bring digital

signals to consumers who cannot afford cable. But it is not clear that this is true: broadcasters rest their assertions on questionable data. In any event, these assertions are entitled to little credence, for they contradict broadcasters' assertions elsewhere.

Whereas few consumers would thus be helped, most would be harmed by digital must-carry rules. Most cable systems have little or no capacity available. Thus, adding a digital broadcast signal would necessarily mean dropping some other service. That might be a cable programming service, in which case there is a loss of programming diversity. Or it might be an Internet-related service, in which case consumers lose the benefits of competition.

Broadcasters' assertions that the burden will be only temporary are meritless: there is every reason to believe that the digital transition will last decades. Broadcasters' assertions that spectrum enhancement and digital compression will soon ameliorate channel congestion are equally meritless. For practical business reasons, cable operators will for the foreseeable future have to continue to provide an analog tier substantially identical to their current offerings, which are usually channel-locked. Requiring cable operators to carry digital broadcast signals in new digital cable tiers would deprive subscribers of new and innovative services, and would inhibit investment in system upgrades.

In any event, there is no reason why the Commission should tackle these issues now. For one thing, until it becomes evident just how broadcasters intend to use their digital spectrum, there can be no coherent policy rationale for a rule requiring carriage of broadcasters' digital signals. For another thing, broadcasters themselves assume that only smaller and public broadcasters are in need of digital must-carry protection. Such stations will not be required to begin broadcasting digital signals for some years.

Quite apart from being contrary to the public interest, requiring cable operators to carry digital signals during the transition period would violate the First Amendment. Broadcasters are wrong in arguing that the Supreme Court's Turner decisions conclusively blessed all forms of must-carry: those decisions did not address compelled carriage of digital signals, and they do not bind the Commission or courts to the extent that relevant facts are different or have changed.

On the merits, broadcasters' First Amendment arguments are even less convincing. As already explained, the Turner rationale, based on preserving access to free television for consumers who cannot afford cable, simply has no application to digital signals. And the theory that carriage of digital signals is necessary to drive the sale of digital TV sets is without any record support. Moreover, by arguing that antenna reception of digital signals does not work well, broadcasters in effect not only waive the Turner rationale of preserving free over-the-air

television, but also demonstrate that a digital must-carry requirement would be content-based.

Requiring cable operators to carry digital signals during the transition would also violate the statute. Broadcasters argue that the statute requires carriage of digital signals, but they themselves do not seem to believe this, as they would have the Commission make various exceptions in circumstances where even they concede that carriage would be burdensome. And broadcasters simply ignore Section 614(b)(4)(B)'s timing language, under which the Commission may not require carriage until the transition is complete. Public broadcasters' digital signals, moreover, are not entitled to carriage even after the transition, a result that necessarily follows from Section 615's omission of any parallel to Section 614(b)(4)(B).

Quite apart from Section 614(b)(4)(B), express statutory limitations elsewhere in Section 614 make clear that duplicative carriage cannot be compelled during the transition, thereby reinforcing TWC's reading of Section 614(b)(4)(B). In particular, broadcasters are entitled to carriage of only their "primary video" signal, which, during the transition, will be their analog signal. Moreover, Section 614(b)(5) releases cable operators from any obligation to carry both of two signals where one "substantially duplicates" the other or both are "affiliated with a particular broadcast network."

Broadcasters' seek other, additional rights, but these arguments are insubstantial. For one thing, Section 336 is clear

that multiplexed SDTV broadcast signals, even if provided for free, can never be entitled to must-carry rights. For another thing, broadcasters' electronic program guides are not entitled to any carriage. Finally, the statute simply does not permit separate retransmission-consent elections with respect to analog and digital signals.

Glossary

A&E	A&E Television Networks
ADI	area of dominant influence
ALTV	Association of Local Television Stations, Inc.
APTS	Association of America's Public Television Stations
Ameritech	Ameritech New Media, Inc.
Armstrong/ Inter Mountain Cable	Armstrong Holdings, Inc./ Inter Mountain Cable, Inc.
BellSouth	BellSouth Corporation and BellSouth Interactive Media Services, Inc.
Benedek	Benedek Broadcasting Corporation <u>et al.</u>
CEMA	Consumers Electronics Manufacturers Association
Cablevision Systems	Cablevision Systems Corp.
Capitol	Capitol Broadcasting Co., Inc.
Circuit City	Circuit City Stores, Inc.
DBS	direct broadcast satellite
DTV	digital television
EPG	electronic program guide
Encore	Encore Media Group LLC
Gemstar/Starsight	Gemstar International Group Limited and Starsight Telecast, Inc.
HBO/TBS	Home Box Office/Turner Broadcasting System, Inc.
J&B	Jenner & Block (App. A to Comments of National Association of Broadcasters)
MSTV	Association for Maximum Service Television, Inc.
MediaOne	MediaOne Group, Inc.

Microsoft	Microsoft Corporation
NAB	National Association of Broadcasters
NBC	National Broadcasting Co., Inc.
NCTA	National Cable Television Association
NPRM	Notice of Proposed Rule Making
Paxson	Paxson Communications Corporation
Philips	Philips Electronics North America Corporation
SDTV	standard definition television
SPR (ALTV)	Strategic Policy Research (Exh. 1 to Comments of Association of Local Television Stations, Inc.)
SPR (NAB)	Strategic Policy Research (App. D to Comments of National Association of Broadcasters)
SRA	Station Representatives Association, Inc.
Sinclair	Sinclair Broadcast Group, Inc.
TCI	Tele-Communications, Inc.
TWC	Time Warner Cable
Thomson	Thomson Consumer Electronics, Inc.
Trinity	Trinity Broadcasting Party
<u>Turner I</u>	<u>Turner Broadcasting Sys., Inc. v. FCC,</u> 512 U.S. 622 (1994)
<u>Turner II</u>	<u>Turner Broadcasting Sys., Inc. v. FCC,</u> 117 S. Ct. 1174 (1997)
UCC/MAP	United Church of Christ, Inc., Media Access Project, <u>et al.</u>
UPN	Board of Governors of the UPN Affiliates Association
ZDTV	ZDTV, L.L.C.

1992 Cable Act

Cable Television Consumer Protection and
Competition Act of 1992, Pub. L. No.
102-385, 106 Stat. 1460

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Exhibit A

BEFORE THE
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REPLY COMMENTS OF
TIME WARNER CABLE

In their opening comments, broadcasters argue that the Commission must immediately adopt rules requiring cable operators to carry all digital signals during the transition period. In support, broadcasters present a parade of far-fetched and alarmist assertions and suggestions, including that the viability of broadcast television is in jeopardy (even though, particularly with analog must-carry in place, broadcasting is lucrative by any measure); that owners of digital TV sets might not be able to afford cable (even though such sets cost thousands of dollars); and that, unless every last digital signal is carried, consumers will not purchase digital TV sets (even though broadcasters themselves assert that only digital signals that are little watched risk non-carriage).¹

¹Perhaps the most far-fetched of all is ALTV's claim that imposition of a must-carry requirement is necessary because, without it, cable subscribers, "having never seen a digital station on their cable system, . . . may not even realize such stations exist." See ALTV at 79. ALTV does not explain how cable subscribers might stumble into buying a digital TV set

Common sense compels the rejection of each of these assertions and others like them. If the Commission chooses to act at this time (and there is no compelling reason for it to do so), it should not add to cable operators' must-carry burdens. As more fully explained below, requiring cable operators to carry digital signals during the transition period would hurt consumers; would infringe upon cable operators' rights under the First and Fifth Amendments; would exceed the express limitation that Section 614(b)(4)(B) places upon the Commission's authority; and would be inconsistent with numerous statutory limitations on must-carry rights.

Argument

I. REQUIRING CABLE OPERATORS TO CARRY DIGITAL SIGNALS DURING THE TRANSITION PERIOD WOULD NOT SERVE THE PUBLIC INTEREST.

As TWC showed in its opening comments, requiring cable operators to carry digital signals during the transition period would disserve the public interest.² Except for perhaps a few wealthy cable subscribers owning digital TV sets, no consumers would benefit. To the contrary, most consumers would be seriously harmed. In any event, it is simply premature even to consider these issues.

without knowing of digital signals, nor how analog TV set owners might learn about digital signals from seeing blank screens.

²See TWC at 3-11.

A. Requiring Cable Operators To Carry Digital Signals During the Transition Period Would Not Benefit Consumers.

The traditional rationale for must-carry posits that, unless broadcast signals are carried on cable, broadcasters might wither, so that consumers who cannot afford cable will be left with less (or less attractive) programming.³ Where the digital transition is concerned, this rationale is simply not plausible: consumers who are unable to afford a \$30-per-month cable bill will certainly be unable to afford a \$7,000 digital TV set. Thus, as a policy objective, making digital signals available to consumers that cannot afford cable makes about as much sense as distributing polo mallets to the poor.⁴

Similarly, the argument that "the vitality, even the basic survival, of local television service is threatened by the transition to digital" (SRA at 5) is simply unrealistic. The broadcast industry is thriving: in recent years, broadcasters' earnings have ballooned and station-sale prices have skyrocketed. See TWC at 20 n.19. And, because analog must-carry rights continue to guarantee broadcasters' advertising revenue, it is difficult to see how this could change anytime soon. In the

³See TWC at 17; see also 1992 Cable Act § 2(a)(12); Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 646-47 (1994) ("Turner I").

⁴And, in this rulemaking, it is no answer to say that, eventually, prices of digital TV sets may fall to rival those of analog TV sets that non-cable subscribers can afford. If that happens, there will be time enough to act.

meantime, preserving broadcasters' viability with digital must-carry rights simply makes no sense.⁵

Broadcasters therefore place their primary reliance not on the traditional must-carry rationale but on one that is novel and untested: that digital must-carry is necessary to ensure a rapid transition to digital broadcasting.⁶ That rationale hinges on the prediction that broadcasters will not invest in digital broadcasting facilities unless consumers buy digital TV sets⁷ -- which will not happen, the argument runs, unless digital broadcast signals are available on cable.⁸ But broadcasters themselves contradict that premise: they point to numerous broadcasters that, even without the certainty of must-carry

⁵Again, in the unlikely event that broadcasters' viability changes, there will be time enough to act.

⁶See, e.g., J&B at 16-17.

⁷Any such failure to construct digital facilities would presumably violate 47 C.F.R. § 73.624(d), which imposes unambiguous build-out requirements on digital licensees. It seems strange, to say the least, that broadcasters should premise their main argument in this proceeding on a refusal to obey the law.

⁸See, e.g., NAB at 7; J&B at 17, 24; APTS at 11. That broadcasters advance this argument is perhaps remarkable in itself. After years of cajoling, broadcasters were granted billions of dollars worth of digital spectrum for free, with few strings attached. Now, broadcasters claim that investing in digital transmission facilities (at a cost of perhaps a million dollars per station, see NAB at 23 n.55; Circuit City at 14-15) burdens them so severely that they should receive additional incentives. The distastefulness of this position has not gone unnoticed even within broadcasters' own ranks. See Communications Daily, Oct. 2, 1998, at 2 (quoting CBS CEO Mel Karmazin as saying that it is "'hypocrisy' for broadcasters to . . . see[k] digital must-carry").

requirements, have sunk investment in digital broadcasting facilities well ahead of schedule.⁹

And even assuming that cable carriage of digital broadcast signals might help drive the penetration of digital TV sets, broadcasters could not possibly explain why access to all digital signals is necessary to that end. Broadcasters themselves assume that the digital signals of major broadcasters will likely be carried even without digital must-carry rules.¹⁰ This assumption is correct: cable operators have already reached voluntary agreements to carry digital signals. For example, TWC recently entered into a broad-based agreement to carry the digital signals of CBS stations. See, e.g., Leslie Cauley, Time Warner Inc. Agrees to Carry CBS's Digital TV, Wall St. J., Dec. 9, 1998, at B-6.¹¹ The CBS agreement (which no doubt will be followed by many like it) demonstrates that carriage of digital signals is being addressed in the market place, and simply does not require regulatory intervention.

⁹See, e.g., APTS at 9; MSTV at 11-12; see also Remarks of William E. Kennard, Chairman, Federal Communications Commission, to the "Dawn of Digital Television" Summit Meeting (Nov. 16, 1998) <<http://www.fcc.gov/Speeches/Kennard/spwek834.html>> ("Many stations in smaller markets have decided that digital is the way of the future and that moving quickly is the best way to be a leader in that digital future.").

¹⁰See, e.g., NAB at 19-24; J&B at 18-19; UPN at 3.

¹¹See also MediaOne at 1 ("MediaOne already has negotiated a digital carriage provision in the retransmission consent agreement with eight of [the nine broadcasters scheduled to launch DTV signals in 1998 within MediaOne's franchise areas]."); BellSouth at 25 (citing Albinak, Hindery Sees DTV Deals Before Fall, Broadcasting & Cable, July 27, 1998, at 36).

Broadcasters therefore imply that, without must-carry, only smaller broadcasters (with low ratings) will go without carriage.¹² But, if that is so, it is difficult to see how digital must-carry requirements would serve any purpose: requiring carriage of little watched stations would do nothing to drive the sale of digital TV sets. Conversely, lack of carriage of smaller stations' digital signals also would do nothing to discourage the sale of digital TV sets: such sets are able to receive analog signals (indeed, with improved resolution, see TWC at 21), so that no cable subscriber could decline to purchase a digital TV set for fear of losing cable access to some niche broadcaster.

In any event, both the traditional must-carry rationale and the "prime the pump" rationale start from the incorrect premise that cable is a bottleneck with respect to digital signals. In its opening comments, TWC demonstrated that, because remote-controlled input-selection switches will be built into digital TV sets, cable operators (like DBS providers) lack all bottleneck power.¹³ Thus, TWC argued, whatever governmental objectives digital must-carry requirements might be intended to serve could as easily be attained without them.¹⁴

¹²See, e.g., NAB at 21-22 n.53.

¹³See TWC at 7-8, 21-22; see also Philips at 19 ("[t]hese switches . . . will be a standard feature in all of Philips' DTV receivers, usually located on the receiver's remote control unit"); Thomson at 24 (same).

¹⁴See TWC at 7-8, 21-22.

In their opening comments, broadcasters do not seriously argue that whatever flaws may have affected input-selection switches in 1992 still exist today.¹⁵ Instead, broadcasters claim that antenna reception is not a viable alternative to cable carriage because over-the-air transmission of digital signals does not work well.¹⁶ By so arguing, broadcasters further destroy the traditional must-carry rationale. Clearly, there cannot be an important policy interest in helping broadcasters bring digital signals to consumers who cannot afford cable if broadcasters concede that such consumers could not receive digital signals off-air in any event.

Moreover, the broadcasters' antenna argument rests on a questionable factional foundation.¹⁷ Broadcasters point to disappointing test results of pilot stations. But, as demonstrated in consumer electronics manufacturers' comments, the

¹⁵To the extent that they make assertions along those lines, they point to no evidence. See, e.g., MSTV at 49 ("It is our understanding that less than half the DTV sets produced will have input selectors on the remote control devices."); NAB at 11 (stating that "consumers once connected to cable will use only cable to view broadcast stations" without explaining why this would be so in the digital world).

¹⁶See, e.g., ALTV at 30, 79; SPR (ALTV) at 13; APTS at 48; Sinclair at 2-3.

¹⁷Indeed, some broadcasters concede as much by arguing that manufacturers should be compelled to build A/B switches into digital TV sets to facilitate the reception of ancillary and supplementary signals, which, under 47 U.S.C. § 336(b)(3), are not entitled to must-carry rights. See Sinclair at 8. It is unclear why, if antennas are effective for ancillary and supplementary signals, they are not effective for other digital signals.

reliability of those results is in doubt.¹⁸ At best, then, the antenna issue provides yet another reason why the Commission should defer a ruling in this docket: the Commission should wait until more and more accurate test results become available.

More generally, the broadcasters' assertions are entitled to little credence, for their position on antenna reception here is directly contrary to their position in the pending dispute over the Satellite Home Viewer Act ("SHVA").¹⁹ In that dispute, broadcasters -- consistent with their interest in keeping broadcast signals off DBS -- have taken the position that antenna reception is a perfectly appropriate alternative to receiving broadcast signals off satellites, saying that input-selection switches and antennas allow DBS subscribers easy access to off-

¹⁸See CEMA at 26 ("These concerns are . . . largely based on misinterpreted findings from a statistically insignificant number of field tests using prototype DTV receivers that do not reflect the level of technology and sophistication of the DTV receivers available to the public this Fall."); Philips at 14-15 ("statistically misleading findings from unreliable field tests using only a very limited number of relatively immature receiver implementations").

¹⁹Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, Part 73 Definition and Measurement of Signals of Grade B Intensity, Notice of Proposed Rulemaking, CS Docket No. 98-201, FCC 98-302 (rel. Nov. 17, 1998).

air signals.²⁰ If that is true for DBS (which it is, see TWC at 7-8 & n.10), it is obviously also true for cable.

B. Requiring Cable Operators To Carry Digital Signals During the Transition Period Would Harm Consumers.

Whereas few consumers would thus be helped, most would be harmed by digital must-carry rules. As TWC demonstrated in its opening comments, most cable systems have little or no capacity available. See TWC at 9. Thus, adding a digital broadcast signal would necessarily mean bumping some other service. That might be a cable programming service, in which case there is a net loss of programming diversity. See id. Or it might be an Internet-related service, in which case consumers lose the benefits of competition. See id. at 9-10.

Broadcasters argue, however, that requiring carriage of digital broadcast signals during the transition will impose only a slight burden. Although broadcasters concede that "mandatory carriage of both digital and analog signals will no doubt cause an increase in the number of broadcast channels subject to must-

²⁰See, e.g., Comments of NAB in CS Docket No. 98-201 (filed Dec. 11, 1998), at 71-72 (DBS is "offering turnkey satellite services, including powerful new antennae capable of tapping local TV channels with the mere zap of a remote control") (internal quotation marks omitted); Comments of MSTV in CS Docket No 98-201 (filed, Dec. 11, 1998) (even consumers in rural areas "can, and generally do, take relatively simple measures such as installation of an improved roof-top antenna and careful location and orientation of that antenna to enhance their off-the-air reception") (internal quotation marks omitted); Joint Comments of ABC, CBS, Fox and NBC Television Network Affiliate Associations in CS Docket No. 98-201, Volume 1 (filed Dec. 11, 1998), at 42 ("[D]ue to a variety of technological improvements, more households today are capable of receiving an acceptable picture over the air than ever before.").

carry,"²¹ they argue that the increased burden is only temporary,²² and that, in light of upgrades of cable systems, the burden will in time diminish to insignificance.²³

The suggestion that the burden of requiring cable operators to carry digital signals during the transition period would be only temporary is transparently unconvincing. It is true, of course, that Congress has tentatively fixed December 31, 2006, as the date by which analog broadcasting must end. See 47 U.S.C. § 309(j)(14)(A). But that deadline is contingent upon an 85 percent penetration of digital TV sets. See id. § 309(j)(14)(B)(iii)(II). If history is any indication, there is no realistic chance that 85 percent penetration will come about in just eight years: it took decades for color television to

²¹J&B at 18; see also SPR (NAB) at 9 ("full digital TV must-carry will result in a significantly larger number of carried stations (during the transition period) than was the case following passage of the 1992 Act"); MSTV at 53 (there "typically will be 4-12 DTV signals gradually turning on in a given market over the next few years").

²²See, e.g., NAB at 25; J&B at 22; SPR at 4; SRA at 7.

²³See, e.g., NAB at 26-35; MSTV at 49; ALTV at 61; SPR (ALTV) at 18. Broadcasters also argue that, even at existing capacity levels, cable operators have sufficient vacant channels available to accommodate digital broadcast signals. TWC has already shown that, at least with respect to TWC, this is simply not true. See Leddy Aff. For evidence with respect to vacant channels on other operators' cable systems, TWC refers the Commission to the reply comments NCTA filed in this same proceeding today.

achieve that level.²⁴ Thus, any burden the Commission imposes in this rulemaking may stay in place for decades to come.

The argument that increases in cable spectrum and digital compression will render any burden de minimis is similarly mistaken. It is true that TWC and other cable operators have recently launched efforts to upgrade their cable spectrum to 750 MHz. See Chiddix Reply Aff. ¶ 3 (attached as Exhibit A to these comments). But, in the spectrum below 550 MHz, cable operators usually preserve the currently offered analog tier as a low-cost and convenient option for consumers. See id. ¶ 5. Neither digital compression nor spectrum enhancement will do anything to ameliorate congestion in that analog tier. See id. ¶ 6.

And even a requirement that cable operators carry digital broadcast signals in the cable spectrum above 550 MHz (which cable operators are expected to use mostly to transmit a digital tier) would impose a significant burden. System upgrades require enormous and risky investment. See id. ¶ 7. Requiring cable operators to carry digital broadcast signals in new spectrum

²⁴Indeed, one recent survey predicts that digital TV set penetration will be only 2.5 percent by the end of 2002 (halfway into the transition), see Communications Daily, Nov. 12, 1998, at 8 (citing Yankee Group study), and another predicts that the transition will take more than 20 years, see Communications Daily, Dec. 3, 1998, at 8 (citing Strategy Analytics study). Accordingly, broadcasters have in moments of greater candor conceded that the 2006 date is unrealistic. See Electronic Media, July 13, 1998 ("Frankly, I doubt that's a realistic schedule," said Greg Schmidt, VP/General Counsel at LIN Television Corp, who spoke on behalf of the National Association of Broadcasters (NAB)."); see also Andrew Glass, Problems Envisioned for High-Definition TV, Atlanta Constitution, July 9, 1998, at F3 (quoting Sen. John McCain as saying that the "deadline was a joke from the very beginning").

would inhibit future investment, thereby depriving consumers of new choices in video programming. See TWC at 10.²⁵ Such a requirement would also make it less likely that cable operators provide facilities-based competition in Internet and other new services. See TWC at 9-10. Contrary to MSTV's comments, which dismiss this as "irrelevant" (MSTV at 53), this is obviously a policy consideration of the highest importance, see TWC at 9 & n.13.

In any event, broadcasters' reliance on system upgrades is not persuasive for even more fundamental reasons. Through decades of must-carry debate, broadcasters have consistently asserted that, even if present cable capacity is scarce, future system upgrades will soon solve the problem.²⁶ But this has never happened: since the beginning of the cable industry, the supply of cable programming has always outstripped available channel capacity. Thus, today, more than 225 cable programming networks compete for carriage on systems whose capacity is usually well below 100 channels.²⁷ There can be little doubt

²⁵Requiring carriage of digital signals would thus be contrary to the statutory policy to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems." 1992 Cable Act § 2(b)(3).

²⁶See, e.g., Brief for Appellees National Association of Broadcasters and Association of Local Television Stations at 44-45, Turner Broadcasting Sys., Inc. v. FCC, 117 S. Ct. 1174 (1997) (No. 95-992) (filed June 17, 1996) ("Even the Limited 'Actual Effects' of Must-Carry Are Certain to Diminish As Channel Capacity Continues to Expand.").

²⁷See Encore at 6.

that future increases in cable capacity will similarly be more than matched by increases in the number of programming services.

Accordingly, even if a digital must-carry rule would not require bumping a currently carried programming service, it would surely prevent future programming services from obtaining carriage. This Commission should take a dynamic, not a static, approach to the issues presented here: there is no reason why tomorrow's diverse programming is entitled to any less solicitude than today's. This is not to say that broadcasters' digital signals should not be carried. It is simply to say that broadcasters' digital signals should be required to prove themselves in the marketplace.

C. It Is Premature for the Commission To Act at This Time.

In any event, as TWC explained in its opening comments, it is premature for the Commission to entertain the issues presented in this docket. As TWC demonstrated in its opening comments, see TWC at 4-5, 11, the statute and the Commission's regulations leave broadcasters free to determine what use to make of their digital spectrum. Broadcasters to date have failed to announce their plans; broadcasters' comments provide no clear additional indications on this point. Until it becomes evident just how broadcasters intend to use their digital spectrum, there can be no coherent policy rationale for a rule requiring carriage of broadcasters' digital signals.

And broadcasters' opening comments provide an additional reason why there is no pressing reason for the Commission to act

at this time. No commenter argues that must-carry rules are necessary to ensure carriage of digital signals of stations in the top 30 markets. To the contrary, broadcasters assume that the digital signals of major broadcasters will be carried even without digital must-carry rules,²⁸ thus necessarily implying that only smaller and public broadcasters would benefit from digital must-carry requirements.²⁹ But smaller and public broadcasters will not be required to provide digital signals until May 2002 and May 2003, respectively.³⁰ Thus, the Commission can safely defer action for some years.³¹

Broadcasters fall back on the argument that, unless the Commission imposes rules at this early date, the 2002 and 2003 dates may be in jeopardy, reasoning that immediate certainty is necessary to help broadcasters secure financing for digital transmitting facilities.³² But broadcasters nowhere explain why they need so much lead time. Moreover, in portraying themselves

²⁸See, e.g., NAB at 19-24; J&B at 18-19; UPN at 3.

²⁹Indeed, none of the four major networks has filed comments urging the Commission to adopt must-carry rules; the only major network that has filed comments at all "takes no position . . . as to whether cable systems should be required to carry DTV broadcast signals." NBC at 2.

³⁰See 47 C.F.R. § 73.624(d)(1)(iii) & (iv).

³¹Consumer representatives agree. See UCC/MAP at 4-6; see also Microsoft at 21. And even broadcasters agree in principle that there are benefits to waiting. See NAB at 48 ("it may be better to wait to make changes in the Commission's established rules until we have more experience with digital television in the marketplace").

³²See, e.g., NAB at 12-14; J&B at 19 n.9; UPN at 4.

as loyal foot soldiers in the digital war, broadcasters point to numerous stations that, even without the certainty of must-carry requirements, have invested in digital broadcasting facilities well ahead of schedule.³³ There will be time enough to act if this trend threatens to reverse itself.

II. REQUIRING CARRIAGE OF DIGITAL SIGNALS DURING THE TRANSITION PERIOD WOULD VIOLATE CABLE OPERATORS' CONSTITUTIONAL RIGHTS.

No broadcaster has addressed the Fifth Amendment implications of requiring carriage of digital signals; on this issue, TWC therefore simply refers the Commission to its opening comments.³⁴ Broadcasters do argue that the First Amendment does not preclude digital must-carry requirements. TWC has already addressed the factual and logical bases of their arguments in Part I of these reply comments.³⁵ TWC will briefly respond to their legal arguments here.

A. The Turner Decisions Plainly Do Not Immunize Digital Must-Carry Requirements from First Amendment Scrutiny.

Broadcasters argue that the Supreme Court's decisions in the Turner litigation resolved all questions regarding the

³³See supra pp. 4-5 & n.9.

³⁴See TWC at 26-30. It is worth pointing out, however, that TWC's analysis finds strong support in the Commission's recent decision in Implementation of Section 207 of the Telecommunications Act of 1996, Second Report and Order, CS Docket No. 96-83, FCC 98-273, ¶¶ 17-29, 38-45 (rel. Nov. 20, 1998) (refusing to adopt rule effecting physical occupation because statute provided no unambiguous authorization).

³⁵In particular, TWC will not repeat in this Part II its answer to broadcasters' argument that, for purposes of O'Brien analysis, carriage of digital signals would not burden substantially more speech than is necessary to further the government's interests. See supra, pp. 10-12.

constitutionality of the must-carry statute, and urge that the Commission may not now revisit those questions. See, e.g., NAB at 42. In particular, broadcasters argue that the Commission lacks authority "to reevaluate the factual underpinnings" of any carriage obligation. J&B at 12; see NAB at 43. The theory appears to be that, once the Supreme Court has in any way addressed the "facial" constitutionality of any aspect of a statute, any court is forever barred from entertaining any constitutional challenge to any aspect of that statute. See J&B at 13; NAB at 42.

That theory is misguided. First, the Supreme Court in Turner simply had no occasion to address the issue now before the Commission. Cable operators in Turner challenged the statutory requirement to carry analog television signals; the Turner plaintiffs did not challenge any requirement to carry digital signals.³⁶ Similarly, broadcasters in Turner defended the must-carry statute on the ground that carriage of analog channels imposed only a minimal burden.³⁷ Broadcasters cite no precedent for their theory that, once the Supreme Court determines that one aspect of a statute is consistent with the Constitution, all courts in later lawsuits must hold all aspects of the statute --

³⁶This is not surprising: the statute does not create any such requirement. See TWC at 30-47; see also infra, Part III.

³⁷See, e.g., Brief for Appellees National Association of Broadcasters and Association of Local Television Stations at 38-41, Turner Broadcasting Sys., Inc. v. FCC, 117 S. Ct. 1174 (1997) (No. 95-992) (filed June 17, 1996). Broadcasters did not address the burden imposed by digital signals.

including aspects of the statute not previously challenged -- to be valid. No such precedent exists.³⁸

Second, even if the Turner court had passed on any digital must-carry requirement, stare decisis would not necessarily bar a First Amendment challenge. As was recently re-emphasized in connection with challenges to the cable/telephone cross-ownership ban, "[w]hen a statute's constitutionality is predicated on a particular state of facts, that constitutionality 'may be challenged by showing to the court that those facts have ceased to exist.'" Ameritech Corp. v. United States, 867 F. Supp. 721, 734 (N.D. Ill. 1994) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938)). For example, if a court finds that today's input-selection switches are different from those existing previously, it would clearly be at liberty to invalidate the statute without overruling Turner.³⁹

³⁸To the contrary, where a point is not "raised in briefs or argument nor discussed in the opinion of the Court," a decision is "not a binding precedent on th[e] point." United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952).

³⁹It is particularly ironic that NAB should argue otherwise: NAB (along with ALTV) only last year submitted papers in the D.C. Circuit in which it argued precisely this in support of a renewed First Amendment challenge to the newspaper/broadcast cross-ownership ban. NAB argued that, "in view of the immense changes that have occurred in the marketplace," the "original spectrum scarcity rationale that underlies the Red Lion doctrine . . . no longer justifies any lower level of judicial scrutiny" for broadcast regulation than for regulation of other media. Brief Amici Curiae of NAA, ALTS, and NAB at 26, 29-30, Tribune Co. v. FCC, 133 F.3d 61 (D.C. Cir. 1998) (No. 97-1228) (filed July 30, 1997). NAB argued that a court therefore "need not overrule Red Lion in order to determine that its factual predicate -- the scarcity of channels -- cannot today justify the newspaper/broadcast ban." Id. at 32 n.70.

B. No Coherent Rationale Exists Under Which a Digital Must-Carry Requirement Could Survive Intermediate Scrutiny.

Though this is clearly not their primary theory, broadcasters try to defend a digital must-carry requirement on the basis of the Turner rationale. Some broadcasters attempt to depict the Turner rationale as permitting any measure aimed at curbing anticompetitive conduct by cable operators. See J&B at 14-15. They are of course mistaken. Five members of the Turner II Court refused to hold that even an analog must-carry regime could be sustained on that basis. See 117 S. Ct. at 1203 (Breyer, J., concurring) (refusing to embrace "the principal opinion's analysis of the statute's efforts to 'promot[e] fair competition'"); id. at 1207 (O'Connor, J., dissenting) ("the must carry provisions cannot be justified as a narrowly tailored means of addressing anticompetitive behavior").

The Turner rationale instead focused on access to off-air signals by consumers who cannot afford cable. See TWC at 17. And, as already explained, that theory simply does not work in the case of digital signals. For one thing, it is simply absurd to posit that there are consumers who cannot afford cable but who can afford a digital TV set. See supra, p.3. For another thing, the Commission could not plausibly predict that the viability of broadcasters is in any way jeopardized -- particularly so long as analog must-carry rules remain in effect. See supra, pp. 3-4.⁴⁰

⁴⁰In particular, no broadcaster argues that owners of digital TV sets will somehow stop watching analog signals carried on cable. See TWC at 21.

Broadcasters therefore put more emphasis on their theory that carriage is necessary to ensure a quick transition, in that consumers will not purchase digital TV sets unless there are digital signals to be viewed, and broadcasters will not invest in digital broadcasting equipment unless consumers buy digital TV sets. The threshold problems with this rationale are obvious. Congress did not identify this interest as justifying Section 614. Thus, it is doubtful, to say the least, that the Commission would have even statutory authority to use any Section 614-derived power to pursue this interest. Moreover, there are no statutory findings relating to this interest to which a court might defer. See 117 S. Ct. at 1189.

In any event, as already explained, the theory collapses of its own weight. For one thing, reality stands in stark contrast to broadcasters' dire predictions: broadcasters are making investments in digital transmission equipment even without must-carry rights. See supra, pp. 4-5 & n.9. Thus, there simply is no "record that convincingly shows a problem to exist." Home Box Office, Inc. v. FCC, 567 F.2d 9, 50 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977). For another thing, broadcasters utterly fail to demonstrate why carriage of all digital signals is necessary to drive the sale of digital TV sets: they nowhere explain how carriage of little-watched niche broadcasters would affect consumers' purchasing decisions in any "direct and material way." Turner I, 512 U.S. at 664 (plurality).

C. Broadcasters' Own Arguments Concerning Antenna Reception Show That a Digital Must-Carry Requirement Cannot Survive First Amendment Scrutiny.

In its opening comments, TWC demonstrated that, in light of technological progress in input-selection switches, cable no longer has any bottleneck power (if it ever had any). See TWC at 7-8, 21-22. Broadcasters do not quarrel with the premise of TWC's argument, but claim instead that over-the-air transmission of digital signals does not work well. See supra, pp. 6-7. As already explained, this assertion rests on a doubtful factual basis. See supra, pp. 7-8. However that may be, it is clear that, through this assertion, broadcasters destroy whatever may be left of the Turner rationale. There obviously cannot be an important interest in helping broadcasters bring digital signals to consumers who cannot afford cable if broadcasters concede that digital signals cannot be received off-air in any event.

Moreover, by arguing that over-the-air transmission of digital signals does not work, broadcasters abandon any pretense of justifying digital must-carry on content-neutral grounds. By making this argument, broadcasters in effect concede that they remain "broadcasters" in name only, having instead become cable programmers with a governmentally enforced carriage preference

over CNN, C-SPAN, and others.⁴¹ As shown below, the First Amendment does not tolerate such a naked speaker preference.

In Turner I, the Supreme Court held that, even though Sections 614 and 615 discriminate in favor of broadcasters and against cable programmers, the provisions do not trigger strict scrutiny under the First Amendment. This was so, the court reasoned, because "Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." See 512 U.S. at 646. That purpose, the court held, was "unrelated to the content of expression disseminated by cable and broadcast speakers," id. at 647; rather, it was based "upon the manner in which speakers transmit their messages to viewers," id. at 645.

By claiming that off-air antennas are ineffective, broadcasters obliterate that fragile distinction: if broadcasters are incapable of transmitting their messages to viewers over the air, any justification for protecting non-cable subscribers collapses. Thus, discrimination in broadcasters' favor could not be based on anything other than the content of their

⁴¹This is but an extension of a process that has been under way for some time. In the wake of the 1992 Cable Act, numerous broadcasters have abused must-carry by trying to leverage weak over-the-air signals into "regional superstations" with guaranteed ADI-wide cable carriage. See Petition of Cablevision Sys. Corp., 11 FCC Rcd 6453, ¶ 48 (CSB 1996), aff'd, Market Modifications and the New York Area of Dominant Influence, Memorandum Opinion and Order, 12 FCC Rcd 12262 (1997), aff'd sub nom. WLNY-TV, Inc. v. FCC, No. 97-4243 (2d Cir. Dec. 21, 1998).

expression.⁴² Any must-carry rationale premised on the ineffectiveness of antennas therefore necessarily subjects must-carry requirements to strict scrutiny, requiring that they be "narrowly tailored to a compelling state interest." 512 U.S. at 680 (O'Connor, J., dissenting). No commenter argues that digital must-carry rules could survive such review.

III. IN LIGHT OF SECTION 614(b)(4)(B), THE COMMISSION LACKS AUTHORITY TO REQUIRE CABLE OPERATORS TO CARRY DIGITAL SIGNALS DURING THE TRANSITION PERIOD.

Broadcasters argue that Sections 614 and 615 require carriage of all broadcast television signals; that these provisions make no exception for digital signals; and that the Commission therefore lacks authority to issue rules under which cable operators would not be required to carry digital broadcast signals. See, e.g., NAB at 3-6; J&B at 1-10; UPN at 4; Paxson at 12. But see Trinity at 4. But broadcasters themselves do not appear to place much stock in this theory. Commenting broadcasters concede that the Commission has authority not to require carriage where carriage would be especially burdensome (e.g., in the case of small systems).⁴³ That concession is

⁴²Indeed, some broadcasters expressly suggest that the superior content of their programming justifies digital must-carry rights. See, e.g., APTS at 2 ("[n]o cable service can substitute for the unique noncommercial services provided by public television").

⁴³See, e.g., NAB at iii, 26, 35 (exception for small systems and systems that have not upgraded); MSTV at 51-52 (carriage only on unused and new capacity); Benedek at 28 (same); ALTV at 22, 48, 51 (carriage only on large systems and systems carrying digital cable signals); APTS at 27 (proposing ad hoc waiver procedure under which cable operator that had no vacant channels on July 10, 1998, may qualify for exemption); Sinclair at 4

utterly inconsistent with any theory that the statute deprives the Commission of authority not to require carriage of digital broadcast signals.

Broadcasters further undermine their theory by arguing that limiting provisions in Section 614 do not "fit" with digital signals, so that "direct application of the analog must carry rules to local television stations' DTV signals in some circumstances might lead to a dysfunctional or arbitrary resul[t]." ALTV at 22. Their solution to this problem is that the Commission, while enforcing the basic carriage obligation of Section 614(a), should simply ignore or relax any limiting provisions.⁴⁴ Broadcasters nowhere explain why the Commission has authority to do that but not to hold the basic carriage provision inapplicable. If limiting provisions do not "fit" with digital signals, the much more obvious conclusion is that the basic carriage requirement of Section 614(a) is inapplicable to digital signals.

And Section 614(b)(4)(B) makes clear that this is the correct reading of the statute. Section 614(b)(4)(B) specifically addresses the circumstances under which the Commission may impose carriage requirements with respect to

(carriage only on systems already transmitting digital signals); Capitol at 3 (one-year phase-in period).

⁴⁴See, e.g., NAB at 38 (primary video); J&B at 9 (primary video); MSTV at 26-27 (primary video); id. at 29 (VBI and line 21); ALTV at 22 (channel positioning); id. at 49 (channel cap); id. at 75-77 (market changes); APTS at 37 (primary video, VBI and line 21); Paxson at 21 (channel cap).

digital signals. Because it is "a commonplace of statutory construction that the specific governs the general," Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992), "the law is settled that [h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment," Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228 (1957) (internal quotation marks omitted). Thus, the question whether carriage of digital signals is required must be resolved by reference to Section 614(b)(4)(B), and not simplistically by reference to the basic carriage obligation.⁴⁵

And, as explained in TWC's opening comments, see TWC at 32-33, Section 614(b)(4)(B) unambiguously provides that the Commission may not require cable operators to carry digital signals during the transition period. Section 614(b)(4)(B) contemplates "cable carriage of [only those] broadcast signals of local commercial television stations which have been changed to conform with . . . modified [broadcast] standards." 47 U.S.C. § 534(b)(4)(B) (emphasis added). Digital signals broadcast during the transition on temporary "loaner" frequencies have not been "changed": they were never analog. Thus, the "changed"

⁴⁵Broadcasters rely on Section 614(g), see J&B at 5-6, but that provision actually undermines their argument. Section 614(g) shows that specific subsections of Section 614 can take television stations out of the general carriage obligation of Section 614(a). Just as Section 614(g) removed home-shopping stations' signals from the scope of the basic carriage obligation, so Section 614(b)(4)(B) removes digital signals from the scope of that obligation.

signals contemplated in Section 614(b)(4)(B) must be the digital signals broadcast on permanent digital frequencies after the transition is complete.

Most broadcasters simply ignore this express timing language.⁴⁶ Consumer groups do address it, but say that it renders Section 614(b)(4)(B) "ambiguous as to digital TV signal carriage requirement during the transition period." UCC/MAP at 7. TWC does not agree that there is ambiguity, but, if there were, the result would still be an absence of commission authority. Section 624(f)(1) -- a provision broadcasters simply ignore -- provides that the Commission may impose must-carry requirements only "as expressly provided" in the statute. 47 U.S.C. § 544(f)(1) (emphasis added). Moreover, the Commission must resolve any ambiguity against carriage to avoid constitutional questions. See TWC at 12, 27.

Broadcasters also simply ignore that there is no support in any of the findings Congress adopted in the 1992 Cable Act for a digital must-carry requirement. See id. at 35-39. Had Congress intended such a requirement, it would surely have addressed digital signals in its findings. Moreover, none of the goals Congress listed in the 1992 Cable Act would be in any way advanced by imposing simultaneous analog and digital must-carry requirements on cable operators, nor would the absence of a

⁴⁶See, e.g., J&B at 7 n.5.

digital must-carry scheme during the transition threaten any congressional policy objective.⁴⁷

Finally, it is clear that digital signals of non-commercial stations are not entitled to carriage. See id. at 31 n.31. As explained above, Section 614(b)(4)(B) makes clear that digital signals are not encompassed within the term "signals" of Section 614(a). That conclusion applies with equal force to Section 615(a).⁴⁸ Yet, Section 615 contains no parallel to Section 614(b)(4)(B) -- the only possible source of power to impose digital must-carry requirements with respect to commercial stations. Because differences in statutory phrasing necessarily imply differences in meaning,⁴⁹ the Commission lacks power to require the carriage of non-commercial stations' digital signals -- during the transition or thereafter.

Public broadcasters' assertion that the absence of a parallel to Section 614(b)(4)(B) in Section 615 was a mere "oversight" (APTS at 13-14) is so plainly at odds with these

⁴⁷See Ameritech Comments at 13-15; TCI Comments at 11; NCTA Comments at 17-18; A&E Comments at 21-27, 28-30; Cablevision Systems Comments at 4-7; BET Comments at 12-23; HBO/TBS Comments at 13-18; BellSouth Comments at 6-12; ZDTV Comments at 4; Armstrong/Inter Mountain Cable Comments at 34-35.

⁴⁸See, e.g., Ratzlaf v. United States, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

⁴⁹See, e.g., Russello v. United States, 464 U.S. 16, 23-24 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

settled principles of statutory interpretation that it requires no additional response. Similarly, public broadcasters' apparent suggestion that their lack of retransmission-consent rights somehow stands in the way of voluntary carriage of their digital signals (see id. at 23) is flatly mistaken. That lack does not mean that cable operators may not voluntarily carry non-commercial stations' digital signals; to the contrary, it means that non-commercial stations cannot prevent such voluntary carriage.

IV. UNDER EXPRESS STATUTORY LIMITATIONS, DIGITAL SIGNALS ARE NOT ENTITLED TO CARRIAGE DURING THE TRANSITION.

Regardless of whether Section 614(b)(4)(B) permits digital must-carry requirements during the transition, express statutory limitations elsewhere in Section 614 make clear that duplicative carriage cannot be compelled during the transition. This reinforces the conclusion that Section 614(b)(4)(B) should be read not to empower the Commission to require cable operators to carry digital signals during the transition period: it would be odd (to say the least) if the Congress had created a carriage right that, upon closer inspection, turned out never to apply.

A. Broadcasters Are Not Entitled to Carriage of Anything Beyond Their "Primary Video" Transmission.

Broadcasters argue that, for purposes of the "duplication" provisions, digital and analog signals form one and the same "station," which, they say, renders the non-duplication provisions inapplicable. See, e.g., APTS at 33-34. But, even assuming arguendo that this is the correct reading of the term

"station,"⁵⁰ digital signals would still not be entitled to carriage. Where a single station broadcasts both an analog and a digital signal, it is entitled to carriage of only its "primary video." See 47 U.S.C. § 534(b)(3)(A). As TWC demonstrated in its opening comments, the "primary" signal is currently the analog signal. See TWC at 49.

This reading is consistent with the purposes of Section 614. Requiring carriage of more than one signal of a single licensee would do nothing to "promot[e] a diversity of views." 1992 Cable Act § 2(a)(6). The legislative history further supports TWC's reading. The House Report spoke of "primary audio and video," H.R. Rep. No. 628, 102d Cong., 1st Sess. 92 (1992), and acknowledged that separate audio transmissions of "alternative languages" (e.g., additional audio transmissions in Spanish) were not primary audio, id. at 93. The analogy is clear: a separate, additional video transmission (here a digital one) is not "primary video."

Broadcasters, however, argue that more than one signal can be "primary," saying that no signal "will be more 'primary' than another."⁵¹ This argument makes a mockery of the English

⁵⁰The definition of the term "station" is ultimately irrelevant to any must-carry requirements (which, because that definition involves arcane distinctions having nothing to do with must-carry, is only appropriate). If a broadcaster's analog and digital signals involve one and the same "station," Section 614(b)(3)(A) deprives the digital signal of must-carry rights; if they involve different "stations," Section 614(b)(5) does.

⁵¹MSTV at 28; see NAB at 38 ("there would not be one 'primary' or 'main' program, since each would be of equal importance"); APTS at 36 ("no single one of these programming

language. "Primary" means "first in rank or importance." Webster's Third New International Dictionary 1800 (1993). To suggest that two signals can simultaneously be "first in rank or importance" is contemptuous of the clear text of the statute.

B. Section 614(b)(5) Further Makes Clear That Digital Signals Are Not Entitled to Carriage.

Consistent with the statutory purpose to "promot[e] a diversity of views" by providing access to "nonduplicative local public television services" (1992 Cable Act § 2(a)(6), (8)), Section 614(b)(5) releases cable operators from any obligation to carry both of two signals where one "substantially duplicates" the other or both are "affiliated with a particular broadcast network" (47 U.S.C. § 534(b)(5)). Broadcasters argue that this provision has no application to analog and digital signals of the same broadcaster because both belong to the same "station." As already explained, that view of the term "station" merely leads to the conclusion that the "primary video" provision disentitles the digital signal to must-carry rights. See supra, p.27 n.50.

Just in case the Commission disagrees with their reading of the term "station," broadcasters argue that, for purposes of the duplication provision of Section 614(b)(5), a digital signal does not "substantially duplicat[e]" an analog signal.⁵² This argument fails: substantial duplication has always turned on

streams can be regarded as 'primary;' all are 'primary').

⁵²See, e.g., ALTV at 64; APTS at 34; Sinclair at 5. This back-up argument of course does not affect the network-affiliate portion of Section 614(b)(5), which does not turn on duplication.

programming content -- not on the technical format in which a signal is transmitted.⁵³ In a previous NPRM, this Commission found the point too obvious to merit extended discussion,⁵⁴ and even some broadcasters concede that this is so.⁵⁵ This reading of course fits snugly with the statute's purpose to "promot[e] a diversity of views." 1992 Cable Act § 2(a)(6); see 47 U.S.C. § 535(e) ("Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services").⁵⁶

Some broadcasters argue, however, that analog and digital TV set owners constitute different audiences, and that there is no duplication where two identical programs "target different audiences." APTS at 34; see Benedek at 10. In support of this

⁵³See, e.g., H.R. Rep. No. 628, at 94 ("'substantially duplicates' is intended to refer to the simultaneous transmission of identical programming") (emphasis added); 47 U.S.C. § 535(e) ("the programming of which substantially duplicates the programming broadcast by another . . . station") (emphasis added); 47 C.F.R. § 76.56(b)(5) ("substantially duplicates means that a station regularly simultaneously broadcasts the identical programming as another station") (emphasis added); cf. 47 U.S.C. § 534(h)(1)(B)(i) (depriving "translators" and "passive repeaters" -- stations that broadcast the same programming as their parent station but on a different frequency -- of must-carry rights).

⁵⁴Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry, 10 FCC Rcd 10540, ¶ 82 (1995).

⁵⁵See Paxson at 29.

⁵⁶This is particularly so because digital TV sets will be able to receive analog signals. See supra, p.6. Thus, determining duplication on the basis of content rather than format does not deprive either analog or digital TV set owners of access to even a single broadcast voice.

argument, they rely on language in the Commission's 1993 must-carry order to the effect that English and Spanish programs are not duplicative "as they target different audiences."⁵⁷ But reliance on such loose language is not persuasive argument. Different languages target different audiences because they affect the content of the programming. The Commission has never held that targeting different audiences by itself is enough.

C. Multiplexed Digital Signals Are "Ancillary and Supplementary Services" Even If Not Provided for a Fee.

The 1996 Act unambiguously provides that all "ancillary or supplementary services" are without must-carry rights. See 47 U.S.C. § 336(b)(3). Broadcasters argue, however, that digital services are not "ancillary or supplementary" so long as broadcasters charge no fees for them.⁵⁸ But the statute does not permit this reading. As explained more fully below, all digital video programming signals other than the "main" signal (that required by this Commission's rules) are ancillary and supplementary. Thus, additional multiplexed SDTV broadcast signals (even if provided for free) are not entitled to must-carry rights -- not even after the transition.⁵⁹

⁵⁷Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Report and Order, 8 FCC Rcd 2965, ¶ 21 (1993).

⁵⁸See, e.g., NAB at 39-40; MSTV at 28; ALTV at 69; Benedek at 17 n.28.

⁵⁹In any event, it is doubtful that cable operators could even accommodate multicast signals. See generally BellSouth at 22.

The purpose of Section 336 was to allow broadcasters flexibility in using their digital spectrum for purposes other than high-definition television (the original objective of advanced television).⁶⁰ Although Congress decided that broadcasters "must provide at least one free, over-the-air advanced television broadcast service" on their new spectrum, S. Rep. No. 23, at 41, it determined that they should be free to offer "additional services," H.R. Rep. No. 204, at 116. But Congress "restrict[ed] any potential use of spectrum apart from the main channel signal to 'ancillary and supplementary' uses." Id. (emphasis added).⁶¹ Thus, Congress intended that any use of digital spectrum apart from the signal required by this Commission's rules would be ancillary and supplementary -- even if provided for free.

The text of Section 336 clearly reflects this intent. At the outset, Section 336(e) makes clear that the broadcasters' reading of "ancillary and supplementary" as referring only to subscription TV must be wrong. In Section 336(e), Congress required the Commission to collect fees from broadcasters that

⁶⁰See S. Rep. No. 23, 104th Cong., 1st Sess. 41-42 (1995); H.R. Rep. No. 204, 104th Cong., 1st Sess. 116-17 (1995); see also J. Brinkley, Did Broadcasters Hoodwink Congress with False Promises About HDTV?, N.Y. Times on the Web, Sept. 15, 1997 (quoting Rep. Tauzin as saying: "The whole idea was that [the broadcasters] would exchange one channel for another channel to broadcast HDTV.").

⁶¹See also id. (licensees may provide "such other services as the Commission may permit during those periods when the licensee is not actually transmitting a main broadcast signal") (emphasis added).

provide "ancillary or supplementary services" only if (A) consumers must pay a subscription fee; or (B) the broadcaster receives compensation from a third party. See 47 U.S.C. § 336(e)(1). Accordingly, this Commission has correctly determined that "not all ancillary or supplementary services are feeable":⁶² a service can be provided for free yet still be ancillary or supplementary.

And Section 336(b)(2) makes clear that all advanced television services not required by this Commission's rules are ancillary and supplementary. That section empowers the Commission to "limit the broadcasting of ancillary or supplementary service . . . so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require." 47 U.S.C. § 336(b)(2). Clearly, then, Congress contemplated a dichotomy between required services and ancillary or supplementary services: Congress understood that there is no

⁶²Fees for Ancillary and Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, Report and Order, MM Docket No. 97-247, FCC 98-303, ¶ 32 (rel. Nov. 19, 1998). Section 336(e)(1)(B) further confirms that advertiser-supported signals can fall within this category of non-feeable ancillary and supplementary services. That provision states that mere transmission of "commercial advertisements used to support broadcasting for which a subscription fee is not required" does not make an ancillary and supplementary service "feeable." Reading free over-the-air multiplexed services as not being "ancillary and supplementary" would render this exception superfluous, contrary to an established maxim of statutory interpretation. See, e.g., Astoria Federal Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

overlap between the two categories and that anything not falling in the former category falls in the latter.

This Commission's rules require broadcasters to transmit only "one over-the-air video program signal at no direct charge to viewers on the DTV channel." 47 C.F.R. § 73.624(b). Accordingly, any digital signals other than that one free video program signal is ancillary and supplementary. In particular, because this Commission's rules do not require broadcasters to provide multiplexed SDTV video program signals beyond the one required video program signal, such multiplexed signals are ancillary and supplementary and not entitled to must-carry rights.⁶³

D. Broadcasters' Electronic Program Guides Are Not Entitled to Carriage.

Broadcasters also argue that their electronic program guides ("EPGs") are entitled to must-carry status.⁶⁴ But the statute flatly precludes must-carry rights for broadcasters' EPGs. Section 614(b)(3)(A) requires cable operators to carry only "program-related material," and (as broadcasters concede, see, e.g., Benedek at 16) EPGs usually are not program-related.⁶⁵ Moreover, even if Section 614(b)(3)(A) did not deprive EPGs of

⁶³To the extent that 47 C.F.R. § 73.624(c) can be read to suggest otherwise, it is contrary to the statute, and the Commission should reconsider it.

⁶⁴See, e.g., Benedek at 16; Gemstar/Starsight at 6.

⁶⁵See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues, Memorandum Opinion and Order, 9 FCC Rcd 6723, ¶¶ 46, 50 (1994).

must-carry rights, Section 336(b)(3) would: EPGs clearly are not part of the main simulcast signal, and are therefore explicitly denied must-carry rights. See supra, Part IV-C. And if these provisions leave any room for doubt, Section 624(f)(1) resolves it against carriage. See supra, p.24.

E. Broadcasters Are Not Entitled to Separate Retransmission-Consent Elections.

Commercial broadcasters claim that they are entitled to separate retransmission-consent elections with respect to their analog and digital signals. See, e.g., NAB at 41-42; MSTV at 39; ALTV at 16; SRA at 8. They are of course trying to have their cake and eat it too: they wish to obtain value for their analog signal (which cable operators may want to carry voluntarily) while compelling carriage of their digital signal (which cable operators may not want to carry voluntarily). The problem with this approach is that, if (as broadcasters argue) a broadcaster's analog and digital signals involve the same "station," the statute does not permit it.

Section 325(b)(1) prohibits retransmission of "the signal of a broadcasting station" except with retransmission consent or "pursuant to section [614], in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section." 47 U.S.C. § 325(b)(1)(B) (emphasis added). Thus, the text of the statute is clear: if a "station" elects must-carry treatment, it loses all retransmission-consent rights. As the Commission recognized in the NPRM, a "separate must carry retransmission consent" approach thus automatically falls with

broadcasters' position concerning the meaning of the term
"station." See NPRM ¶ 34 & n.93.

Conclusion

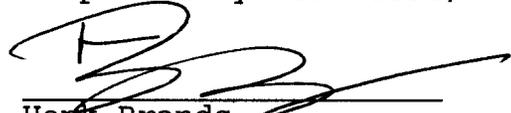
For the reasons set forth above and in TWC's opening comments, the Commission may not and should not require cable operators to carry digital broadcast signals during the transition period.

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December 22, 1998

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

REPLY AFFIDAVIT OF JAMES A. CHIDDIX

STATE OF COLORADO,)
) ss.:
COUNTY OF ARAPAHOE,)

JAMES A. CHIDDIX, being duly sworn, deposes and states as follows:

1. I am Time Warner Cable's ("TWC's") Senior Vice President, Engineering and Technology, and Chief Technical Officer. I am responsible for planning and supervising TWC's engineering activities and research and development. I submitted an affidavit in support of TWC's opening comments in this rulemaking proceeding. I now submit this reply affidavit in support of TWC's reply comments.

2. In their opening comments, NAB and other broadcaster groups claim that cable systems' channel capacity will rapidly increase in the near future, and that a digital must-carry requirement will therefore not impose a substantial burden. In particular, broadcasters predict that the combination of two factors will cause available cable capacity to explode

imminently: (1) expansion of cable systems' bandwidth; and (2) the implementation of digital compression. The purpose of this reply affidavit is to demonstrate that those claims are unrealistic.

3. The typical cable system in the United States has a bandwidth of 550 MHz (accommodating about 78 analog channels) or less. One way of adding to a cable system's channel capacity is to enhance the network's ability to transmit higher radio frequencies, thereby adding 6 MHz slots. Many cable operators, including TWC, have therefore begun upgrading their systems to 750 MHz.

4. To make these upgrades cost-effective, however, spectrum above 550 MHz is usually reserved for digital signals. Digital signals do not load broadband amplifiers to the same extent as analog signals. This allows amplifiers to be spaced further apart, which significantly lowers costs. Meanwhile, for practical business reasons, TWC will use the spectrum below 550 MHz to transmit only analog signals for many years to come. It is true that, as a matter of technology, cable operators could digitize the entire spectrum, and that, using compression, they could multiply their channel capacity in old spectrum. But, as explained below, this will not be practicable in the foreseeable future.

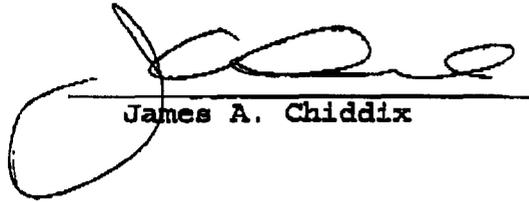
5. Digitally compressed cable signals require digital set-top cable boxes, which, at least currently, are expensive. If a cable system were all digital, subscribers would need such a box

for every TV set and VCR, thus particularly burdening multi-set households. Many subscribers have "cable-ready" TV sets and do not need a set-top box to watch or record our large tier of unscrambled analog signals. Thus, for reasons of cost and convenience, many subscribers would not favor a transition to all-digital cable.

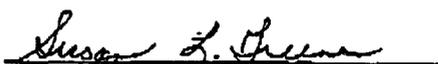
6. Accordingly, for the foreseeable future, upgraded systems will likely have two "tiers": an analog tier substantially similar to that offered now, and a digital tier used for new services not already available to analog subscribers. Digital compression will thus do nothing to make available new channels in the analog tier, and carrying new digital broadcast signals in the analog tier would require existing services to be dropped. Nor could cable operators make room on the analog tier by moving programming services to the digital tier: unable to receive the digital tier, analog-only subscribers or subscribers with extra outlets would lose access to programming they have come to expect.

7. Requiring carriage of digital broadcast signals in the new digital tier would impose different, but equally significant hardships. System upgrades require enormous and risky investment. Cable operators make such investments because, in the increasingly competitive video marketplace, they are under pressure continuously to improve upon their product. Thus, cable operators plan to use this part of the spectrum for new and innovative services, including additional standard definition

cable programming services, cable modem services, competitive telephone service, and broadcast and cable HDTV signals. Requiring carriage of all digital broadcast signals in the digital tier would significantly interfere with these plans.


James A. Chiddix

Sworn to before me this
22nd day of December, 1998.


Notary Public



My Commission Expires February 16, 2001

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of December 1998, a true and correct copy of the foregoing Reply Comments was served by First Class Mail on the parties listed in the attached service list.

A handwritten signature in black ink, appearing to be 'Henk Brands', written over a horizontal line.

Henk Brands

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Communications Company, L.P., Suburban
Cable TV Co. Inc., Mediacom LLC, Prime
Communications--Potomac, LLC, Tele-
Media Corporation