ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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	)	

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REPLY COMMENTS OF
UNIVISION COMMUNICATIONS INC.

UNIVISION COMMUNICATIONS INC.

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SUMMARY

Univision Communications Inc. ("Univision"), which operates the nation's most-watched Spanish language television network, and which indirectly operates Spanish language television stations in twelve of the top fifteen Hispanic television markets, hereby submits its Reply Comments in the Commission's digital television must-carry proceeding. Univision has had extensive experience with the poor treatment received by minority-oriented television stations from local cable systems on carriage matters. Based on this experience, Univision strongly urges the Commission to modify its rules to require that cable systems carry on their basic tier both the analog and digital signals of local television stations during the transition to digital television ("DTV"). Without such a requirement, DTV stations that serve minority audiences are unlikely to be carried on cable systems since, by definition, such stations appeal only to a specific segment of the overall viewing audience. This would be a great loss, as these stations are major contributors to the diversity of views the Commission has long sought to foster among broadcast stations.

Because Univision's largely urban viewers rarely have access to an outdoor antenna, they must rely heavily on cable systems to receive their video programming. Failure to require cable systems to carry all of the DTV signals in a market would effectively leave Hispanic and other minority viewers out of the digital revolution, threatening the success of the DTV transition and creating a nation of DTV have and have-nots. This is not the result intended by Congress nor desired by the Commission.

In fact, given that Spanish language stations must spend the same amount as their English language counterparts to build DTV facilities, leaving Spanish language DTV stations without any assurance of cable carriage will almost certainly delay the onset of Spanish language DTV broadcasting. Moreover, the immense cost of building and operating a DTV facility that can only be received in Hispanic households having an outdoor antenna could threaten the financial

stability of a licensee's associated Spanish language NTSC station. As a result, it is possible that a DTV transition without must-carry would leave Hispanic viewers unable to receive *either* DTV or NTSC Spanish language programming in their market.

By requiring DTV must-carry, the Commission will protect broadcast diversity, speed the DTV transition, and ensure that *all* Americans enjoy the benefits, both economic and personal, that DTV promises. Minority audiences should not be left to fend for themselves in the upcoming tumultuous years of the DTV transition, and no Commission rulemaking will have more of an impact in preventing such a result than this one. Univision therefore urges the Commission to adopt DTV must-carry rules that require cable system operators to join broadcasters and electronics manufacturers in ensuring that DTV is available to all members of the public, and that the diversity which has been the hallmark of the American system of broadcasting continues to prosper in the digital era.

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REPLY COMMENTS OF
UNIVISION COMMUNICATIONS INC.

Univision Communications Inc. ("Univision"), by its attorneys, hereby respectfully submits its reply comments to the Commission's Notice of Proposed Rule Making regarding the applicability of the must-carry rules to digital transmissions by television broadcast station licensees.[1] For the reasons set forth below, Univision urges the Commission to mandate basic tier cable carriage of both the analog and digital television signals of local commercial broadcast stations during the digital television ("DTV") transition period.

INTRODUCTION

Univision is the leading Spanish-language television broadcaster in the United States. It operates the Univision Network, the most popular Spanish-language broadcast network in the country, with 47 television station affiliates, 22 of which are full-power television stations. Univision also controls Univision Television Group, Inc., which indirectly owns and operates

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[1] These reply comments are timely filed pursuant to the Commission's Order in this proceeding extending the time for filing reply comments to December 22, 1998. *See* Carriage of the Transmissions of Digital Television Broadcast Stations, DA 98-2342 (released November 18, 1998).

thirteen full-power UHF and eight low-power UHF television stations, including stations in 12 of the top 15 Hispanic markets. Given the physical limitations of Univision's UHF signals, as well as the lack of outdoor antennas among Univision's largely urban audience, cable carriage of Univision's DTV signal is critical if Univision's Hispanic audience is to participate in the DTV transition. Thus, the Commission's decision to review the applicability of the must-carry rules to digital signals during the transition to DTV is of extreme importance to Univision and its viewers.

Like many commenters in this proceeding, Univision supports mandatory carriage of both analog and digital television signals during the DTV transition period. Univision echoes the concerns of fellow broadcasters that without mandatory carriage of both signals on the basic cable tier, DTV will never achieve widespread acceptance within the television viewing community. With almost two-thirds of the population utilizing cable systems for their reception of broadcast programming, mandatory carriage of DTV is imperative. As one commenter in this proceeding maintained, "[f]or the digital television transmission to succeed at all . . . and most surely for it to succeed for *all* broadcasters, consumers must have access to all DTV broadcasts . . . ."[2/] Allowing cable companies to cherry-pick DTV signals or, worse yet, avoid DTV carriage altogether, will create a population divided into technological have and have-nots, with minority audiences being left behind in the DTV transition. As a Spanish-language programmer with a minority viewing audience, Univision fears that, without mandatory carriage requirements, cable companies will forgo carriage of Univision's digital signal in favor of English-language networks. This would not only be harmful to the large and growing Hispanic community, but would also make it difficult for DTV to succeed on a nationwide basis.

[2/] Comments of the National Association of Broadcasters ("NAB") at 9 (emphasis in original).

Mandatory carriage of DTV also will ensure that broadcasters and other affected industries realize the benefits necessary to counterbalance the enormous costs involved in building digital facilities and operating two stations during the transition. Broadcasters are expending considerable sums in this venture, and equipment manufacturers are also investing heavily to develop digital set-top converters and receivers to ensure the viability of this new medium. Now that consumers finally have the opportunity to benefit from this large investment by broadcasters and electronics manufacturers, cable companies should not be permitted to impede the reception of DTV signals. For consumers to realistically consider the purchase of digital equipment, they need assurance that DTV signals will be coming down the wire that two-thirds of them rely upon for their television program signals. Without mandatory carriage, it appears unlikely that cable companies will deliver all local digital broadcast signals. Given Univision's minority audience, and Univision's extensive prior experience with cable systems unwilling to comply with the NTSC must-carry rules,[3/] it is likely that many cable systems will refuse to carry Spanish language DTV programming without must-carry requirements. As this audience already has limited viewing choices, the lack of mandatory digital signal carriage will jeopardize the very acceptance of DTV by the Hispanic population.

Congress has required the Commission to implement DTV must-carry rules, and the rules herein proposed will ensure a successful DTV transition for *all* portions of the viewing audience, while remaining well within the Commission's statutory authority.[4/] The Supreme Court has held that must-carry rules are a constitutionally content-neutral regulation of free speech[5/] that advance an important government interest (the preservation of free, over-the-air broadcasting)

[3/] *See infra* Note 14 and accompanying text.

[4/] *See* 47 U.S.C. § 534(b)(4)(B).

[5/] Turner Broadcasting System v. FCC, 512 U.S. 622 (1994) (hereinafter "Turner I").

and do not burden free speech more than necessary to further that interest.[6] As Congress has made clear that there is an even stronger governmental interest in ensuring a successful DTV transition, and the burden on cable systems from DTV must-carry rules will not be materially greater than that created by the NTSC must-carry rules, DTV must-carry rules are not only constitutionally permissible, but Congressionally mandated.

I. Mandatory Cable Carriage of Digital Signals Is Necessary to Ensure a Prompt and Successful Transition to DTV

In a statement that finds little support in the record of this proceeding, cable operators argue, in defiance of Congress, that transitional digital must-carry rules will actually impede the implementation of DTV.[7] As part of this argument, the National Cable Television Association ("NCTA") alleges that a digital must-carry requirement would "interfere with the efficient development of programming and digital technology that best serves the needs and interests of viewers."[8]

Univision, along with many commenters, adamantly disagrees. Mandatory carriage of digital signals is essential to widespread acceptance of DTV and the economies of scale necessary to bring the cost of digital televisions within reach of *all* Americans. Since two-thirds of American viewers receive their television programming, including that which originates as over-the-air broadcasts, through cable systems, mandatory carriage is necessary to ensure that consumers are able to access DTV signals. As one commenter noted, "DTV viewership will not grow unless digital signals are made available, without degradation or compromise, through

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[6] Turner Broadcasting System v. FCC, 520 U.S.180 (1997) (hereinafter "Turner II").

[7] *See* Comments of the National Cable Television Association at 37; Comments of Tele-Communications, Inc. at 14.

[8] Comments of NCTA at 37.

cable systems."[9] A successful DTV transition that brings the benefits of DTV to *all* Americans requires cooperation and expenditures by *all* affected industries, including cable companies.

A. Efforts to Transition to DTV Will Be Frustrated Without Cooperation From the Cable Industry

While broadcasters and consumer electronics manufacturers are expending substantial sums to implement the national DTV policy formulated by Congress and the Commission, cable companies cannot be allowed to stand on the sidelines. Cable operators' assertions that carriage is costly and burdensome misses the point.[10] The transition to DTV is costly and burdensome for broadcasters as well, but is necessary if government is to provide the benefits of DTV to the public at large, and ensure the international preeminence of U.S-produced DTV programming and equipment. Moreover, unlike cable system operators, broadcasters have no way of passing such costs directly to the primary beneficiaries -- viewers. Thus, the burden which cable operators are being asked to bear in this proceeding pales in comparison to that which broadcasters have taken on at the request of Congress and the Commission.

When the Commission authorized DTV implementation, its goals were clear: "to preserve and promote free, universally available, local broadcast television in a digital world, as well as to advance spectrum efficiency and the rapid recovery of spectrum by fostering the swift development of DTV."[11] As broadcasters, equipment manufacturers, and consumers alike prepare for what has been touted by the Commission as a historic change in the television

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[9] Comments of the Association for Maximum Service Television, Inc. at iii.

[10] *See* Comments of NCTA at 37.

[11] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, 13 FCC Rcd 6860 (1998), at ¶ 1.

landscape, cable operators cannot and should not be permitted to use their role as gatekeepers to impede that process.

When the Commission finalized plans and procedures for digital television earlier this year, it observed:

> With the introduction of DTV technology we are now on the threshold of major changes in broadcast television. This new technology will open the door to dramatic changes in the nature of broadcast television, allowing broadcasters to offer high definition television service, with major improvements in picture quality, compact-disc quality audio signals, simultaneous multiple program services ("multicasting"), and data services.[12]

Realization and implementation of this new technology consistent with these goals requires a cooperative effort from broadcasters, equipment manufacturers, consumers, and cable companies. Substantial investments from all sectors of the industry are required, from the consumers who will have to purchase new digital receivers to the broadcasters who have already expended considerable sums to construct digital facilities.[13] For their part, equipment manufacturers have invested substantial sums of money in research and design efforts as they move towards implementation of digital television. Each of these groups is making the leap of faith that their symbiotic partners in this governmentally-endorsed venture will each do their part to make DTV a reality for all segments of America. The Commission, as manager of the transition to DTV, cannot afford to permit cable companies to remain inactive.

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[12] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, 13 FCC Rcd 7418 (1998), at ¶ 3.

[13] *See* Comments of the Association for Maximum Service Television, Inc. at iii.

B. Economic Impact to Minority-Oriented Broadcasters Will Be Severe Without Transitional DTV Must-Carry

Univision has given more than most to see that the DTV transition succeeds. In addition to the expenditures necessary to build digital facilities for each of its full-power stations, a large number of Univision's 25 owned or affiliated low power television stations have been displaced by full power DTV allotments. As a result, Univision's ability to reach many areas of Hispanic population with a broadcast signal has been reduced. The Hispanic community, which already has limited programming choices, has therefore seen its options diminished in many communities because of the advent of DTV. It would be most ironic if this largely urban population group were also deprived of the benefits of DTV because of the inability to utilize an outdoor antenna in an urban environment and the refusal by cable systems to carry Spanish-language DTV signals. However, given Univision's experience with many cable system operators that have displayed a bias against minority-oriented NTSC stations,[14] minority-oriented DTV stations are certain to have difficulty reaching their audience if DTV must-carry is not enacted.

C. Development and Public Acceptance of Digital Equipment, Particularly Within the Minority Community, Will Be Stunted Without Digital Must-Carry

Without must-carry requirements for DTV, the efforts by equipment manufacturers to develop and promote new digital receiving equipment will face a limited audience. Along with broadcasters, equipment manufacturers have expended considerable resources over many years to develop, at the request of the government, world-leading digital television technology. In fact,

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[14] *See* Petition for Special Relief, CSR No. 5327-M (November 19, 1998); Petition for Special Relief, CSR No. 5153-A (October 29, 1998); In re Complaint of KDTV License Partnership, G.P. against TCI Cablevision of California, Inc., Petition for Special Relief, 13 FCC Rcd 10331 (1998); In re Complaint of KDTV License Partnership, G.P. against TCI Cablevision of California, Inc.; Request for Carriage of KDTV, San Francisco, California, 13 FCC Rcd 2444 (1998).

the Consumer Electronics Manufacturers Association ("CEMA") estimates that its members collectively have invested nearly one billion dollars in digital television.[15] Digital television sets have already begun to appear on store shelves, although bearing the large price tags of first generation technology. One commenter noted that as early as next year, it will begin offering digital set-top converters that will provide consumers the opportunity to view digital signals through an analog television receiver, thereby providing consumers with low cost entry into the DTV arena.[16]

However, consumer electronics manufacturers, like broadcasters, face the chicken-and-egg problem of trying to jump-start a national market for DTV programming and equipment when it appears that two-thirds of households will have to alter their method of video reception and buy new receiving equipment in order to become a DTV household. DTV must-carry is critical to minimizing the obstacles faced by consumers in obtaining DTV programming, and is therefore essential to the refinement and widespread adoption of digital television equipment. Consumers themselves agree with this point. A recent study conducted by Harris Corporation showed that 91% of consumers surveyed wanted local cable companies to carry digital programming and that 56% agreed to give up channels in order to receive a higher quality television signal.[17] Even assuming that cable system operators eventually relent and expand their systems to meet this consumer demand, it is unlikely that minority-oriented broadcasters like Univision, which necessarily target a specific segment of the overall audience, will be carried by cable systems in the absence of DTV must-carry requirements.

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[15] Comments of CEMA at 4.

[16] Comments of Thomson Consumer Electronics, Inc. at 5.

[17] Comments of the Harris Corporation at 6 (*citing* "Digital TV Survey Findings," Systems Research Corporation (June 1998)).

Such selective carriage would of course be harmful to Univision itself, but more importantly, would be harmful to the Hispanic population. The Commission recently recognized the importance of providing new services to this fastest-growing segment of the U.S. population,[18] ruling that the needs of the Hispanic community require that Spanish-language programming be closed captioned, despite the expense and many technical difficulties involved.[19] For similar reasons, cable systems should not be allowed to avoid serving the Hispanic community's technological needs merely by citing the cost and difficulty of compliance with DTV must-carry requirements.

II. DTV Cable Carriage Rules Should Be Designed to Maximize the Likelihood of Success of DTV Conversion

A. The One-Third Cap Should Not Be Calculated in a Manner That Would Bar Stations, Particularly Minority-Oriented Stations, From Cable Carriage

In crafting the 1992 Cable Act, Congress sought to strike a balance that would ensure the vitality of the largest possible number of local broadcast stations, but would not unduly burden cable operators. In order to accomplish this balance, Congress imposed a one-third cap on the number of channels a cable system must dedicate to carriage of local commercial broadcast signals.[20] Thus, under the Commission's present rules, cable operators are required to carry the signals of local commercial broadcasters up to a maximum of one-third of the activated usable channels on the cable system. Once the one-third cap is reached, the cable operator is permitted

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[18] According to the U.S. Census Bureau, Hispanics currently account for 11% of the U.S. population (approximately 30.5 million people). The U.S. Hispanic population is growing five times faster than the general population, and by 2010, the Hispanic population is expected to reach 42.4 million. Broadcasting and Cable, November 9, 1998, at 34.

[19] *See* Closed Captioning and Video Description of Video Programming, Order on Reconsideration, 1998 FCC LEXIS 5060 (1998), at ¶¶ 92-98.

[20] 47 U.S.C. § 534(b)(1)(B).

to choose which local broadcasters will be denied carriage, providing the cable operator with tremendous bargaining leverage in carriage negotiations.

If the Commission merely includes DTV signals within the scope of the current must-carry rules without reexamining the one-third cap, several undesirable consequences could result. For example, where a cable system is already at or near the one-third cap in its carriage of local stations, the cable operator might be able to simply ignore the Commission's new DTV must-carry rules and continue to carry only its existing complement of NTSC signals. As the record in this proceeding demonstrates, such a result would severely impede the chances of success for the DTV conversion effort.

Alternatively, cable operators at or near the one-third cap could decide to carry the DTV signals of the major networks, displacing the NTSC signals of other local broadcast stations. In this case, the breadth and diversity of local broadcasting could be seriously harmed, as the major network's NTSC and digital signals would both be carried, while minority-oriented NTSC stations like Univision's are dropped from cable systems entirely. Such a result could have serious economic consequences for new and minority-oriented network broadcast affiliates, and would leave the Hispanic population in particular without any cable viewing options. This undesirable outcome would thwart the intent of Congress in creating the must-carry regime, as it would threaten the vitality of free, over-the-air broadcast television while narrowing the available audience for DTV.

In order to avoid this result, the Commission should ensure that no full-power local broadcasters lose cable carriage rights in order to give preference to new DTV signals. The Commission should establish rules that will ensure that on cable systems in which the one-third cap is reached, each local broadcast station has cable carriage for at least <u>one</u> of its signals before any broadcaster is entitled to have <u>both</u> its NTSC and DTV signals carried.

In situations where all NTSC and DTV signals cannot be carried without exceeding the one-third cap, the broadcaster, not the cable operator, should be permitted to choose which signal will be carried. Otherwise, a station may be faced with the sudden loss of carriage of its primary revenue-producing NTSC signal before its DTV signal has established an economically viable audience, or may be unable to find an audience for its new digital signal if the cable operator chooses to carry only its NTSC signal. The first of these scenarios would threaten the vitality of free local over-the-air television and harm diversity, while the second would threaten the success of the DTV conversion effort.

In addition, the Commission should reexamine the method used for calculating the one-third cap. Many cable systems are being upgraded to increase their potential capacity, while the number of channels actually being offered to subscribers remains constant. The cable industry has admitted this, noting that while the upgrades create the potential for many new video channels, these channels often remain unused because the cable operators plan to use the capacity instead to provide other, more lucrative services, such as telephone service and Internet access.[21] Due to the economics of the cable rate regulation scheme, one of the easiest ways for cable operators to justify increasing the rates charged to consumers is to upgrade their facilities. But these upgraded facilities, which the video consumers are paying for, are not being used to provide a wider range of video viewing options to the consumers who are paying the inflated rates, but rather are being held unused so that the cable operators can enter another market at

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[21] Comments of NCTA at 42 ("Some larger systems that have upgraded their facilities may currently have new, unused channel capacity. But these systems were not upgraded simply so that they could double existing broadcast channel uses up to one-third of capacity. The point of expanding channel capacity is to be able to offer a range of diverse broadcast and non-broadcast, video and non-video analog and digital services -- including high-speed data . . . .").

some point in the future. Unfortunately, given the fact that cable operators have a monopoly in most markets, their cable subscribers have no option but to accept such practices.[22]

Such behavior by cable operators is not in the public interest, and runs contrary to the intent of Congress.[23] Cable operators should not be permitted to horde unused channel capacity, then turn around and argue that they cannot carry the signals of local broadcasters because they have already filled one-third of the activated usable channels on their cable systems with local broadcast signals.

The one-third channel capacity ceiling should be calculated based on total usable cable capacity, not on the number of existing channels that are used for cable television service.[24] According to the 1992 Cable Act, the term "usable activated channels" means "activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission."[25] Further, "the term 'activated channels' means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided,

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[22] "Congress concluded that . . . the overwhelming majority of cable operators exercise a monopoly over cable service. 'The result,' Congress determined, 'is undue market power for the cable operator as compared to that of consumers and video programmers.'" Turner I, 512 U.S. at 633 (*citing* § 2(a)(2) of the 1992 Cable Act).

[23] Congress has consistently spoken of the lack of value consumers receive for cable service rate increases. In describing the purpose for enacting the 1992 Cable Act, the House Committee on Energy and Commerce stated "the Committee has become increasingly concerned about the actions of some cable operators who clearly have abused both their unique position in the marketplace and their deregulated status. . . . [T]he cable industry . . . has invested . . . in capital improvements and programming. . . . However, these expenditures have been accompanied by rate increases which, in some instances, the Committee believes, have been unreasonable." H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 29, 31.

[24] *See* Comments of Golden Orange Broadcasting Co., Inc. at 6-7.

[25] 47 U.S.C. § 522(19).

including any channel designated for public, educational, or governmental use."[26] If a cable system has been upgraded to permit increased capacity, it has been "engineered" to create additional bandwidth/channels, whether or not that portion of the cable bandwidth is actually used for video programming. Thus, the Commission should measure the one-third cap based on the maximum capacity of a system, and not allow cable operators to use this loophole to avoid their statutory local broadcast carriage requirements.

Finally, local stations that are carried on a cable system pursuant to retransmission consent are not being carried pursuant to the Commission's must-carry rules, and thus should not be counted in calculating the one-third cap.[27] Such a method of calculation is required by Congress, which made the selection of programming by cable operators "subject to Section 325(b)."[28] Section 325(b)(5) states:

> The exercise by a television broadcast station of the right to grant retransmission consent under this subsection shall not interfere with or supersede the rights under Section 534 or 535 of any station electing to assert the right to signal carriage under that section.[29]

In other words, the carriage of stations pursuant to retransmission consent may not interfere with the rights of another station carried pursuant to must-carry. Thus, if the Commission were to count stations carried under retransmission consent as part of a cable operator's one-third must-carry requirement, then the carriage of those stations under retransmission consent would improperly interfere with other stations' must-carry rights.

The goal of Congress in passing the 1992 Cable Act was to "encourage the growth and development of cable systems and . . . assure that cable systems are responsive to the needs and

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[26] 47 U.S.C. § 522(1).

[27] *See* Comments of Golden Orange Broadcasting Co., Inc. at 3-6.

[28] 47 U.S.C. § 534(a).

[29] 47 U.S.C. § 325(b)(5).

interests of the local community."[30] Congress has given the Commission broad authority to ensure that cable operators provide adequate levels of service to their customers,[31] and that local broadcast signals are carried on cable systems. The one-third of capacity must-carry limit should not be calculated in a manner that would defeat this goal, particularly since it is those stations that provide diversity and minority programming that are typically the first to be removed from systems that are over the must-carry limit.

B. DTV Cable Carriage Rules Should Mandate Carriage of the Entire DTV Signal

As has been stated by numerous commenters in this proceeding, the Commission's rules should require that cable operators carry the entire digital broadcast signal.[32] Any other rule would be inconsistent with the 1992 Cable Act. According to Section 614:

> A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. . . . The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system.[33]

The suggestion that a cable operator be permitted to pick apart the signal broadcast by a station and carry part of it, while deleting another part, would be inconsistent with this very explicit statutory language.

Many broadcasters are planning to include control information, electronic program guides, and other innovative new programming and programming related signals as a part of the stations'

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[30] 47 U.S.C. § 521(2).

[31] *See generally* 47 U.S.C. §§ 521-573.

[32] *See, e.g.*, Comments of Sinclair Broadcast Group, Inc. at 4; Comments of Corporation for General Trade, Inc. at 13-14; Comments of Benedek Broadcasting Corporation *et al.* at 12-17; Comments of Paxson Communications Corporation at 26-28.

[33] 47 U.S.C. § 534(b)(3).

DTV offerings.[34] The Commission should not stifle the innovation that is integral to the deployment of this new technology by permitting cable operators to dissect the signal of the local broadcaster, passing through portions of it while blocking others out. On the contrary, the DTV implementation effort is most likely to flourish if cable operators are required to pass these DTV innovations, and the DTV signal itself, through to consumers without alteration.

C. DTV Cable Carriage Rules Must Prohibit Signal Degradation

Related to the need to maintain the features and integrity of a local station's DTV signal is the need to prohibit degradation of the DTV signal.[35] Congress was very clear on the signal degradation issue when it enacted must-carry, and there is no justification for failing to impose the same requirement on digital signals, particularly when improved picture and audio quality is one of the major public benefits of DTV. The 1992 Cable Act states that: "[t]he signals of local commercial television stations that a cable operator carries shall be carried without material degradation."[36]

Further, permitting signal degradation would threaten the success of the DTV conversion effort. A successful conversion to DTV requires that consumers purchase sets, which may not occur unless consumers are strongly impressed by the improved picture and sound quality available through DTV. Permitting material degradation by cable carriers will deny consumers

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[34] *See, e.g.*, Comments of Zenith Electronic Corporation at 9-10; Comments of the Association for Maximum Service Television at 30-37.

[35] *See, e.g.*, Comments of the Association for Maximum Service Television at 30-32; Comments of the Association of Local Television Stations, Inc. at 62-64; Comments of Sinclair Broadcast Group, Inc. at 5; Comments of Cordillera Communications, Inc. at 8; Comments of Corporation for General Trade, Inc. at 10-13; Comments of Morgan Murphy Stations and Cosmos Broadcasting Corporation at 10-11; Comments of Granite Broadcasting Corporation at 9; Comments of Benedek Broadcasting Corporation *et al.* at 18-20; Comments of Paxson Communications Corporation at 29-30.

[36] 47 U.S.C. § 534(b)(4)(A).

the full benefits of digital television, and may mislead millions of consumers as to the picture and sound quality of digital television sets. Congress has recognized the importance of preventing cable systems from operating in such a way as to limit the performance and capabilities of consumers' receiving equipment. This recognition is based on the conclusion that consumers who are prevented from reaping the full benefits of new technology by their cable operators will be less likely to purchase new equipment and the development of new technology will therefore be slowed. Specifically, Section 624A of the Communications Act of 1934, as amended, states:

> The Congress finds that --
>
> (1) new and recent models of television receivers and video cassette recorders often contain premium features and functions that are disabled or inhibited because of cable scrambling, encoding, or encryption technologies and devices, including converter boxes and remote control devices required by cable operators to receive programming;
>
> (2) if these problems are allowed to persist, consumers will be less likely to purchase, and electronics equipment manufacturers will be less likely to develop, manufacture, or offer for sale, television receivers and video cassette recorders with new and innovative features and functions . . . .[37]

DTV clearly falls within the definition of "new and innovative features and functions," the development and adoption of which Congress and the Commission certainly wish to encourage. Allowing cable systems to degrade DTV signals will greatly delay adoption of DTV and slow or halt the development of more sophisticated DTV and related technologies. This is clearly not what Congress intended, and DTV must-carry rules should ensure that cable subscribers receive the full benefit of both their receiving equipment and the DTV programming it is designed to receive.

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[37] 47 U.S.C. § 544a(a). As a result of these findings, Congress gave the Commission explicit authority to regulate the cable industry to ensure that "cable subscribers will be able to enjoy the full benefit of . . . the programming available on cable systems . . . ." 47 U.S.C. § 544a(b)(1).

III. Cable Carriage of DTV Signals Is Required by Law

A. Congress Has Mandated the Cable Carriage of DTV

The Commission is required to implement rules concerning the cable carriage of DTV signals.[38] Section 614(a) of the Communications Act of 1934, as amended, specifically requires that cable operators "carry . . . the signals of local commercial television stations . . . ."[39] The DTV signals at issue in this proceeding fall within the definition of a local commercial television signal, and thus are encompassed within the plain meaning of the must-carry requirement.

In addition, Congress has directed the Commission to ensure the successful conversion to DTV, and has strongly urged the Commission to move forward quickly with implementation of DTV. In the Telecommunications Act of 1996, Congress directed the Commission to quickly reclaim spectrum after the DTV conversion[40] and instructed the Commission to report on the progress of DTV after 10 years.[41] In the Balanced Budget Act of 1997, Congress codified the Commission's aggressive deployment schedule and set deadlines for the return of analog

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[38] *See, e.g.*, Comments of NAB at 2-8; Comments of the Association of Local Television Stations, Inc. at 7-13; Comments of the Association for Maximum Service Television at 12-19; Comments of Capitol Broadcasting Company, Inc. at 3; Comments of Retlaw Enterprises, Inc. at 2; Comments of Lee Enterprises, Inc. at 2; Comments of Cordillera Communications, Inc. at 2; Comments of the Arkansas Broadcasters Association at 2; Comments of Maranatha Broadcasting Company, Inc. at 3-6; Comments of Paxson Communications Corporation at 2-5; Comments of Morgan Murphy Stations and Cosmos Broadcasting Corporation at 3-4.

[39] 47 U.S.C. § 534(a).

[40] "If the Commission grants a license for advanced television services to a person that, as of the date of such issuance, is licensed to operate a television broadcast station or holds a permit to construct such a station (or both), the Commission shall, as a condition of such license, require that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation." 47 U.S.C. § 336(c).

[41] "Within 10 years after the date the Commission first issues additional licenses for advanced television services, the Commission shall conduct an evaluation of the advanced television services program." 47 U.S.C. § 336(f).

spectrum.[42] Without digital must-carry, the industry and the Commission will have no chance of meeting the Congressional deadline for DTV conversion.

Congress has often expressed its support for local television broadcasting.[43] One of the reasons it cited for passing the must-carry provisions of the 1992 Cable Act was to ensure the survival of free, over-the-air local television.[44] As the Supreme Court noted in Turner I,

> Congress concluded that unless cable operators are required to carry local broadcast stations, 'there is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried,' § 2(a)(15); the 'marked shift in market share' from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television, §§ 2(a)(13)-(14); and that, as a consequence, 'the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized,' § 2(a)(16).[45]

The same rationale that motivated the 1992 Cable Act -- that, absent cable carriage, broadcasters face losses sufficient to threaten the economic viability of their free service to the public -- applies equally to digital and analog transmissions. Moreover, the intent of Congress in adopting NTSC must-carry was merely to *preserve* free, over-the-air television. With regard to DTV, must-carry is even more vital, as Congress and the Commission are trying to *initiate* a new free, over-the-air television system, which is a far more difficult task.

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[42] Balanced Budget Act of 1997, 11 Stat. 251 (1997).

[43] *See, e.g.*, S. Rep. No. 104-23, 104th Cong. 1st Sess. at 69 (1995) ("Local television stations provide vitally important services in our communities. Because local programming informs our citizens . . . and provides other community-building benefits, we cannot afford to undermine this valuable resource." (Additional views of Senator Hollings)).

[44] "Congress declared that the must-carry provisions serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." Turner I, 512 U.S. at 662 (*citing* S. Rep. No. 102-92, p. 58, (1991); H. R. Rep. No. 102-628, p. 63 (1992); U.S. Code Cong. & Admin. News 1992, p. 1191; §§ 2(a)(8), (9), and (10) of the 1992 Cable Act).

[45] Turner I, 512 U.S. at 634.

Congress specifically contemplated the arrival of DTV, then called "advanced television," at the time the Cable Act of 1992 was passed, and directed the Commission 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 . . . ."[46] The intent of Congress could not be more explicitly stated. Congress intended the DTV signals of local stations to be carried on cable systems, and directed the Commission to modify the cable carriage rules to ensure such carriage. As the Supreme Court stated in Chevron v. Natural Resources Defense Council,

> "the question is: whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[47]

Opponents of DTV must-carry rules seek to twist the clear direction of Congress to introduce doubt as to its proper interpretation. For example, the NCTA has focused solely on Section 614 of the Communication Act of 1934, as amended, which states that:

> (B) Advanced television - At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.[48]

The NCTA argues over the meaning of the word "changed" in the above text, suggesting that only after DTV has completely replaced NTSC and all analog spectrum has been reclaimed can cable operators be required to carry DTV signals.[49] Such an interpretation not only distorts the

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[46] 47 U.S.C. § 534(b)(4)(B).

[47] 467 U.S. 837, 842-843 (1984).

[48] 47 U.S.C. § 534(b)(4)(B).

[49] Comments of NCTA at 10-11.

clear meaning of the statute, but also ignores the overarching intent of Congress that DTV succeed and that the industry as a whole rapidly move forward towards a conversion to DTV.

Moreover, if the NCTA's interpretation were correct, Section 614 itself would be unnecessary, as the existing must-carry rules already require carriage of a broadcaster's "signal," and do not differentiate between NTSC and DTV signals. Thus, if Congress had intended that a station's DTV signal be carried only after its NTSC channel had been returned, there would be no need to instruct the Commission to create new must-carry rules, as a broadcaster's "signal," DTV or otherwise, would still be eligible for carriage under the existing must-carry rules.[50/]

NCTA's strained interpretation is also clearly rebutted by the Conference report to the legislation, which notes that:

> Subsection (b)(4)(B) provides that, when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this section.[51/]

Thus, there can be little doubt that Congress intended that the Commission mandate cable carriage of local DTV stations, and the Commission should move as quickly as possible to implement that directive.

B. DTV Must-Carry Rules Are Constitutionally Permissible

While a number of cable system commenters make the effort, it cannot seriously be argued that DTV must-carry is barred by the United States Constitution. At the time it was considering the 1992 Cable Act, Congress considered the relevant constitutional issues, and determined that

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[50/] Comments of NCTA at 10-11.

[51/] H. R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. at 8325 (1992).

the Act was constitutional.[52] Further, the Supreme Court has examined the existing must-carry rules and found them to be constitutional.[53] Given the clear mandate of Congress that must-carry rights include DTV signals, the Commission need not undertake further analysis of the constitutionality of must-carry rules, particularly since the FCC lacks authority to declare an act of Congress unconstitutional.[54] In any case, however, as is discussed below, the rules easily survive constitutional scrutiny.

1. DTV Must-Carry Rules Withstand First Amendment Scrutiny

It is settled law that must-carry requirements are permissible under the First Amendment to the Constitution. In Turner I, the Supreme Court held that must-carry rules are a content neutral regulation of speech.[55] The proper standard for judging such regulations, as set forth in United States v. O'Brien,[56] is that the regulation must "advance[] important governmental interests unrelated to the suppression of free speech and . . . not burden substantially more speech than necessary to further those interests."[57] In Turner II, the Court examined the must-carry

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[52] "The Committee also has considered the implications of Section 615 [with respect to] the First Amendment rights of cable operators and has concluded that it satisfies the First Amendment standards." H. R. Rep. No. 102-628, 102d Cong., 2d Sess. at 72 (1992). "Finally, the Committee notes that some cable operators have contended that signal carriage regulations would constitute a 'taking' of their channels in violation of the Fifth Amendment. . . . The reestablishment of signal carriage requirements will not . . . result in any unconstitutional taking of cable operators' property without compensation." Id. at 67.

[53] Turner II, 520 U.S. 180 (1997).

[54] *See* GTE California v. FCC, 39 F.3d 940, 946 (9th Cir. 1994) (*citing* Johnson v. Robison, 415 U.S. 361, 368 (1974)).

[55] "It is true that the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry. . . . [S]peaker distinctions of this nature are not presumed invalid under the First Amendment." Turner I, 512 U.S. at 645.

[56] United States v. O'Brien, 391 U.S. 367 (1968).

[57] Turner II, 117 S. Ct. at 118 (*citing* United States v. O'Brien 391 U.S. at 377 (1968)).

rules in the 1992 Cable Act and held that they meet these requirements.[58] The Court noted that the governmental interests stated by Congress, namely the preservation of the benefits of free, over-the-air local broadcast television, the promotion of widespread dissemination of information from a multiplicity of sources, and the promotion of fair competition in the market for television programming, are of great importance, and that these interests are directly advanced by the legislation in question.

There is no basis for the argument that application of the must-carry rules to digital broadcasts presents an unconstitutional restriction of free speech. The requirement that cable operators carry digital signals is of exactly the same character as the analog must-carry requirement, and thus the same O'Brien analysis would apply. All of the governmental interests cited in Turner I and Turner II also apply in the digital arena. In fact, there is an even greater governmental interest in seeing that the roll-out of DTV and its accompanying public benefits is successful, and that the way is cleared for reallocation of NTSC spectrum as soon as possible. In short, the inclusion of digital signals in the must-carry rules would not impermissibly burden free speech rights under the First Amendment.

2. DTV Must-Carry Rules Withstand Fifth Amendment Scrutiny

The cable industry has suggested that the imposition of digital must-carry rules would constitute a taking without compensation in violation of the Fifth Amendment of the Constitution.[59] As Congress earlier concluded in adopting the current must-carry rules, this is not the case.[60]

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[58] 520 U.S. 180 (1997).

[59] *See, e.g.*, Comments of NCTA at 32-37.

[60] "Finally, the Committee notes that some cable operators have contended that signal carriage regulations would constitute a 'taking' of their channels in violation of the Fifth Amendment

(continued...)

The U.S. Supreme Court has held that takings are most readily found "when the interference with property can be characterized as physical invasion by government . . . ."[61] The cable operators, however, cannot point to any such invasion, as there is no specific physical location in their cable systems that is "occupied" as a result of must-carry rules, nor has any tangible object been placed on their property. The cases concerning permanent physical occupation cited by NCTA are therefore inapplicable. For example, in Loretto v. Teleprompter Manhattan CATV Corporation,[62] the Court held that the required placement of a cable operator's wires, an actual, tangible object, on the real property of an apartment building owner constituted a taking. In Bell Atlantic Corporation v. FCC,[63] the D.C. Circuit declared invalid the Commission's requirement that local exchange carriers give up a portion of the physical space in their central office for the placement of competitors' tangible switching equipment. The Commission then revised its rules to merely require virtual (electronic) co-location, and held that such a requirement was not a taking. Finally, FCC v. Florida Power Corp. [64] involved the attachment of wires to utility poles, which, even though it involved a physical invasion, was declared by the U.S. Supreme Court not to be a taking.

Even if the imposition of DTV must-carry rules actually were a physical invasion, it is not a permanent physical invasion. In Loretto, the Court noted that "this Court has consistently

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[60] (...continued)
. . . . The reestablishment of signal carriage requirements will not . . . result in any unconstitutional taking of cable operators' property without compensation." H. R. Rep. No. 102-628, 102d Cong., 2d Sess. at 67 (1992).

[61] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1982) (*citing* United States v. Causby, 328 U.S. 256 (1946)).

[62] 458 U.S. 419 (1982).

[63] 24 F.3d 1441 (D.C. Cir. 1996).

[64] 480 U.S. 245 (1987).

distinguished between . . . cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . ."[65] The cable industry has conceded that the changes in the must-carry rules contemplated in this proceeding are to be temporary in nature,[66] and these proposed rules therefore cannot constitute a permanent physical invasion.

The proposed must-carry rules also do not constitute a regulatory taking. The Loretto Court reaffirmed that "the Court has often upheld substantial regulation of an owner's use of his property where deemed necessary to promote the public interest."[67] Factors relevant to determining when a regulation has gone so far as to constitute a taking include (1) the character of the governmental action, (2) the economic impact of the regulation, and (3) the regulation's interference with investment-backed expectations.

Cable operators have chosen to enter a highly regulated industry, and depend on government consent to their use of rights-of-way in order to install their facilities. These operators are in many cases local monopolies, and are subject to substantial economic regulation. In such an environment, a government action that alters the economic benefits and burdens of the cable industry in order to promote the public interest is not a taking, and is merely the trade-off accepted by cable operators to obtain the use of public properties.

Furthermore, the requirement of digital cable carriage does not destroy any property of cable operators, and is unlikely to cause a material economic loss to cable operators. Most cable operators have their subscribers locked in as a result of their monopoly position, and are therefore able to easily recover any costs incurred from system expansion (assuming such

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[65] 458 U.S. at 42.

[66] "The critical question before the Commission in this proceeding is whether, during the eight or more years while broadcasters are transmitting two over-the-air television signals, it should mandate . . . must-carry . . . ." Comments of NCTA at 1.

[67] 458 U.S. at 426.

expansion is even necessary to carry DTV stations). Also, DTV must-carry does not interfere with cable operators' investment-backed expectations. As discussed above, even in the unlikely event that cable operators could show some projected diminution in system values because of DTV must-carry, cable operators have voluntarily entered a highly regulated industry, well aware that Congress and the Commission may alter the regulatory burden as required by the public interest. As one court has noted, "Congress never promised that it would abstain from all actions having an economic impact upon the cable industry . . . ."[68] This knowledge of the likelihood of regulatory change undermines any possible claim of interference with investment-backed expectations:

> [g]iven that the cable industry . . . [is] subject to significant regulation under Title VI of the Communications Act, the expectations of entities in the cable industry must be based on those regulations, the premise of the law underlying them, and that regulations are amended to respond to changing circumstances.[69]

Moreover, as the cable industry itself has noted, the conversion to DTV has been a long time coming,[70] and operators have therefore been aware for some time of the potential for digital must-carry regulation.

In short, because DTV must-carry rules would not constitute a permanent physical occupation, but merely a reasonable regulation intended to further an important governmental

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[68] Cox Cable Communications, Inc. v. United States, 866 F. Supp. 553, 559 (M.D. Ga. 1994).

[69] Telecommunications Services Inside Wiring, Customer Premise Equipment, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, 13 FCC Rcd 3659 (1997), at ¶ 229.

[70] "Congress was aware, through the FCC's numerous notices, that the Commission had been considering since 1987 adoption of a new 'advanced television' standard to replace the existing NTSC standard. This paper record, and the widespread reporting about 'advanced television,' revealed that the Commission was contemplating a transition period during which broadcasters would continue to transmit NTSC signals while also transmitting new, advanced television signals." Comments of NCTA at 8 (citations omitted).

interest, the proposed rules do not constitute a taking of property in violation of the Fifth Amendment.

CONCLUSION

For all of the reasons set forth above and in the comments of other parties to this proceeding, Univision urges the Commission to include the DTV signals of local broadcasters among the signals that are guaranteed carriage on the basic tier of local cable television systems pursuant to the must-carry rules.

Respectfully submitted,

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