A recent study on the effects of cable television digital rebuilds by Paul Kagan & Associates, a leading cable industry research analyst, concluded that "[g]oing digital nearly doubles the average system's channel capacity, from 61 to 118 video channels."[90] And the investment analyst, Donaldson, Lufkin & Jenrette, recently forecast that digital cable will achieve subscriber penetrations going from 1.7% in 1998 to 32.4% of all subscribers in 2002.[91]

To provide a visual depiction of this explosive growth in cable carrying capacity, NAB has calculated a growth rate of per system cable capacity based on the Paul Kagan Associates (analog) channel capacity estimates and factoring in the Donaldson, Lufkin digital penetration forecast, as is further explained in the resulting Cable Growth Chart, appended hereto as Exhibit B.[92]

As is readily seen from this Cable Growth Chart, while cable capacity has been expanding for years, the growth rate *dramatically* picked up in late 1996, with explosive growth occurring from 1998 onward. As is also readily

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[90] *Digital Doubles Channel Capacity; Analog/Digital Cable Channel Model; Analog & Digital Tier Pricing Survey*, Pay TV Newsletter, Sept. 25, 1998, No. 455.

[91] *U.S. Cable TV Industry New Product Subscriber Forecast*, Broadcasting & Cable, Nov. 10, 1998, Cable TV Operations at 15.

[92] The point of this chart is to depict the steep growth curve of cable capacity. The chart in fact substantially understates *per average subscriber* growth figures in that, as NCTA notes on its web site, larger cable systems tend to offer more channels and thus the average *subscriber* receives substantially more channels than are provided by the average cable *system*.

apparent, digital capabilities do indeed, as NCTA's web site proclaims, cause capacity to grow *exponentially*.[93]

As this chart also shows, future growth is significant enough that, as a general matter, as cable systems add this substantial *new* bandwidth and digital "doubling" capabilities, they can accommodate the gradual addition of DTV signals *without* bumping existing programming.[94]

As can be seen from these depictions of cable growth, using data from independent sources, the relative "burden" on the average cable system from carriage of both its in-market DTV *and* NTSC signals will in fact be *de minimus*.

C. The Burden of DTV *and* NTSC Must Carry Will Be Less Than the Burden of Carrying Analog-only Signals.

In response to cable companies complaints of the increased burden and lost cable programming that DTV must carry would entail,[95] NAB has constructed a bar chart (attached as Exhibit G) showing, for the years since

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[93] Moreover, this chart assumes 2 DTV signals in a single 6 MHz cable channel. Since services such as HITS provide as many as 12 SDTV programs in a 6 MHz cable channel, the total capacity shown in the chart understates the total number or programs on the average cable system.

[94] This opportunity for adding DTV signals without having to displace existing cable programming is also seen in NAB's updated version of C-SPAN's "typical" channel line-up, discussed *supra* at Section I.A.2.C. and attached here as Exhibit E.

[95] *See* Section I.A.2. *supra*.

must carry was passed through 2004, local commercial broadcast stations as a percentage of cable carrying capacity.[96]

Two points are clearly evident. One, the burden of carrying local broadcast stations has in fact diminished over time (as capacity has expanded). And two, the relative burden of carrying both DTV *and* NTSC signals will be *less* than the burden of carrying only analog signals (because of dramatic increases in capacity).

As is evident from looking at this chart alongside the Cable Growth Chart (Appendix B), as the rate of capacity expansion increases after 1996, the relative percentage of local stations correspondingly drops substantially after 1996. There is a "blip" upwards in the percentage burden in 2002 when all DTVs come on-air,[97] which immediately begins to diminish (and, in fact, with combined digital/analog cable capability even the "blip up" is immediately erased). Thus, even at the height of the transition, the "burden" of carrying local stations will be far less than the burden on cable from analog stations when must carry went into effect.

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[96] This chart (Relative Burden Chart appended at Exhibit G) in fact overstates the burden of carrying must carry eligible stations, as we had available only the total number of local commercial broadcast stations and not the number of must carry eligibles. Thus local stations not required to be carried under must carry (because of signal strength, network duplication or the one-third cap) *were* included here as "local stations."

[97] Even the burden represented by the "blip up" in 2002 is still less than the burden of 1996 or earlier – and less than the burden in 1998 or earlier with the combined analog/digital capacity projections.

Cable parties now make the argument that the "burden" of analog must carry was small because so many broadcasters were being voluntarily carried but the burden of "must carrying" all DTV signals will be great. But several cable parties argued that "marketplace negotiations" would provide for DTV carriage[98] (at least for some broadcasters) and there are press reports that the networks are engaged in discussions with cable operators over DTV carriage[99] (and CBS and Time Warner recently concluded a DTV carriage deal).[100] Thus, the "burden" of DTV carriage will, under cable's line of reasoning, also be reduced. And, the fact remains (as shown in the Relative Burden Chart) that the relative cable capacity devoted to local broadcasters has diminished over time, and will continue to diminish in the future, notwithstanding the addition of DTV signals.

II. Cable's Depiction of Digital Must Carry as an Unfair and Unnecessary (Or Premature) Preference for Broadcasters and their Broadcast Programming Misses (Or Rejects) the Point of Must Carry, and of the DTV Transition.

Cable parties' in their comments argue that DTV must carry would be bad public policy because it amounts to an unfair preference for broadcasters over cable programmers and over cable operators' choices. But in doing so cable

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[98] NCTA Comments at 39. *See also* MediaOne Comments at 7; Time Warner Comments at 10-11; TCI Comments at 12; Cablevision Comments at 14.
[99] *E.g.*, *Cable's Digital Efforts*, Letter to Editor, Broadcast & Cable, September 7, 1998 at 71; *Legal Issues Head Digital Must-Carry*, Multichannel News, May 4, 1998 at 195.
[100] *See* David B. Wilkerson, *CBS, Time Warner set key digital pact* (last updated December 8, 1998) <http://cbs.marketwatch.com/archive/19981208/news/current/cbs_twx.htx.>

misses the point that Congress determined that broadcast programming *should have* a preferred berth on monopoly cable systems to serve overriding policy goals for the benefit of the *entire* viewing public.

A. In Complaining that DTV Must Carry Is Unfair, Cable Discounts the Public Interest In Preserving the Competitiveness and Multiplicity of Free Television Through the DTV Transition (For the Benefit of the Entire Public).

Cable parties argue that DTV must carry is bad policy because it amounts to an unfair preference for broadcasters and broadcast programming over cable programmers' offerings and over cable operators' prerogatives.[101] They argue that this preference would be unfair because it will reduce program diversity and choice for cable consumers,[102] limit cable operators' ability to add new and diverse niche programming that consumers really desire,[103] harm cable programmers' ability to access the cable audience,[104] deter production of new cable programming and hamstring cable operators' ability to provide innovative cable services.[105] They claim that it would be unfair to cause all this only to enable delivery of duplicative content to the few upscale viewers with expensive DTV sets and, otherwise, to present most cable consumers with blank channels.[106]

One, as has been shown above, DTV must carry will not do these things. Two, must carry is not an unfair preference. To the contrary,

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[101] *See e.g.*, A&E Comments at 42-43; MediaOne Comments at 21.
[102] *See e.g.*, C-SPAN Comments at 14-15 and Exhibit A.
[103] *See e.g.*, MediaOne Comments at 21.
[104] *See e.g.*, C-SPAN Comments at 4-6.
[105] *See e.g.*, TCI Comments at 21; Time Warner Comments at 9,10.

Congress determined that it was in fact fair and fitting, given cable's monopoly gatekeeper position and its incentives vis-à-vis broadcaster-competitors, to require that cable carry local commercial broadcast signals, up to one-third of cable capacity. And Congress determined that must carry would (and was needed to) ensure the paramount public interest in preserving a multiplicity of competitive, free broadcast outlets for *non-cable* consumers. In service of the same goal, to ensure the future competitiveness of the multiplicity of free television outlets for *all* consumers, the FCC determined that it was necessary to transition the entire broadcast industry to a competitive, digital future.

Cable parties of course view the imposition of DTV must carry only from their own perspective, which does not include the interests of non-cable consumers' receiving, free and universally, a multiplicity of competitive broadcast program offerings. To the contrary, cable operators, as competitors of broadcasters for advertising and for those same non-cable consumers, quite naturally would *not* value the importance of preserving the strength and diversity of free broadcast programming.[107]

Cable interests, not valuing free television, naturally would consider a preference for broadcasters' programming to be "unfair" vis-à-vis *themselves and their customers.* And they would thus consider *any* "required" carriage of broadcasters as unfair, *irrespective of the amount of burden such preference*

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[106] *See e.g.*, Time Warner Comments at 8.

imposes. Cable parties would be expected to claim, as they have, that the sky is falling.

But as NAB has demonstrated, the harm that cable interests allege is belied by the rapid growth in cable capacity that is sweeping the entire cable industry. Thus, cable operators, as a general matter, will not "unfairly" have to drop cable programming from their line-ups.[108] For cable systems that have not upgraded, there should be exceptions and phase-in rules. Cable programmers, as a general matter, likewise will not "unfairly" be displaced and denied access for their programming *because of must carry*. New cable programming will not be deterred, as is evidenced by the burgeoning numbers of new cable networks.[109] Similarly, cable subscribers, as a general matter, will not be deprived of current or new cable programming.

As to the much-touted "blank screens," viewers will not by and large even see "blank screens," as most remote controls will simply skip over "blank" DTV channels, much as they do with pay-per-view and subscription channels now. The reduced number of channels seen by viewers with analog sets will be overshadowed by the panoply of cable channels otherwise available. Arguments as to lessened diversity because of "simulcast" DTV programming miss the point that the purpose and net result of the DTV

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[107] *See* SPR Study at 5-7 and ALTV Comments at Exhibit 1.
[108] As to cable operators *qua* cable operators, it should be noted that a limited imposition on their programming prerogatives by must carry is *because* they are monopolist gatekeepers.

transition is to *preserve* diversity. Moreover, the FCC's rules requiring simulcasting are for the *end* of the transition only.[110] Viewers who purchase new DTV sets will see not only greatly enhanced versions of whatever programming is voluntarily simulcast, but also may receive the benefits of new multi-cast multiple broadcast channels as they are introduced by the new DTV technology. Finally, it is disingenuous to suggest, as have some cable parties, that provision of innovative cable services (such as Internet access and telephony) will be deterred because of must carry obligations. These services are the *driver* for current upgrades[111] and, in addition, take relatively little spectrum.[112]

Thus DTV must carry, while naturally viewed as "unfair" by cable interests, cannot be objectively viewed as such. To do so misses the point that it is the interests of *non-cable* viewers that both must carry and the DTV transition seek to serve.

What would be "unfair" is for cable to block access to the vast majority of the overall audience for DTV broadcasts. The DTV transition, done in the name of all viewers, would be slowed and compromised by any significant non-carriage of DTV broadcasters. And, as Congress found in adopting must

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[109] *See* Exhibit D for a more potent cause of any difficulty of new independent programmers achieving carriage.
[110] Should the transition be extended, the FCC's purpose in requiring simulcasting for the end of the transition only would necessitate an adjustment in these rules. *See Fifth Report and Order*, MM Docket 87-268, 12 FCC Rcd. 12809 (1997).
[111] *See* SPR Study at 5-7; Exhibit A.

carry, cable has the record, the ability and the incentive to disadvantage significant numbers of local broadcasters. Moreover, the reasons recited by Congress and the Supreme Court[113] for cable to disadvantage broadcasters (competitiveness in general and competition for advertising in particular) are, in the DTV context, increased by competitiveness as multi-channel providers and by the fact that, without DTV, cable's broadcast competitors will have little future.

B. Cable Parties' and Microsoft's Comments that No Regulation Is Needed Misapprehend the Nature of the DTV Transition.

Cable parties and Microsoft argue against government regulation of cable carriage of broadcasters' DTV signals, as to both policy and technical requirements, because they are either premature or unnecessary. They say government action is premature because there is no coherent policy rationale for must carry with DTV service proposals not yet perfected and because there are too many technical "bugs" to be worked out. They also say government requirements are unnecessary as the marketplace is solving or should solve both carriage and technical issues.[114]

But here too they are wrong. They misapprehend the nature of the DTV transition which has been government-required, planned and facilitated in order to secure a competitive future for free television, the very *same*

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[112] *Id.*
[113] *Turner II*, 117 S. Ct. 1174.
[114] Comments of Microsoft Corporation (hereinafter "Microsoft Comments") CS Docket 98-120, Oct. 13, 1998 @ 15; MediaOne Comments at 7.

objective sought by the must carry law. The transition is premised on broadcasters' DTV signals being available to consumers in order to stimulate sales of new DTV receivers and thus achieve a rapid and successful transition. But as with analog television, cable stands in the way of achieving this objective for *all* broadcasters. As with analog television, marketplace forces will not secure cable carriage for all broadcasters, nor will they achieve, without government oversight, timely, effective and compatible technical solutions for DTV cable carriage. Cable parties and Microsoft misapprehend the appropriate role for government cable carriage policies and the ramifications of those policies on the overall DTV transition.

Cable parties argue that DTV must carry is unnecessary because marketplace negotiations will achieve cable carriage. But, as the Supreme Court pointed out,[115] must carry is most important for the smaller and less strong broadcasters, not the stronger, bigger broadcasters with which cable is negotiating.[116] These same cable parties have *not* suggested that cable will carry *all or even most* DTV broadcasters. To the contrary, they insist that they will and should carry *only* those DTV broadcasters that their consumers demand,[117] an argument identical to one they made opposing analog must carry. But this argument misses the chicken and egg conundrum of

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[115] *Turner II*, 117 U.S. 1174.
[116] *See* David B. Wilkerson, *CBS, Time Warner set key digital pact* (last updated Dec. 8, 1998) <http://cbs.marketwatch.com/archive/19981208/news/current/cbs_twx.htx>.
[117] *See e.g.*, MediaOne Comments at 24.

consumers' needing access to DTV broadcasts to encourage them to purchase DTV sets, to see set prices fall, to encourage further set sales, etc.

Microsoft Corporation takes the opportunity to try to impress its own business paradigm of "marketplace not regulation" on the broadcast industry.[118] It is joined by TCI and MediaOne in its misguided rationale which maintains that, oblivious of all else, marketplace forces are the most effective mechanism for meeting consumer demand.[119] But the DTV transition is about more than just meeting *current* consumer demand. The Commission has been resolute in its basic determination that the DTV transition necessary for the preservation of the free over-the-air broadcasting service. In light of the FCC's rapid implementation schedule forcing broadcasters to convert to digital, Microsoft's assertion (echoed by TCI and MediaOne) that "the Commission should not adopt must-carry rules that could interfere with marketplace forces"[120] is unsupportable.[121] Must-carry

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[118] Microsoft Comments at 15-16.
[119] TCI Comments at 16-17; MediaOne Comments at 16-20.
[120] Microsoft Comments at 16.
[121] Microsoft advises the Commission to refrain from mandating carriage of particular video formats, noting the diversity of formats being deployed and the lack of a consensus as to which video format is most desirable. Microsoft Comments at 24. Incredibly, they then advocate that the Commission "should expressly permit cable operators to cross-convert the video formats of DTV signals as they deem appropriate to conserve bandwidth on the systems – so long as they do not discriminate against broadcast programming." *Id.* at 25. Such a policy would foil broadcasters' efforts to provide signals with high technical quality to consumers. NAB and others made the point that "no material degradation" must apply in the overall context of a digital must carry policy. The only sensible way to define "no material degradation," as suggested in NAB's Comments at 40, is to insist that the payload bits are not

will accelerate the DTV transition, as was pointed out by NAB[122] and others, not retard it as suggested by Microsoft and some cable parties. The Commission and Congress have already ruled that the public interest will be best served by a rapid DTV transition.[123]

MediaOne says that "Commission intervention into the digital transition is unnecessary since the marketplace already is working to resolved the issues raised in the Notice."[124] They use the example of digital modulation for digital broadcast and digital cable as an "example of a complex technical issue that has been partially resolved by the marketplace and probably will be completely resolved."[125] A poorer example of marketplace resolution of a technical problem could not have been chosen.[126] This marketplace-based decision has resulted in basic incompatibility

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altered or processed in any way. Microsoft's notion of cable systems determining the technical quality of broadcast signals at their whim is chilling and inimical to any reasonable regulatory framework for cable carriage of broadcast DTV signals.

[122] *See* NAB Comments at 16-18.

[123] *See* NAB Comments at 15.

[124] Comments of MediaOne at 7.

[125] Comments of MediaOne at 11.

[126] In 1994-95, the Advisory Committee on Advanced Television Service supervised the tests of both 8VSB modulation as well as 16 VSB which has the same data capacity as 256 QAM. Ultimately, 16 VSB was documented in the ATSC DTV Standard as the high data rate transmission mode (*See* Annex D of the DTV Standard: RF/Transmission Systems Characteristics). The tests performed under the auspices of the Advisory Committee, and conducted by CableLabs, showed that 16 VSB was just as well suited, if not better suited, for transmission of digital information over cable than 256 QAM. MediaOne's assertion that "VSB does not work efficiently for cable because it was not designed, or optimized, for a wired environment" is plainly

between cable and broadcast digital signals, which must now be overcome in implementation of systems and products. Ultimately this will cause more cost and more confusion to consumers. Digital modulation standards for cable and broadcast are hardly a shining success story of the marketplace at work.

Some cable parties suggest[127] that the Commission should delay adopting digital carriage rules until a consensus is reached among

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wrong. The reasons for the cable industry choosing QAM, whatever they may really be, were certainly not technical in nature.

[127] *See* Time Warner Comments at 4: "To date, few broadcasters have announced just how they intend to use their digital spectrum, and even the plans of those that have may still change depending on competitive developments. If there is any certainty at this time, then, it is this: "nobody has the answer to the who, what where, when, and how of digital TV." (Quoting Chairman Kennard). In light of this unsettled state of affairs, it would be impossible for the Commission to articulate a coherent policy rationale for a requirement that cable operators carry digital signals during the transition period: imposition of such a requirement would simply be a stab in the dark." *See also* NCTA Comments at 39: "The uncertainties swirling around the transition to digital broadcasting makes regulatory intervention unwise at this stage of the process. As one cable executive explained, this "is an extraordinarily complex transition, involving advanced technologies that have yet to be fully understood and mastered by their creators, let alone by the public at large. Such an environment is uniquely suited to resolution through the operation of market forces, rather than government intervention." (Quote from testimony of Joseph Collins, chairman and CEO of Time Warner Cable, before Senate Commerce Committee, July 8, 1998, at 8). *See also* MediaOne Comments at 14: "The broadcasters' digital networks also are complex. And given the unique characteristics of the two media, the integration of digital broadcast signals into digital streams of cable programming means there is no single solution to the myriad of technical challenges." *See also* TCI Comments at 14: "The integration of digital broadcast signals into digital streams of cable programming presents an array of technical challenges. Overcoming these challenges will not be facilitated by new regulatory requirements that impose

broadcasters concerning digital program formats, multiplexing, *et cetera*, arguing in essence, "if they don't know what they're going to broadcast, how can we be expected to carry them." This argument is entirely fallacious. Broadcasters indeed know precisely what they will transmit on their digital signals: 19.4 megabits of information per second, with 8VSB modulation, according to the ATSC standard. That broadcasters have differing views about the *content* that will be transmitted over digital signals, and the business plans that will be most valuable to consumers, does not imply that there is any doubt about the technical characteristics of broadcast digital signals which could justify waiting to impose carriage rules. Indeed, the flexibility of the digital technical standard is one of the strongest factors favoring the transition to digital television, and it would be ironic if that same factor would be used to justify delaying the adoption of must carry rules.

Both MediaOne and TCI argue that the government should refrain from regulation to resolve remaining issues in the transition to digital.[128] They paint a daunting picture of vastly complex cable networks filled to the

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new burdens and limit the available array of solutions to the existing problems."

[128] *See* MediaOne Comments at 16: "...there is a substantial chance that government intervention at this critical point would freeze the current level of technology and stifle the development of new technologies." *See also* TCI Comments at 16-17: "The Commission has adopted a market-based approach in other highly dynamic industries in order to avoid the potential that government intervention would freeze the current level of technology and stifle the development of new technologies."

brim with technology and disparate new services, connecting to complex broadcaster digital networks, with an additional element of technological changes that are rapid and constant. MediaOne says "because technology is in such a state of flux, there is insufficient information for the Commission to regulate digital video as contemplated by the Notice."[129] Despite MediaOne and TCI's attempt to obscure the real issue with the difficulties associated with introducing and maintaining compatibility with new peripheral services, the rules necessary to insure cable carriage of broadcast DTV signals are not all that complicated. Regardless of what services reside in the packets of information contained in the broadcast DTV signal, the cable provider can simply pass the signal through its system. The arguments of MediaOne and TCI set up a much more complicated "straw man" than is necessary to address the basic point of implementing DTV signal carriage on cable.

Similarly Microsoft states that that "imposing must-carry requirements now also would be premature because the potential cable carriage options are flawed."[130] Microsoft would have the Commission believe that the technology for digital cable carriage must be fully developed, deployed and all the "bugs" worked out before the Commission makes a policy decision on the basic justification for carriage requirements in the first place.

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[129] *See* MediaOne Comments at 16; TCI Comments at 16: "Government regulation is bound to be particularly damaging when imposed upon industries undergoing a high level of technological change or where technology is at a nascent stage of development."
[130] Microsoft Comments at 10.

This is an absurd case of requesting that the tail wag the dog. Complete and thoroughly tested technical solutions for implementing cable carriage will flow from appropriate policy decisions made by the Commission on the digital must carry issue, not the other way around.[131]

MediaOne and TCI choose to revive the evergreen but tired argument that standards freeze technological innovation. This issue was fully and thoroughly vetted in the discussion on the need for a broadcast digital television standard at all in comments submitted in the Commission's Fifth Further Notice of Proposed Rule Making on advanced television.[132] The Commission considered these views in the digital standard proceeding and

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[131] In the same vein, Microsoft, *id.* at 7-9, points out the market need for development of copy protection in certain digital services and notes that technical issues with respect to implementing copy protection remain unresolved at this time. While this is an interesting discourse in relation to premium cable services that may wish to distribute first-run movies, their arguments are not relevant in the case of cable carriage of digital broadcast signals. Digital broadcast signals are already available over-the-air to consumers from over 40 stations, with more stations soon to join them. These signals are not copy protected now and no technical copy protection control of programming provided via over the air transmission (other than the negotiating that takes place as a natural course of business between copyright holders and broadcasters) is in place now – and yet digital broadcasting has begun. It is nonsensical that the same digital program material now available cannot be provided by cable just because complete copy protection schemes have not been developed. Microsoft's principal argument seems to be that "[i]f the Commission were to adopt must-carry rules, it would risk giving consumers the false impression that these issues do not exist." *Id.* at 9. Such reasoning is hardly bedrock for reasoned governmental regulatory decision making.

[132] In that proceeding (MM Docket 87-268), NCTA's comments (filed July 11, 1996) repeated the same notion now being exhumed by MediaOne and TCI: "[a]s a general matter, government mandated standards freeze technology

ultimately rejected them, adopting a single transmission standard for DTV, stating: "[f]irst, we conclude that the DTV Standard will serve our goal of ensuring that all affected parties have sufficient confidence and certainty in order to promote the smooth introduction of a free and universally available digital broadcast television service."[133] The same principle applies in the case of cable carriage of broadcast DTV signals. As we stated in our comments in the instant proceeding, "[t]o enthusiastically pursue the digital transition, broadcasters need the certainty that they can reach the entire viewing audience. . . . Similarly, only if broadcasters, particularly medium and smaller-size broadcasters, in all size markets, have the *certainty* that their DTV broadcasts will get through to the 67% of the audience on cable, will those broadcasters have the incentive to aggressively continue their plans to borrow money, hire consultants, order DTV equipment and push ahead to their DTV future."[134] And from the consumer side, NAB stated "without the incentive of the full panoply of DTV broadcast offerings, cable consumers will not be tempted to buy DTV sets as surely or as quickly, and the transition itself will go slower."[135]

As in the debate over the DTV Standard, the conclusion is the same. Market forces can fuel the fire of the DTV transition, but they can't get the

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and chill innovation. . . . Federal standards will only hamper innovation and competition by fixing the technology in time."

[133] FCC *Fifth Report and Order* in Docket MM 87-268, released December 27, 1996, at ¶ 33.

[134] NAB Comments at 12.

fire started. Government regulation is needed to strike the initial match and get the transition going, in this case, with mandated cable carriage rules.

III. The Statutory and Constitutional Arguments Advanced by the Cable Companies Provide No Basis For Declining to Implement Mandatory Carriage of Digital and Analog Signals During the Transition to Digital Television.

The mandatory carriage scheme that Congress established in the Cable Act of 1992 is straightforward. Recognizing the importance of cable carriage to the survival of free over-the-air television and understanding the incentive of cable operators to use their bottleneck facilities to disadvantage broadcasters, Congress required in § 614(b)(1)(B) that cable systems carry "the signals" of broadcast television stations. The Act's carriage obligation makes no distinctions between digital and analog signals. In order to accommodate the First Amendment interests of cable operators and programmers, Congress narrowly tailored the Act's mandatory carriage obligation through provisions such as the one-third cap, § 614(b)(1)(B), and the non-duplication provisions, § 614(b)(5). Finally, recognizing that digital television was coming, but anticipating that application of the mandatory carriage requirements to the new mode of transmission might require minor adjustments to the basic framework, Congress instructed the FCC to make any changes in the mandatory carriage requirements "necessary to ensure" carriage of the digital signals, § 614(b)(4)(B).

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[135] *Id.* at 21-22.

The National Cable Television Association ("NCTA"), Time Warner Cable ("TWC"), and a host of cable operators and programmers (collectively "the cable companies") mount a threefold attack on this straightforward, coherent framework. First, they argue that the 1992 Act *forbids* mandatory carriage of both analog and digital signals during the transition. Second, they argue that imposition of dual mandatory carriage obligations during the transition would violate the First Amendment, principally because, in their view, mandatory carriage of digital and analog signals during the transition would not advance the important government interests that the Supreme Court deemed sufficient in *Turner II* to justify the burdens of must carry. Third, they argue that the imposition of dual mandatory carriage obligations during the transition would effect a "permanent physical occupation of property," and therefore an uncompensated taking in violation of the Fifth Amendment.

None of these attacks, individually or collectively, is sufficient to shake the solid statutory structure Congress erected in the 1992 Cable Act. The cable companies' statutory arguments cannot be squared with the text of the statute, which unambiguously requires carriage of both analog and digital signals. Their First Amendment arguments miss the mark; in fact, the imposition of mandatory carriage during the transition will serve the government's important interest in preserving the benefits of free over-the-air television. Their Fifth Amendment arguments are meritless because the

mandatory carriage requirements do not constitute a physical taking under the Supreme Court's opinion in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

The Commission must, therefore, obey the plain text of the statute and require mandatory carriage of both analog and digital signals during the transition.

A. The Cable Companies' Statutory Arguments Are Unpersuasive.

In § 614(b)(1)(B), Congress declared that cable operators "shall carry the signals" of broadcast operators. That statutory command contains neither distinctions between analog and digital signals nor temporal limitations. As the Commission has previously noted, "[t]he Cable Act of 1992 gives the Commission minimal discretion in implementing the general must-carry obligation provisions."[136]

The cable companies' principal statutory argument is that -- the unambiguous command of § 614(b)(1)(B) notwithstanding -- § 614 of the Communications Act actually *bars* the Commission from instituting digital must carry during the transition. As we demonstrate below, the specific

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[136] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Broadcast Signal Carriage Issues*, 8 F.C.C.R. 2965, ¶ 27 (1993). As demonstrated in our initial comments, no other provision of the 1992 Cable Act gives the Commission any leeway to reduce the mandatory carriage obligations set forth in the Act during a "transition." *See* Statement of Jenner & Block In Response to Notice of Proposed Rulemaking, Adopted July 9, 1998, attached as Appendix A to the Comments of the

statutory provisions on which the cable companies rely do not support the result they seek. But, more important, as we show first, the cable companies' understanding of the statute cannot be correct; the statute must be read to *require* mandatory carriage of digital signals both during and after the transition.

1. The 1992 Act Requires Mandatory Carriage of Both Digital and Analog Signals, and the Cable Companies' Contrary Argument Cannot Be Squared With the Text of the Act.

It is common ground that § 614(b)(1)(B) requires mandatory carriage of analog signals, and that § 614(b)(1)(B) expresses that command without limiting itself expressly to "analog" signals. Nor is there any dispute that, *at the very least*, § 614(b)(4)(B) expresses Congress' understanding that digital signals will be carried after the analog spectrum has been returned (in the words of the cable companies, after the analog signals have been "exchanged" for digital signals.[137] Nevertheless, the cable companies quickly depart this common ground and argue that the statutory scheme makes clear that there is to be *no* mandatory carriage of digital signals during the transition.

National Association of Broadcasters CS Docket 98-120, Oct. 13, 1998 at 2-10 (hereinafter "Jenner Statement").

[137] *See* NCTA Comments at 10-11, Time Warner Comments at 32-33; TCI Comments at 17-18 n.18; MediaOne Comments at 26-27. That is the inevitable reading of the cable companies' argument that § 614(b)(4)(B) requires the Commission to take actions "necessary to ensure" the carriage of signals which "have been changed" from analog to digital. A contrary reading would not only render § 614(b)(4)(B) meaningless, it would require the conclusion that Congress intended to abandon non-cable viewers after the transition, a proposition that cannot possibly be squared with text and voluminous history of the 1992 Act.

The cable companies' argument forces them to take one of three possible positions, none of which can be reconciled with the text of the Act. First, the cable companies can take the position that the term "signals" in the 1992 Act refers only to *analog* signals, and that § 614(b)(1)(B)'s mandatory carriage requirements relate only to *analog* signals. But this position cannot be correct. The statute does not limit itself explicitly to "analog" signals. Thus, the cable companies ask the Commission to conclude that Congress, which was plainly aware of the impending transition to digital technology, intended a fundamental distinction between analog signals and digital signals, yet did not include that limitation in the text. That conclusion is not plausible.

More important, if the cable companies were correct and the term "signals" referred throughout the 1992 Act solely to analog signals, then Congress' careful scheme would collapse. To begin with, § 614(b)(4)(B) is most naturally read as presupposing (rather than mandating) carriage of digital signals; yet if "signals" referred only to analog signals, then § 614(b)(1)(B) would not impose such a requirement, and the Act would appear to lack *any* provision mandating the carriage of digital signals, even though § 614(b)(4)(B) presumes that one exists. Even assuming that § 614(b)(4)(B) were itself the source of the carriage requirement, the cable companies' reading would still make hash of the statute. The cable companies' position would require, for example, that the one-third cap

contained in § 614(b)(1)(B), which uses only the term "signals," would not apply to *digital* signals, and the FCC would thus be free to set a higher cap. Similarly, the non-duplication provisions of § 614(b)(5), which again contain the unadorned term "signals," would not apply of their own accord to *digital* signals, and the FCC would be free to adopt or not adopt the nonduplication provisions in any digital must carry regime. But that reading of the Act is nonsensical. The detailed provisions of the 1992 Cable Act make clear that Congress carefully drafted the mandatory carriage provisions to minimize the burden to cable operators while seeking to maintain the benefits of free over-the-air television for viewers who lack cable.[138] It is implausible to argue that Congress drafted a carefully tailored statute for analog signals, and then gave the FCC a blank check for digital signals, with the FCC free to incorporate or exclude the fundamental compromises embodied in the 1992 Act.

To avoid these problems, the cable companies could concede that the term "signals" refers to both analog and digital signals. But if that is correct, then the plain language of § 614(b)(1)(B) compels carriage of both analog and digital signals during the transition. Just as the term "signals" contains no distinction between analog and digital signals, it does not provide for a hiatus that would permit non-carriage of all digital signals during the transition.

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[138] *See, e.g.*, § 614(b)(1)(B) (one-third cap); § 614(b)(5) (non-duplication provisions); S. Rep. No. 102-92, at 37-38 (1991) (permitting cable operators to

For the reasons discussed in our initial comments, no other provision gives the FCC authority to ignore this statutory command.[139] Most important, § 614(b)(4)(B) gives the FCC authority to make only changes that are "necessary to ensure" cable carriage of signals which have been changed to the new digital format. Whatever else § 614(b)(4)(B) might authorize, it can not authorize *eliminating* the cable operators' obligations to carry digital signals during the transition, because eliminating those obligations cannot possibly be "necessary" to *ensure* carriage of those signals.

Finally, the cable companies could take the position that the term "signals" refers only to analog signals in the provisions (such as § 614(b)(1)(B)) that *create* the must carry obligations, but that "signals" refers to both analog and digital signals in the provisions (such as the § 614(b)(2) and § 614(b)(5)) that *limit* the must carry obligations. This is the approach that the cable operators appear at times to take: they argue, for example, that despite the existence of the unadorned term "signals" in § 614(b)(1)(B), the 1992 Cable Act nowhere requires carriage of digital signals, yet they argue simultaneously that the nonduplication provisions (which again use the unadorned term "signals") apply to both digital and analog signals,[140] and that any "must-carry regime must conform to existing statutory limits."[141]

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count signals carried pursuant to retransmission consent agreements against must carry obligations).

[139] *See* Jenner Statement at 2-10.

[140] *See* NCTA Comments at 12-14.

[141] Time Warner Comments at 48.

But such a blatantly self-serving and *ad hoc* approach to statutory interpretation cannot possibly be correct, and indeed violates the fundamental canon of statutory construction that "similar language contained within the same section of a statute must be accorded a consistent meaning." [142]

In fact, the cable companies' arguments serve only to distort the clear structure that Congress created. Congress made a number of conclusions about the industry it was about to regulate, including that (1) broadcasters were vulnerable to the owners of cable bottleneck facilities, (2) cable operators had substantial incentives to disadvantage broadcasters, (3) maintenance of free over-the-air television was a vitally important interest, and (4) digital television was coming. In light of that, Congress did three things. First, it unambiguously established mandatory carriage requirements for *all* signals, including both analog and digital.[143] Second, it set out in detail the rules to govern carriage of those signals -- rules that carefully balanced all of the interests at stake.[144] Third, to allow sufficient "play in the joints" to accommodate the unforeseeable technical differences between analog and digital signals, Congress added § 614(b)(4)(B), which gives the FCC authority to "establish . . . changes in the signal carriage

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[142] *National Credit Union Administration v. First National Bank & Trust Co.*, 118 S. Ct. 927, 939 (1998); *see also Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992) (a phrase "ought to be accorded a consistent meaning within the section").
[143] *See* § 614(b)(1)(B)

requirements." That authority, however, is strictly limited: the FCC can only modify the carriage requirements to "*ensure carriage*" of digital signals. In short, Congress established a structure that makes substantially more sense then any of the readings that the cable companies have attempted to impose on the Act, and Congress did so in a way that avoids the textual gymnastics that the cable companies' arguments require.

2. None of the Assorted Statutory Provisions on Which the Cable Companies Rely Compels the Result They Seek.

The cable companies rely on a number of disparate statutory provisions to support their argument that the 1992 Act bars mandatory carriage during the transition. None of those provisions, however, compels the result the cable companies seek.

a. Section 614(b)(4)(B)

The cable operators place principal reliance on § 614(b)(4)(B). In their view, § 614(b)(4)(B) gives the FCC authority to impose carriage requirements only for signals that "have been changed," and signals "have been changed" only when broadcasters have "exchanged" their analog signals for digital signals and thus are no longer broadcasting both analog and digital signals. Section 614(b)(4)(B), however, cannot be read as the cable companies suggest.

First, there is no merit to Time Warner's argument that § 614(b)(4)(B) acts as "an absolute bar on digital must carry until after transition."[145]

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[144] *See, e.g.*, § 614(b)(1)(B); § 614(b)(2); § 614(b)(5)
[145] *See* Time Warner Comments at 33

Indeed, the argument that § 614(b)(4)(B) *by itself* bars must carry during the transition is sufficiently strained that even NCTA, which otherwise generally echoes the arguments set forth in the Time Warner comments, declines to make it, choosing instead to make only the more limited argument that § 614(b)(4)(B) does not *authorize* the imposition of digital must carry during the transition.[146] With good reason. Even under the cable companies' reading of the phrase "signals . . . which have been changed," § 614(b)(4)(B) clearly acts as a grant of authority to the Commission to "establish any changes" necessary to ensure the carriage of digital signals. But the grant of authority acts only as a floor, confirming the FCC's authority to take actions necessary to ensure the carriage of digital signals; it does not act as a ceiling to ensure the carriage of those signals *and no others*. Thus, even accepting the cable companies' tortured definition of "have been changed," § 614(b)(4)(B) cannot be read to *bar* digital must carry.[147]

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[146] This distinction, of course, is critical, in light of the explicit command in § 614(b)(1)(B) that a cable system "*shall carry* the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system." NCTA's argument that § 614(b)(4)(B) does not *authorize* digital must carry -- even if correct -- would thus be of no consequence because the "authorization" for must carry is contained in § 614(b)(1)(B).

[147] Even if the cable companies' reading of "have been changed" were correct, § 614(b)(4)(B) would not by itself bar the Commission from promulgating rules for the transition for yet another reason. Section 614(b)(4)(B) permits changes in the signal carriage requirements "necessary to ensure" carriage of signals that have been changed. Thus, even under Time Warner's reading of the statute, the Commission would have authority to impose digital must carry during the transition as long as it viewed mandatory carriage as "necessary to ensure" carriage of those signals after the transition. The

Second, the cable operators' reading of "have been changed" as "have been substituted for" is unpersuasive. Although "change" can mean "substitute for" or "exchange," that is not the primary meaning of the term. In Webster's Third New International Dictionary, the primary definition is simply to "make different"; "substitute" is further down the list.[148] Thus rather than supporting the cable companies' argument, the dictionary definitions undermine it.

More important, the cable companies' strained reading of "changed" leads to absurd results. When Congress passed the 1992 Act, it was expected that the transition from analog to digital could take 15 years or longer.[149] Under the cable companies' reading of § 614(b)(4)(B), the FCC would have to conclude that Congress directed the Commission to initiate a proceeding to establish changes in signal carriage requirements as soon as the Commission promulgated new standards for television broadcast signals, but that Congress did not want those new requirements to take effect for another 15

Commission might well find such a requirement "necessary" so that all of the bugs are worked out of the system before the moment that the analog spectrum is returned in its entirety.

[148] *See also* Random House College Dictionary (revised ed. 1980) ("substitute" and "exchange" are the third definition listed); Random House Webster's College Dictionary (2d ed. 1997) (same).

[149] *See, e.g.*, *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 7 F.C.C.R. 3340, ¶ 53 (1992) (tentatively concluding that FCC "should establish a date for conversion that is 15 years from the date adoption of an ATV system or a final Table of ATV Allotments is effective, whichever is later") (internal footnotes omitted).

years, or even longer.[150] If the language clearly dictated such an odd result, perhaps the Commission would be bound to accept it. But here, the most natural reading of the text is also the one that makes the most sense: Congress commanded the Commission to initiate a proceeding to alter carriage requirements as soon as the Commission modified the standards for television broadcast signals because Congress understood that must carry would apply during the transition and that the modified carriage requirements would come into play quickly.[151] Indeed, several of the cable companies, including Turner Broadcasting Systems, A&E Television Networks, and others, explicitly argued to the Supreme Court in *Turner II* that the burden of the 1992 Act was substantial in part because "the Cable Act's must-carry provisions authorize the FCC to grant must-carry status to additional spectrum" *i.e.*, the spectrum to be assigned for digital television.[152]

The cable companies should not be permitted now to argue that the FCC lacks the very authority that those companies told the Supreme Court the FCC possessed.

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[150] *See* NCTA Comments at 28 (noting that the end of the transition may not "even be on the horizon").

[151] Time Warner's citations to the legislative history of § 614(b)(4)(B) add nothing to its argument, because, as Time Warner concedes, the House Report "essentially restates the statutory text." Time Warner Comments at 33-34. In light of that concession, Time Warner's assertion that the legislative history somehow "confirms" its reading of the text, Time Warner Comments at 34, is difficult to understand. If the legislative history simply "restates the statutory text," it is hard to see how that history "confirms" anything other than that the statutory provision was properly transcribed.

In sum, the cable companies' strained dictionary definitions notwithstanding, the meaning of § 614(b)(4)(B) is clear: Once a station has begun to transmit a signal the technical characteristics of which are different -- *i.e.*, "changed" -- from the technical characteristics of NTSC signals, the signal "has been changed," and the Commission may "establish any changes" in the mandatory carriage obligations that are "necessary to ensure" the carriage of that signal.

b. Section 614(b)(5)

The cable companies next suggest that the nonduplication provisions of § 614(b)(5) preclude mandatory carriage of both the analog and the digital signals of a single licensee during the transition. For example, NCTA argues that "if the 'advanced television' signal were in fact simulcasting the already-carried analog signal, the statute expressly permit[s] an operator *not* to carry one of them."[153] But as noted,[154] this argument overlooks the plain text of § 614(b)(5), which limits the non-duplication exception to situations involving the "signal of *another* local commercial television station."[155] There is no basis to conclude that a single licensee broadcasting two signals thereby becomes

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[152] Brief for Appellants Turner Broadcasting System, Inc., *et al.*, at 18, *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997) (No. 95-992).
[153] NCTA Comments at 13 (emphasis in original); *see also* MediaOne Comments at 28-29.
[154] *See* Jenner Statement at 2-4.
[155] § 614(b)(5) (emphasis added).

two stations.[156] *Indeed, the cable operators concede this point explicitly.*[157] Thus, the premise of NCTA's signal duplication argument is wrong.

For the same reason, the cable companies' argument with respect to duplication of network affiliate signals,[158] is unavailing. Relying again on § 614(b)(5), NCTA suggests that the network affiliate non-duplication provision "on its face permits an operator to choose not to carry a network affiliate's digital transmission."[159] But § 614(b)(5) provides only that a cable operator need not carry "the signals of *more than one local commercial television station* affiliated with a particular broadcast network."[160] Again, two signals from the same licensee constitute only *one* station, and thus the network affiliate non-duplication provision does not help the cable companies.

More broadly, the cable companies suggest that Congress could not have wanted mandatory carriage of both the digital and the analog signals during the transition because such mandatory carriage would endanger the

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[156] *See* Jenner Statement at 2-4. MediaOne suggests that the nonduplication provision "applies equally whether such programming is transmitted by two separate stations, or a single station with two separate feeds." MediaOne Comments at 31. But the statute speaks of "signals of another local television station," not of "a single station with two separate feeds." The Commission is not free to apply the statute MediaOne wishes Congress had passed instead of the one Congress actually enacted.

[157] *See* Time Warner Comments at 49 ("the analog and digital signals broadcast by a given television licensee are part of the same commercial broadcast television station."); *id.* at 50 ("where a broadcaster provides both a DTV and an analog service under a single station license, there is only one 'station'").

[158] *See* NCTA Comments at 13-14; MediaOne Comments at 32-33.

[159] NCTA Comments at 14.

[160] *Id* at 14 (emphasis added).

must carry rights of certain analog broadcast stations during the transition.[161] To be sure, cable companies that carry both the digital and analog signals of certain broadcast stations and that are over the one-third cap may drop the signals of other broadcast stations in their entirety.[162] Congress no doubt expected, however, that the scope of the problem identified by the cable companies likely would be limited -- and more limited as time went on -- because of the rapid expansion in cable channel capacity. As our initial comments demonstrated, Congress' expectations in this regard have been met.[163] In light of the rapid expansion in capacity and the gradual timetable for the transition to digital television, NAB expects this problem to be more theoretical than real.

Moreover, as unfortunate as is the loss of carriage rights for any broadcast station, the loss of some carriage rights for some broadcast stations is an inevitable result of a statutory scheme that contains a cap. Congress realized that the existence of a cap would prevent some broadcasters from receiving the full benefits of must carry,[164] even in the world of analog must carry, not every broadcast station that sought the benefits of mandatory carriage received them. But Congress understood that respect for the First

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[161] *See, e.g.*, NCTA Comments at 16.
[162] *But see* discussion *supra* Section V. B. as to an important rule change needed to protect carriage at least of one signal for each broadcast.
[163] *See* Jenner Statement at 19-21.
[164] *See, e.g.*, H.R. Conf. Rep. No. 102-862 at 76 (1992) (recognizing that a cable operator might "elect[] not to carry such a signal in fulfillment of its

Amendment demanded a narrow tailoring of the mandatory carriage obligations and likely precluded the extension of full must carry rights to all broadcasters who might benefit from them.

All of this notwithstanding, NAB does not dispute that cable companies that are over the one-third cap may well have the incentive and ability to use their signal selections to undermine the benefits of mandatory carriage or to disadvantage broadcast stations that are attempting to make the transition to digital broadcasting. But Congress addressed this problem in § 614(b)(4)(B): The Commission's authority under § 614(b)(4)(B) surely includes the power to issue regulations to prevent such discrimination if the Commission views such regulation as "necessary to ensure" the carriage of digital signals. The Commission could, for example, establish a preference order to cabin the discretion of cable operators that are over the one-third cap as they choose which broadcast signals will receive carriage. Accordingly, nothing in § 614(b)(5) suggests that Congress did not expect mandatory carriage of digital and analog signals during the transition.[165]

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obligations under sections 614, for example, because it already has carried enough local broadcast stations to fill one-third of its channel capacity").

[165] Relying in part on § 614(b)(5), NCTA and Time Warner suggest that the "duplication" contemplated by mandatory carriage during the transition is somehow at odds with Congress' goals in enacting must carry, particularly because carriage of a digital and analog signal does not, in their view, advance Congress' interest in ensuring program diversity for viewers of free over-the-air television. As we note later on, mandatory carriage *does* advance this interest. *See supra* Section II.A. Moreover, in enacting § 614(b)(5) and the rest of the 1992 Act, Congress did not condemn all duplication for all purposes. In particular, Congress' decision in § 614(b)(5) to preclude

c. Section 624(f)(1)

The cable companies also place extensive reliance on § 624(f)(1), which among other things, prevents a federal agency from imposing requirements regarding the provision of cable services, "except as expressly provided in this title."[166] But § 624(f)(1) provides no support for the cable companies' position because § 614(b)(1)(B) provides for mandatory carriage *expressly*. Just as § 614(b)(1)(B) forecloses any argument that § 624(f)(1) precludes mandatory carriage of *analog* signals, § 614(b)(1)(B) -- which draws no distinction between digital signals and analog signals -- similarly forecloses any argument that § 624(f)(1) precludes mandatory carriage of digital signals, during the transition or at any other time.[167]

d. Section 614(b)(3)

Reaching deeper into their statutory grab bag for provisions to override § 614(b)(1)(B)'s unambiguous command, the cable companies next argue that § 614(b)(3)(A) precludes mandatory carriage under the transition. This argument is meritless. Section 614(b)(3)(A) requires cable operators to carry

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mandatory carriage when duplication would serve none of the important interests identified by Congress cannot plausibly be read to preclude duplication when duplication would serve a number of important interests, including the facilitation of a rapid transition to digital and a correspondingly rapid return of the analog spectrum.

[166] § 624(f)(1) *See, e.g.*, MediaOne Comments at 35; NCTA Comments at 7.

[167] In addition, as we have shown, § 614(b)(4)(B) confirms Congress' understanding that both digital and analog signals would be subject to mandatory carriage obligations: § 614(b)(4)(B) expressly authorizes the Commission to change mandatory carriage requirements to "ensure" carriage

the primary video transmissions of broadcast stations. It does not state -- as the cable operators seem unwilling to acknowledge -- that a cable operator shall carry "*only*" the primary video transmission.[168] Accordingly, § 614(b)(3)(A) sets only a floor on what the cable operators must carry; it does not by its terms set a ceiling that caps or otherwise limits the carriage obligations of cable operators. A provision that requires cable operators to carry certain broadcaster's signals (or elements of those signals) cannot be interpreted as a license to exclude signals not discussed in that provision, and it certainly cannot override carriage obligations set forth explicitly elsewhere in the statute.

Moreover, the cable companies' reliance on the purported irreconcilability of dual mandatory carriage with § 614(b)(3)(A) ignores the FCC's authority under § 614(b)(4)(B) to "establish any changes in the signal carriage requirements" that are "necessary to ensure cable carriage" of digital signals. The scope of the Commission's authority in § 614(b)(4)(B) is undoubtedly sufficiently broad to make clear -- if indeed such clarification is necessary -- that "primary video," at least during the transition, encompasses both the digital and the analog signals.

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of digital signals. Thus, § 614(b)(4)(B) provides an additional measure of express authority sufficient to defeat any argument under § 624(f)(1).

[168] The only transmissions that § 614(b)(3)(A) explicitly gives cable operators the discretion to exclude are those that involve "nonprogram-related material." Neither the principal broadcast analog signal nor the principal broadcast digital signal can plausibly be described as "nonprogram-related material," and thus this exception provides the cable companies no support.

e. Section 614(b)(7)

The cable companies also suggest that § 614(b)(7) demonstrates that the Commission lacks authority to require carriage of digital signals during the transition. But § 614(b)(7) was intended to prevent cable operators from avoiding their must carry obligations by creating obstacles or unnecessary expenses that would as a practical matter substantially reduce the benefits of mandatory carriage. It prevented cable operators from, for example, scrambling broadcast signals so that cable viewers could not view those signals without additional equipment. It would be an ironic and inappropriate distortion of congressional intent for the Commission to take a provision designed to prevent cable operators from undermining mandatory carriage and use it to reduce cable operators' otherwise unambiguous statutory mandatory carriage obligations.

In any event, any changes to § 614(b)(7) necessary to harmonize its requirements with the mandatory carriage of analog and digital signals clearly come within the FCC's authority under § 614(b)(4)(B) to "establish any changes in the signal carriage requirements" that are "necessary to ensure cable carriage" of digital signals, and thus § 614(b)(7) is no barrier to mandatory carriage during the transition.

f. The 1997 Balanced Budget Act

Finally, the cable companies suggest that the 1997 Balanced Budget Act "serves to confirm" the Commission's lack of jurisdiction to impose must

carry requirements during the transition.[169] But, as the cable companies concede, "[t]here is simply nothing in the text of the 1997 Balanced Budget Act that even addresses the Commission's jurisdiction over digital must-carry during the transition."[170]

The cable companies discuss the 1997 Balanced Budget Act, nevertheless, in an attempt to extract the proposition that the 1992 Act cannot be read to impose must carry during the transition.[171] A few of the points made by the cable companies merit brief comment.

First, the cable companies suggest that 47 U.S.C. § 309(j)(14)(B)(iii)(I) confirms that Congress expected that there would be no must carry in the transition because that provision includes the phrase "that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market."[172] In the cable companies' view, the inclusion of the quoted phrase would be "mere surplusage" if Congress had intended for there to be mandatory carriage of

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[169] Time Warner Comments at 42. NCTA and Time Warner also discuss briefly the Telecommunications Act of 1996. They do so, however, for no substantive purpose other then to state the obvious and undisputed proposition that the 1996 Act did not explicitly impose mandatory carriage obligations during the transition. *See* NCTA Comments at 9; Time Warner Comments at 41-42. Again, because those obligations were set out in § 614(b)(1)(B), the absence of any reimposition of those obligations in the 1996 Act is not even surprising, much less significant. Moreover, as we showed in our initial comments, the 1996 Act actually supports the view that the 1992 Act extended must carry rights to digital signals. *See* Jenner Statement at 8-9.

[170] Time Warner Comments at 42.

[171] *See, e.g.*, Time Warner Comments at 42-47; NCTA Comments at 18-20.

digital signals during the transition.[173] But that argument is incorrect. As Congress recognized, cable systems over the one-third cap would not necessarily carry a digital channel of *each* station broadcasting digital signals in the market. Accordingly, there is no merit to the suggestion that the phrase in § 309(j)(14)(B)(iii)(I) would be superfluous if the 1992 Act is read to require mandatory carriage during the transition.

Next, the cable companies attempt to draw support from the fact that the broadcasters must surrender their analog signals even if there is *no* cable carriage as long as 85% of the households in a given area have at least one digital TV set or one analog TV set with a digital-to-analog converter. In the cable companies' view, these provisions show that:

> Congress clearly recognized that the successful transition of broadcast television from analog to DTV can be measured by the ability of viewers to receive DTV broadcasts off-the-air, without any assistance from cable systems; and Congress never considered that mandatory cable carriage of transitional DTV signals was necessary to accomplish this transition.[174]

But this statement is a non sequitur. That the success of the transition can be *measured* by the ability of viewers to receive digital signals without the help of cable has nothing to do with whether mandatory carriage over cable systems is necessary to effect or accelerate that transition in the first place. Indeed, as we indicated in our initial comments, mandatory carriage ensures broadcasters the necessary audience to enable to them to

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[172] Time Warner Comments at 44 (internal quotation omitted).
[173] *Id.* at 45.

invest with confidence in digital technology, thereby ensuring that there will be sufficient digital programming to encourage consumers to purchase digital television sets, facilitating a rapid transition.[175] Without mandatory carriage, that transition will surely be delayed and may well fail. Thus, the fact that Congress, in structuring the transition to digital television, chose reasonably to measure the success of the transition in terms of digital set penetration is irrelevant to whether Congress believed must carry to be necessary to effect that transition, particularly since Congress established cable carriage as the basis for the other test.[176]

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[174] Time Warner Comments at 45.

[175] *See* Jenner Statement at 16-17, 24.

[176] The cable companies also point to the legislative history of the 1997 Act. *See* Time Warner Comments at 43; A&E Comments at 28. Nothing in that legislative history is at all inconsistent with the view that the 1992 Act requires mandatory carriage of both analog and digital signals during the transition. In the instant proceeding, the FCC is defining the precise scope of the must carry obligations during the transition within the bounds set by the 1992 Act. That is no more and no less than Congress expected and expressed in the legislative history. In any event, to the extent that there is any inconsistency between the obligations imposed by the 1992 Act and the legislative history of the 1997 Balanced Budget Act (or, for that matter, the legislative history of the 1996 Telecommunications Act; *see* Time Warner Comments at 39-40; A&E Comments at 27), the statutory language controls. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992) (rejecting interpretation of statute found in legislative history from a subsequent Congress and noting that "inferences from legislative history cannot rest on so slender a reed. Moreover, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (internal quotation omitted); *Wright v. West*, 505 U.S. 277, 295 n.9 (1992) ("We have grave doubts that post-1996 legislative history is of any value in construing [a statute last amended in 1966], for we have often observed that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (citation omitted).

B. The First Amendment Concerns Articulated By the Cable Companies Provide No Justification for Ignoring the Clear Statutory Command.

The cable companies seek to bolster their miscellaneous statutory arguments with the suggestion that imposition of mandatory carriage of digital and analog signals during the transition would violate the First Amendment. As we show, however, mandatory carriage during the transition is constitutional under the Supreme Court's decisions in the *Turner* cases, and thus the Commission may not rely on First Amendment concerns to justify a refusal to require carriage of digital signals during the transition.

1. Mandatory Carriage Of Both Digital And Analog Signals During the Transition Serves Precisely the Same Interests Identified by the Court in the *Turner* Cases in Precisely the Same Way.

The cable companies' primary argument is that the important government interests that the Supreme Court found sufficient to sustain the must carry obligations in *Turner II* are somehow inapposite to digital must carry, particularly during the transition. In particular, they focus on the government's interest in "provid[ing] over-the-air viewers who lack cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate,"[177] and argue that must carry during

[177] NCTA Comments at 25 (quoting *Turner II*, 117 S. Ct. 1174, 1204 (1997) (Breyer, J., concurring) (emphasis in original).

the transition will not advance that interest because "[t]he continued presence of the analog must carry rule means that not a single broadcaster will lose its voice over the air from lack of cable carriage."[178]

That argument is meritless. In fact, the government's interest in ensuring the availability of free over-the-air television -- an important government interest identified and accepted by the Court as sufficient to uphold the constitutionality of the must carry rules in *Turner II* -- is served directly by the requirement that cable operators carry both digital and analog signals during the transition.

The mechanism is straightforward. There is no dispute that the expenses involved for broadcasters in making the transition to digital broadcasting are substantial. Broadcasters are being required to expend $16 billion to invest in new equipment, [179] with additional millions of dollars expected to be spent to develop digital programming. The problem that broadcasters face is that, in the absence of dual mandatory carriage, there is little if any prospect of recovering this initial investment during the transition because they will be denied access to the vast majority of digital viewers, *i.e.*, cable viewers. This problem will be particularly acute in the early years of the transition because, as the cable companies themselves concede, the initial purchasers of digital television sets are likely to be

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[178] NCTA Comments at 25; *see also* TCI Comments at 9; Time Warner Comments at 20-21; MediaOne Comments at 38.

consumers who receive their television signals through cable.[180] In the absence of must carry, therefore, broadcasters will have virtually *no* audience for their digital signals. Consequently, advertisers will have little incentive to advertise on the new digital broadcast channels, and broadcast stations will receive little or no revenue from their digital broadcast signals. Broadcasters will thus find themselves in financial trouble, jeopardizing the free over-the-air programming that Congress sought to preserve.

Moreover, as more and more consumers purchase digital televisions, advertising dollars will increasingly shift to the new digital channels, particularly since the initial owners of digital receivers will be wealthier consumers that advertisers covet. Because these wealthier consumers will be disproportionately cable viewers, as the transition to digital proceeds, advertisers will pour an increasing proportion of their limited advertising dollars into digital programs and cable viewers. Broadcasters whose digital signals are excluded from cable carriage, with their resulting small share of the digital audience, will see a sharp reduction in their overall advertising revenues.

As this process develops, some broadcasters will find themselves in an increasingly precarious position. With decreasing advertising revenues and little prospect of obtaining carriage on cable systems in the absence of

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[179] This works out to approximately $8-10 million per station, excluding the substantial costs of operating two broadcast facilities.
[180] *See* NCTA Comments at 26; Time Warner Comments at 7.

mandatory carriage, many broadcasters will be unable to recover their enormous investments in digital facilities, and the financial health of some broadcasters will undoubtedly suffer. Congress' fear, which the Court found reasonable in *Turner II*, will come to pass: "significant numbers of broadcast stations will be refused carriage on cable systems, and those broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether."[181] The absence of must carry thus "will result in a weakening of the over-the-air television industry and a reduction in competition,"[182] and "the role of local television broadcasting in our system of communications will steadily decline."[183]

In light of this, it is simply implausible to suggest (as the cable companies do) that "[t]here is no reason to believe that . . . the absence of [mandatory carriage during transition] will have any effect on the quality of the analog channels available to non-cable subscribers."[184] In fact, the absence of must carry will have the same impact in the same way that Congress described in 1992 and that the Court in the *Turner* cases upheld: Without mandatory carriage, many cable operators will be unwilling to carry the digital signals of many broadcast stations; the broadcasters whose digital signals are not carried will be unable to reach broad sections of the audience desired by advertisers; and the lack of audience and the accompanying

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[181] *Turner II*, 117 S. Ct. at 1187 (internal quotations and citation omitted).
[182] H. R. Rep. No. 102-628, at 51 (1992), *cited in Turner II*, 117 S. Ct. at 1187.
[183] S. Rep. No. 102-92, at 62 (1991), *cited in Turner II*, 117 S. Ct. at 1187.

decline in advertising revenues will result in financial distress for some broadcasters with a corresponding reduction in the availability of free over-the-air television for all viewers.[185] It is the *Turner* cases all over again.[186]

For this reason, there is no merit to the suggestion that digital must carry during the transition fails to advance the interests that Congress and the Court identified in the *Turner* cases because digital must carry will benefit only the strongest broadcast stations[187] and the "very richest

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[184] NCTA Comments at 25.

[185] *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 647 (1994) ("*Turner I*") ("By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue . . . to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming.").

[186] If broadcasters have the option to return their analog spectrum early, the absence of must carry may well harm the interests of viewers who receive free over-the-air television in yet another way. Under the scheme proposed by cable operators, broadcasters would receive mandatory carriage for their digital signals only after the broadcaster had "exchanged" its analog signal for its digital signal. But if that were correct, once the size of the digital cable audience became sufficiently large, a broadcaster with a digital and an analog signal would face a difficult dilemma. The broadcaster could continue to broadcast two signals, foregoing the possibility of receiving a substantial portion of the lucrative digital advertising revenues. Or, it could return its analog signal, take advantage of its digital must carry rights to make itself eligible for digital advertising dollars, and abandon its free over-the-air viewers who cannot receive digital signals. It seems certain that the economics will drive at least some broadcast stations to elect the latter option long before the vast bulk of the "cableless" viewers have purchased digital television sets, thereby frustrating the principal goals of Congress: the preservation of free over-the-air television for all viewers.

[187] *See* A&E Comments at 23.

viewers."[188] First, it is the broadcast stations in the smaller markets and the stations who are the weakest financially that are likely to benefit the most from must carry during the transition, in part because the stronger stations are more likely to use retransmission consent, and in part because the weaker stations are the ones who will feel most strongly the bottom-line impact of adding substantial digital expenses without corresponding digital revenues. Second, although it is the wealthiest consumers that will be able to see the digital broadcast signals on their cable packages as a result of must carry, it is the poorest customers who will benefit the most because of the preservation of free over-the-air television. Indeed, it is exactly the same mechanism that Congress and the Court understood in the *Turner* cases. That is, it was only the wealthier customers -- those who could afford cable -- who could see the stations carried as a result of must carry. Nonetheless, the Court and Congress recognized that by ensuring carriage of broadcasters on cable, must carry helped to maintain the financial health of broadcasters and thus preserved the benefits of free over-the-air television for those who could not afford cable.[189] In the same way, digital must carry during the transition, by ensuring broadcasters' access to the vast cable audience, ensures the financial health of broadcasters and enables them to maintain the free over-the-air service for those that need it.

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[188] A& E Comments at 22. *See also* Time Warner Comments at 7.
[189] *See Turner I*, 512 U.S. at 647.