

Excuse Number 14:

DTV Must Carry During the Transition Would Be Unconstitutional Because No Substantial Government Interest Has Been Articulated in Support of Such Rules.

Cable interests conveniently neglect to notice any substantial government interest which would be served by DTV must carry rules during the transition. A&E states that, “[T]he interests underlying possible carriage requirements for digital broadcast signals have not been well articulated, nor have they been adopted by Congress.”⁹⁰ The same government interests which justify analog must carry rules justify DTV must carry rules, including must carry rules during the transition.⁹¹ Those interests were articulated by Congress in enacting section 614, which requires carriage DTV as well as analog signals.⁹² How could anyone argue seriously that interests such as preserving the benefits of local broadcasting and preserving public access to multiple sources of information (especially to noncable homes) suddenly are irrelevant when signals are transmitted in a digital format? Is fair competition to be of no interest once television programming flows to viewers’ homes via digital rather than analog signals? To conclude that Congress had the same basic interests at heart in seeking to assure cable carriage of DTV signals involves no stretch of mind or imagination. What does strain credulity is the implicit notion that these interests are unstated and irrelevant with respect to DTV during the transition, but somehow will emerge resplendent to justify DTV must carry *post*-transition. Cable interests, therefore, have chosen to block out the obvious symmetry of interests to be served by DTV, as well as analog must carry requirements.

⁹⁰A&E Comments at 15.

⁹¹ALTV Comments at 23 *et seq.*

⁹²See ALTV Comments at 7-13.

Excuse Number 15:

DTV Must Carry During the Transition Would Be Unconstitutional Because the Substantial Government Interests Justifying Analog Must Carry Fail to Justify -- and, Indeed, May Be Compromised by -- DTV Must Carry During the Transition.

Cable interests attempt without success to show that DTV must carry rules during the transition enjoy none of the justifications of the analog must carry rules. Indeed, they suggest that DTV must carry actually might undermine achievement of the goals which justify analog must carry rules. As Time Warner asserts:

Digital must carry rules are not needed to preserve the system of free, over-the-air broadcasting, to ensure a multiplicity of sources of video programming, or to promote fair competition among providers of video programming.⁹³

Time Warner goes on to say that these policy justifications differ from those which support analog must carry and may even thwart some of those analog goals.⁹⁴

Time Warner is wrong. First, the public (and especially non-cable subscribers, who generally are thought of as among the less affluent) has a vital and continuing interest in free, over-the-air broadcast service. This interest is no less substantial just because signals are transmitted in a digital format. Whether the actual signal is a digital signal or an analog signal, it is part of the system of local television stations which Congress sought to preserve via must carry requirements. The heart of the system is hundreds of local television stations which ultimately will offer free, universally available broadcast service exclusively in digital form. Each of those stations will contribute to the welfare of its community and enhance the diversity of services available. To those viewers with only off-air service, local television stations' DTV service will be especially valuable -- just as analog broadcast service is enormously valuable to them today.

⁹³Time Warner Cable Comments at 22.

⁹⁴Time Warner Cable Comments at 22.

Second, those interests hardly may be placed on the shelf until the transition ends. DTV must carry during the transition is essential to fulfill Congress's goals. If only a few select local television stations' DTV signals are carried during the transition -- a predictable event in the absence of DTV must carry during the transition --, then the benefits and diversity of broadcast DTV service *post*-transition will be circumscribed. New DTV facilities with no cable carriage, like their analog predecessors in the absence of must carry, will falter and fail. Some may be aborted before reaching the air.⁹⁵ Thus, DTV must carry rules *during the transition* will function to preserve the benefits of local broadcast service and the diversity of video programming available *post*-transition.

Fourth, the requirement that the largest stations in the largest markets commence DTV broadcasting more expeditiously than smaller stations and stations in smaller markets in no way undermines the purpose of the rules to protect the viability and vitality of more marginal stations.⁹⁶ *All* existing stations must commence DTV operations or forfeit their DTV frequency.⁹⁷ The Commission has provided additional time to smaller stations and small market stations in recognition of their lesser ability to shoulder the costs of constructing new DTV studio and transmission facilities.⁹⁸ As the Commission also has recognized, these are the very sorts of

⁹⁵Haring, John, Strategic Policy Research, *The Economic Case for Digital Broadcast Carriage Requirements*, (October 13, 1998) at 11-16 [hereinafter cited as *Economic Case*], attached to ALTV Comments.

⁹⁶See Time Warner Cable Comments at 23.

⁹⁷*Fifth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 12808 (1997), at ¶70 [hereinafter cited as *Fifth Report and Order*].

⁹⁸*Fifth Report and Order* at ¶78.

station which will depend on DTV must carry rules for their survival in the digital world.⁹⁹ Therefore, drawing the focus of inquiry only to the front-end of the transition, as cable interests attempt to do, ignores that the interests of all stations -- and all consumers -- would be affected by the absence of DTV must carry rules during the transition.

Discovery, tacking differently in the same wind, argues baselessly that “protecting noncable households from loss of regular television broadcasting service” could not be a proper justification for DTV must carry rules during the transition .¹⁰⁰ It contends that “loss of regular television broadcasting service” is not an issue because local television stations’ analog must carry rights will remain intact.¹⁰¹ Discovery errs, however, in equating “regular” with “analog.” the Court in *Turner I* and *Turner II* meant “regular” in contradistinction to “cable” television. It made no distinction between analog and digital television. Discovery’s argument is, thus, off base.

Discovery, lastly, argues blindly that DTV must carry rules during the transition find no justification in the goal of promoting fair competition.¹⁰² Analog must carry, they say, is enough. Moreover, no basis exists for placing such a heavy burden on cable operators, cable networks, and consumers in order to favor a few local television stations.¹⁰³ Initially, ALTV observes that, as note above and below, the burden is vastly overstated by cable interests. ALTV then simply asks

⁹⁹*Notice* at ¶33.

¹⁰⁰Discovery Comments at 16.

¹⁰¹Discovery Comments at 16.

¹⁰²Discovery Comments at 17.

¹⁰³Discovery Comments at 17.

whether using a monopoly position to deny a competitor access to two-thirds of its potential audience falls within even the most lax definition of fair competition?

Moreover, analog must carry does nothing to assure that local television stations' DTV signals are available to viewers. No less than in the case of analog signals, a local television station's DTV signal can be competitive only if it is carried on local cable systems.¹⁰⁴ Otherwise, it is denied access to a majority of its potential audience. If it is so denied the *opportunity* to compete against cable's digital programming and the DTV signals of its own local broadcast competitors, it will suffer a critical competitive disadvantage. Competition as a whole will suffer. Fair competition will not exist. Thus, cable systems' interdiction of the DTV signals of local television stations is anathema *vis-a-vis* the Congressional interest in promoting fair competition.

Finally, as set forth more fully below, the obvious lack of history for DTV signal carriage in no way undercuts the sound and well-supported prediction that cable operators will treat local television stations' DTV signals no better than they treated their analog signals in the absence of must carry. DTV must carry rules during the transition will promote fair competition. Indeed, in their absence, fair competition will remain the impossible dream.

Therefore, in the absence of DTV must carry rules during the transition, Congress's intention to foster full and fair competition will remain just that, an intention, but one frustrated and unfulfilled.

Bellsouth Corporation wrongly discounts the goal of preserving free television because DTV allegedly is "'free' only in the loosest sense of the word."¹⁰⁵ The sole basis for this allegation

¹⁰⁴Particularly for smaller stations, DTV signals cannot be loss leaders indefinitely; ultimately, they will stand or fall on their own. In the absence of access to the two-thirds of their audiences available only via DTV must carry rules during the transition, the latter is the more likely result.

¹⁰⁵Comments of Bellsouth Corporation *et al.*, CS Docket No. 98-120 (filed October 13, 1998) at [hereinafter cited as "BellSouth Comments"].

is the initial high cost of DTV sets. Such arguments are a tribute to the desperation of some cable operators -- and cable wanna-be's -- to shirk any responsibility for the successful transition of all of television from analog to digital, but nothing more. The cost of sets never has been a relevant consideration in differentiating free television from pay or subscription television. Indeed, it is of no moment. Regardless of how consumers receive television signals, they must have a set to view it on. Furthermore, in a few short years, the price of digital sets will come down. Meanwhile, many viewers with less impatience and smaller pocketbooks will make do with DTV-to-analog converters, which will cost far less than DTV receivers. More to the point, in the absence of DTV must carry rules during the transition, those viewers who choose to remain noncable subscribers will have a leaner menu of choices on free broadcast DTV. Their interest in a more robust variety of *free* television options is precisely the interest advanced by DTV must carry rules during the transition. Thus, Bellsouth is well wide of the mark in attempting to discount the "free" in free broadcast television.

The Office of Communications of the United Church of Christ *et al.* ("UCC *et al.*") and Ameritech New Media in similar vein submit that stations will retain their core advertising bases during the transition, again, because the analog must carry rules will assure their carriage.¹⁰⁶ This contention fails to comprehend the likely scenario during the transition. As more consumers acquire DTV receivers and/or converters, the bulk of the television audience will migrate from analog to digital television. It hardly is as if all viewers will be watching only analog through 2006, then shift instantaneously to DTV on January 1, 2007. Thus, the significance of the analog audience (and concomitantly, analog must carry) will diminish, while the significance of the digital audience (and DTV must carry) will grow. Local television stations which cannot build their digital audiences will be left behind and ultimately left out.

¹⁰⁶Comments of UCC, *et al.*, CS Docket No. 98-120 (filed October 13, 1998) at 10 [hereinafter cited as "UCC Comments"]; Ameritech Comments at 14-15.

Ameritech and UCC *et al.* add cavalierly that broadcasters are making enough money anyway.¹⁰⁷ Some are. Others are not. As illustrated in Table One, below, at least one quarter of the nation's stations operate at or below the fringe of profitability. Among ALTV's member stations, not all Fox affiliates in the lower 25th percentile operated at a profit in 1997; none of the affiliates of UPN and WB and none of the independents in the lower 25th percentile operated profitably. These, of course, are the stations for which must carry remains essential. These are stations which also are required to construct and operate new DTV facilities at their own expense. Thus, UCC *et al.*'s claim that "the financial conditions which justify analog must carry are not the same during the transition, even for the smaller stations that will not receive retransmission consent" is fanciful, indeed, wishful thinking.

Table One
Lower 25%ile • 1997 • All Stations

<u>Affiliation</u>	<u>Net Revenue</u>	<u>Pre-Tax Profits</u>	<u>Profit Margin</u>
ABC	\$5,782,003.00	\$80,911.00	1.4%
CBS	\$5,850,992.00	\$42,180.00	0.7%
Fox	\$4,306,143.00	\$27,907.00	0.6%
NBC	\$5,870,325.00	\$393,136.00	6.7%
UPN	\$2,543,646.00	(\$424,570.00)	-16.7%
WB	\$3,085,436.00	(\$1,331,907.00)	-43.2%
Independent	\$2,451,508.00	(\$228,336.00)	-9.3%

Source: 1998 NAB/BCFM Television Financial Report

¹⁰⁷UCC Comments at 10; Ameritech Comments at 14.

Likewise, Ameritech's assertion that no station would be in jeopardy because the broadcast television industry has thrived in recent years exemplifies false generalization. Many stations do operate at the margin and hardly may be expected to subsidize their DTV operations through the entire transition period. Only DTV must carry rules during the transition will assure that their DTV signals are available to all DTV viewers and enable them to become self-sustaining as quickly as possible.

Finally, NCTA claims that non-cable subscribers actually would suffer if DTV must carry rules during the transition accelerated the transition. NCTA reasons that a viewer who cannot afford cable also cannot afford a DTV receiver or converter. Thus, NCTA urges, the substantial government interest in maintaining free broadcast television service would be compromised rather than advanced by DTV must carry rules during the transition.¹⁰⁸ The faulty premise of this argument is the assumption that DTV receivers and converters will remain expensive. As in the case of every other video and digital device which has entered the marketplace, the prices for these new devices are expected to fall dramatically. As the end of the transition approaches, consumers likely will be replacing their analog receivers in due course with DTV receivers at prices no less daunting than what they might have paid for an analog set. Furthermore, as hard as it may be for NCTA to comprehend, some consumers may be perfectly satisfied with just broadcast television service. Particularly if local television stations provide multiple program services, they will be viewed as closer substitutes for cable service. Therefore, NCTA's new found concern for non-cable subscribers fails to produce a sound basis for discounting the need to preserve off-air DTV choices for non-cable subscribers.

Discovery also makes the absurd claim that DTV must carry rules during the transition would reduce local television stations' incentives to "invest in improved transmitters and broadcast

¹⁰⁸NCTA Comments at 26.

technology.”¹⁰⁹ Local television stations are not going to write off the 30-40% of their audience which continues to rely on off-air reception.¹¹⁰ ALTV, for example, pushed the Commission to permit UHF stations to move quickly to improve their DTV facilities to more closely approach the reach of their VHF competitors’ DTV signals.¹¹¹ Discovery’s position, born of an understandable ignorance of broadcasting, is, therefore, untenable.

Excuse Number 16:

DTV Must Carry During the Transition Would Be Unconstitutional Because the Substantial Government Interest in Preserving the Existing Structure of Broadcast Television Has Eroded.

Ameritech questions whether the unique benefits of broadcast television remain “sufficiently tangible, demonstrable and assured to justify cable carriage.”¹¹² Ameritech suggests that “as cable operators increasingly create local public affairs programming, little if anything remains that makes broadcast television unique.”¹¹³ This approach to the issue is flawed. First, it

¹⁰⁹Discovery Comments at 29.

¹¹⁰Cable interests assert that DBS subscribers continue to rely on off-air reception for access to local television stations. However, as recently stated by the Satellite Broadcasting and Communications Association, “[M]any potential satellite subscribers may not have antennas at all, because they are often disaffected cable subscribers who had their rooftop antennas removed when they subscribed to cable.” Comments of the Satellite Broadcasting and Communications Association, CS Docket No. 98-201 (filed December 11, 1998) at 20, n.52.

¹¹¹ Notably, ALTV was confident even then that the Commission would adopt DTV must carry rules during the transition as per the statute. However, as ALTV has often emphasized, cable carriage is not the panacea *vis-a-vis* resolving the competitive disparity between UHF and VHF stations. Petition for Reconsideration, MM Docket No. 87-268 (filed June 11, 1997, by ALTV).

¹¹²Ameritech Comments at 17.

¹¹³Ameritech Comments at 17.

focuses on program content. Must carry rules, however, are considered content neutral.¹¹⁴ What the must carry rules protect is a *system* of broadcasting consisting of a dispersed array of *local* television stations throughout the nation, which provide a service that is free and universally available.¹¹⁵ Cable television -- or, indeed, any other video medium -- is decidedly *not* free. Cable television, like other MVPDs, is *not* universally available. Furthermore, most communities are served by *multiple, competitive* local television stations, which provide a diversity cable, typically as a *monopoly* provider, cannot equal. Second, local television stations -- unlike cable systems -- remain subject to an obligation to operate in the public interest.¹¹⁶ Third, ALTV finds it ironic that cable interests would tout their local news channels, when they oppose must carry in order to carry more *national* cable networks and apparently are prepared to jettison the purportedly ultimate public affairs channel, C-SPAN, at the drop of a hat.¹¹⁷

Lastly, in this regard, despite the basic irrelevance of program content, ALTV must observe that cable news channels are creatures of a few large markets. Broadcast news and public affairs are found alive and well in all markets from New York to Glendive. Therefore, contrary to the assertions of Ameritech and others, this nations system of local broadcasting, which will undergo no change, save for the shift to a digital transmission standard, in the transition to DTV remains immensely valuable and demonstrably deserving of the protection to be provided by DTV must carry rules during the transition.

¹¹⁴*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994).

¹¹⁵*Turner II*, 1997 LEXIS 2078, *23-25.

¹¹⁶*Turner II*, 1997 LEXIS 2078, *

¹¹⁷Comments of the C-SPAN Networks, CS Docket No. 98-120 (filed October 13, 1998) at 5 [hereinafter cited as "C-SPAN Comments"].

Excuse Number 17:

DTV Must Carry During the Transition Would Be Unconstitutional Because the Substantial Government Interest in Preserving a Diversity of Programming from Multiple Sources Would Be Disserved by DTV Must Carry Rules During the Transition.

Discovery and Ameritech argue in meritless fashion that the second government interest cited by the Court in *Turner II* -- “widespread dissemination of information from a multiplicity of sources” -- is inapplicable.¹¹⁸ First, Discovery states that protecting local television stations’ DTV as well as analog signals would do nothing to enhance source diversity.¹¹⁹ This view is horribly short-sighted. It implicitly assumes that local television stations will maintain their analog and DTV facilities forever, which, of course, they will not. In the long run, the absence of DTV must carry rules during the transition would imperil the viability of DTV stations denied carriage on local cable systems. Only the stations carried by cable would have had even the opportunity to survive. The failure of even a few stations would reduce the multiplicity of sources available to all viewers once the transition ends.

Notably, the end of the transition is subject to no delay directly based on the number of surviving stations. Maintenance of the proverbial rump broadcasting service referenced in *Turner II* might well be sufficient to promote DTV set and converter sales sufficient to satisfy the criteria established by Congress for terminating the transition. Thus, a significant number of smaller stations may be sacrificed, thereby reducing substantially the multiplicity of services available to noncable subscribers. Cable subscribers also would suffer this loss of diversity, but the loss of two or three among 50 to 100 program channels is small beer compared to the loss of two or three

¹¹⁸Discovery Comments at 16; Ameritech Comments at 16.

¹¹⁹Discovery Comments at 16.

of six or seven local television stations. The government interest in diversity, therefore, is very heavily implicated in the decision whether to adopt DTV must carry rules during the transition.

Second, Discovery alleges that diversity would be impeded by DTV must carry rules during the transition because such rules could require cable operators to carry twice as many signals.¹²⁰ First, of course, this is far too simplistic. As will be described below in considerable detail, the marginal impact of DTV must carry rules during the transition will verge on the *de minimis*. No double burden is likely to befall any cable system. Thus, the effect of DTV must carry rules during the transition on the diversity of program services offered by cable systems is likely to be negligible. Second, ALTV wonders how the same cable industry which lusts after cable operators' editorial freedom can suggest that they contribute to diversity, especially with respect to multiple sources. If cable systems are little more than conduits for programming from other sources, why guard their editorial discretion so jealously? If they are content controllers, then how is what they provide diversity? Has not everything they carry passed through the same filter? Such musing may be no more than a worthy aside, but ALTV must admit some chagrin that cable interests long have been able to exploit having it both ways!

Picking up on the same theme, NCTA claims that analog must carry will preserve all local television stations' voices.¹²¹ Ameritech similarly posits that "because both [analog and digital] signals would be subject to the same editorial control, they would represent the same viewpoint..."¹²² The purpose of the transition, however, is to wean viewers from analog broadcasting. Ultimately, that analog voice will be muted forever. If the digital voice of that local

¹²⁰Discovery Comments at 16-17.

¹²¹NCTA Comments at 25.

¹²²Ameritech Comments at 16.

television station has been muted from the outset because cable operators were permitted to determine which broadcast voices were to be heard and which were not, then the voices of local television stations hardly will have been preserved. Only DTV must carry rules during the transition will assure that the voices of all local television stations continue to be heard in the upcoming digital millennium.

Excuse Number 18:

DTV Must Carry During the Transition Would Be Unconstitutional Because Promoting an Expeditious Transition to DTV Is Not a Substantial Government Interest.

Cable interests float the preposterous notion that promoting an expeditious transition to DTV cannot be considered a substantial government interest justifying DTV must carry rules during the transition.¹²³ Far too much is at stake. First, the government has a substantial interest in return of local television stations' analog spectrum. Only after the transition is complete can this occur. Only after the spectrum is returned can it be auctioned. Congress set a deadline for return of spectrum by the end of 2006 precisely in recognition of this interest.¹²⁴ More is involved than revenue for the government, which even Time Warner admits is substantial.¹²⁵ The liberation of this substantial amount of spectrum will provide the opportunity for development of new

¹²³Time Warner Cable Comments at 5-6.

¹²⁴As stated in the Conference Report:

Section 3003 of the conference agreement adds a new section 309(j)(14)(A) to the Communications Act to *require* the Commission to reclaim the 6 MHz each broadcaster now uses for transmission of analog television service signals by no later than December 31, 2006.

1997 Conf. Rep., *supra*.

¹²⁵Time Warner Cable Comments at 6, n.7.

communications services, including more local television stations.¹²⁶ These are substantial government interests

Nonetheless, Time Warner insists that cable and DBS can carry off the transition to DTV, thereby negating any government interest in assuring consumer access to the DTV signals of local television stations as a means of expediting the transition.¹²⁷ This epitomizes wishful thinking in two salient respects. First, Time Warner undoubtedly would love to see consumers be weaned from analog *broadcasting* to digital *cable*. Denying or delaying carriage of local television stations' DTV signals would play an important role in making Time Warner's wish come true. Moreover, it confirms that cable operators will have even greater incentives to deny carriage to local television stations' DTV signals than they did with respect to their analog signals.¹²⁸ Second, one must be dubious of cable's ability to add sufficient impetus to the transition via their own digital offerings. Broadcast programming remains the most popular programming on cable systems. Little reason exists to suggest that this will not continue to be the case in the digital era. Furthermore, many cable systems have placed their digital programming on a separate digital tier for which they make an additional charge to their subscribers. This only compounds the reduced potential inherent in a medium which leaves 30 to 40 per cent of consumers unserved. Thus, assuring carriage of local

¹²⁶These newly available channels will provide an opportunity for new entrants into television broadcasting in a manner unprecedented in recent years.

¹²⁷Time Warner Cable Comments at 6.

¹²⁸Time Warner offers the additional insight that "no one could argue that consumers will refrain from purchasing digital TV sets unless every local digital broadcast signal is carried on cable." Time Warner Cable Comments at 7, n.8. Again, this buttresses the prediction that cable operators will carry some, but not all local television stations' DTV signals, just as it did in the case of analog signals. More to the point, it evades the issue of how many local television stations's DTV signals must be carried to stimulate demand for DTV sets sufficiently to conclude the transition on a timely basis.

television stations' DTV signals via DTV must carry rules during the transition likely will remain essential to a prompt completion of the transition period.

Excuse Number 19:

DTV Must Carry During the Transition Would Be Unconstitutional Because No Record or Evidence Exists to Demonstrate the Need for DTV Must Carry Rules During the Transition.

Cable interests join in a resounding chorus acclaiming the lack of record evidence to support a conclusion that DTV must carry rules during the transition are necessary to remedy a genuine harm.¹²⁹ As deafening as their piercing vibrato may be, it really is just so much noise.

First, their logic would demand that the government stand idly by until a predictable harm occurs. One might envision the government taking no action in preparation for the impending impact of a comet on the earth because no harm will occur until the comet actually hits. The Court hardly has countenanced such an approach, even in the case of cable television regulation. Thus, in *United States v. Southwestern Cable Co.*, 392 U. S. 157, 176-177 (1968), the Court upheld the Commission's initial regulation of cable television carriage of broadcast signals, stating:

The Commission acknowledged that it could not predict with certainty the consequences of unregulated CATV, but reasoned that its statutory responsibilities demand that it "plan in advance of foreseeable events, instead of waiting to react to them."

Here the Commission again must refuse to await the all too predictable repeat of events surrounding carriage of local television stations' analog signals. This position draws further support from *Turner II*. Therein the Court was no less insistent that Congress could act prophylactically:

A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it. "An industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly." *Turner*, supra, at 672 (STEVENS, J., concurring in

¹²⁹See, e.g., Time Warner Cable Comments at 15, 22; Discovery Comments at 18, 36; C-SPAN Comments at 10; NCTA Comments at 22-23.

part and concurring in judgment). As a Senate Committee noted in a Report on the Cable Act, "we need not wait until widespread further harm has occurred to the system of local broadcasting or to competition in the video market before taking action to forestall such consequences. Congress is allowed to make a rational predication of the consequences of inaction and of the effects of regulation in furthering governmental interests." Senate Report, at 60.¹³⁰

Therefore, the Commission has no obligation to await the occurrence of what is eminently predictable (*i.e.*, the failure of cable systems to carry significant numbers of local stations' DTV signals, the resultant weak performance, if not demise of those stations' DTV services, and a sluggish transition).

Second, the prediction that cable operators will refuse to carry the DTV signals of a significant number of local stations is rational and well-supported given the history of noncarriage of analog signals in the absence of must carry. It demonstrates in no uncertain terms that, left to their own devices, cable operators will pursue their own economic interests. If nothing else, the haste with which they apparently will drop C-SPAN clearly suggests that economic motivations will dominate carriage decisions. They certainly have no interest in preserving free, broadcast service, especially to non-cable subscribers.¹³¹ Thus, as in the case of analog television, every reason exists to predict that cable systems will carry those DTV signals which they believe will contribute to their profitability. Other local television stations' DTV signals simply will not be carried.¹³²

Third, the record already includes evidence of harm to the efforts of local television stations to commence DTV service. For example, licensees are complaining that lack of certainty about

¹³⁰*Turner II*, 1997 LEXIS 2078, *58.

¹³¹*See Economic Case, supra*, at 6.

¹³²*See* UPN Affiliates Comments at 3.

carriage is hampering their ability to finance their new DTV facilities.¹³³ As observed by the Station Representatives Association:

Markets hate uncertainty. Uncertainty about whether viewers will have access to the digital signals of their local stations will discourage advertiser support of the new digital services, deter programmers, *scare off investors*, and spook consumers who might otherwise buy sets to receive new digital services.¹³⁴

The prediction of noncarriage is further supported by cable interests, who readily reveal the economic incentives of cable operators to maximize revenue per megahertz of capacity and the importance of advertising dollars to cable networks.¹³⁵ The cable industry's uncompromising attitude on the issue of DTV must carry rules during the transition, perhaps, best reveals its deep-seated antagonism towards carrying all local stations' DTV signals. History *is* destined to repeat itself. The Commission hardly need pretend otherwise.

Excuse Number 20:

DTV Must Carry During the Transition Will Be Unnecessary Because Local Television Stations' DTV Signals Will Be Carried Voluntarily.

Cable interests myopically call DTV must carry rules during the transition unnecessary because "retransmission consent and private negotiation will be the vehicle by which the

¹³³See, e.g., Pappas Comments at 23-24; Comments on Notice of Proposed Rule Making, CS Docket No. 98-120 (filed October 13, 1998, by The Pikes Peak Broadcasting Company *et al.*) at 6 [hereinafter cited as "Pikes Peak Comments"]; Chris-Craft Comments at 3.

¹³⁴Comments of the Station Representatives Association, CS Docket No. 98-120 (filed October 13, 1998) at 4 [emphasis supplied][hereinafter cited as "SRA Comments"]. The looming menace of uncertainty also answers those like Microsoft and UCC *et al.*, who argue that adoption of DTV must carry rules during the transition would be premature. Comments of Microsoft Corporation, CS Docket No. 98-120 (filed October 13, 1998) at 10 [hereinafter cited as "Microsoft's Words"]; UCC Comments at 3 *et seq.* Prematurity arguments also illustrate the danger of looking at the trees instead of the forest. When all is said and done, the absence of DTV must carry rules during the transition will leave many stations with DTV signals unavailable to the bulk of their potential audiences.

¹³⁵Discovery Comments at 7-8; Comments of America's Health Network *et al.*, CS Docket No. 98-120 (filed October 13, 1998) at 16[hereinafter cited as "AHH Comments"].

overwhelming majority of broadcasters will obtain cable carriage for their digital signals.”¹³⁶ Time Warner in a similarly self-serving fashion expresses its confidence in resolution of carriage issues via “private negotiations between cable operators and broadcasters.”¹³⁷ Such confidence in voluntary carriage agreements is not shared by many local television stations, as the record plainly demonstrates. In the words of one station owner:

Many of Pappas’s stations operate in the UHF band and are either not affiliated with a network of affiliated with one of the newer or emerging networks, such as Fox Broadcasting Company, The WB, or the United Paramount Network. Lacking the leverage of longer-established VHF stations that enjoy affiliations with the Big Three, all but one of Pappas’s stations have uniformly been forced to opt for must-carry. Given those facts, and the likelihood that they will persist through at least the next three-year election cycle, retransmission consent offers Pappas and those similarly situated no realistic alternative to must carry for both analog and DTV signals.¹³⁸

This sentiment is shared by UPN affiliates:

The cable industry has made it clear in its opposition to the imposition of DTV must-carry that it will not carry **all** Of the DTV signals available in a market unless required to do so. That is particularly true with regard to affiliates of the new networks and independent television stations....[T]he greater the diversity of UPN affiliate programming and the more defined is the niche programming broadcast by UPN affiliates and independent stations, the less likely cable systems are to voluntarily carry such stations.¹³⁹

Local television stations in smaller markets are no less dubious of voluntary carriage agreements:

An ironic twist to the proposal to use [retransmission consent] negotiations to obtain DTV carriage is that the only stations that will be able to do so are the ones that are less likely to have trouble obtaining DTV carriage: namely, major market affiliates of the major national networks on cable systems close to their city of

¹³⁶Discovery Comments at 31.

¹³⁷Time Warner Cable Comments at 10-11.

¹³⁸Pappas Comments at 22.

¹³⁹UPN Affiliate Comments at 3.

license. This excludes many of the stations Congress was concerned about in enacting must carry, including the small independent stations.¹⁴⁰

Indeed, as ALTV already has shown, negotiations appear to involve large market affiliates, not the margined stations which bring little bargaining power to the table.¹⁴¹ Therefore, retransmission consent agreements will not be a viable vehicle for voluntary carriage of the DTV signals of many local television stations.¹⁴²

Excuse Number 21:

DTV Must Carry Rules During the Transition Would Be Unconstitutional Because They Would Double the Number of Signals Cable Systems Would Be Required to Carry, Thereby Imposing an Undue Burden on Cable Operator's Editorial Prerogatives.

Just as they did in response to efforts to impose analog must carry rules, cable interests do everything but pound their shoes on the table in protest against the supposedly enormous burden DTV must carry rules would impose during the transition. They claim that the must carry burden

¹⁴⁰Pikes Peak Comments at 10; *see also* Comments of Retlaw Enterprises, Inc., CS Docket No. 98-120 (filed October 13, 1998) at 3 [hereinafter cited as "Retlaw Comments"].

¹⁴¹ALTV Comments at 46-47.

¹⁴²In any event, leaving DTV carriage to marketplace negotiations is an illusion, as so aptly noted by the Station Representatives Association:

Nor should the Commission leave these issues to the marketplace or to private party negotiations. With the compulsory license that allows cable to retransmit broadcast signals, retransmission consent and various other regulations derived from Section 307(b), this is not, and never has been, an unregulated marketplace.

SRA Comments at 4.

would double -- *at least*.¹⁴³ They envision the “sacrifice” of a “staggering number of existing cable networks.”¹⁴⁴

Their claims, however, fail to withstand analysis, just as they crumbled under judicial review of the analog must carry rules.¹⁴⁵ The true burden of DTV must carry rules during the transition will be very modest. Cable interests argue that DTV must carry rules during the transition would more than double the burden of analog must carry and then some.¹⁴⁶ The “double the burden” argument at least enjoys a superficial plausibility. If a system is carrying X number of local television stations under analog must carry, then DTV must carry rules during the transition logically might be expected to require the system to carry 2X number of must carry stations. The implicit assumption, of course, is that local television stations electing must carry for their analog signals will elect must carry for their DTV signals. Cable interests, however, do not stop there. They claim that the burden would more than double because cable operators currently carry no digital signals.¹⁴⁷ The implicit assumption there is that more stations will elect must carry for their DTV signals than now elect must carry for their analog signals. Thus, for example, a cable system carrying the analog signals of six local television stations, four via retransmission consent and two under must carry, might end up carrying the DTV signals of three local stations under must carry and three via retransmission consent. Its two station analog must carry burden would more than

¹⁴³*See, e.g.*, NCTA Comments at 30; Discovery Comments at 20-21.

¹⁴⁴A&E Comments at 41.

¹⁴⁵*Turner II*, 1997 LEXIS 2078, *62-64.

¹⁴⁶NCTA Comments at 30.

¹⁴⁷NCTA Comments at 30.

double from two analog signals to five signals (two analog and three digital) under an analog plus digital must carry rule. This, however, is the high point of the analysis from cable's perspective.

From there, it begins to dissemble. First, a double burden turns out to be *de minimis*. The number of analog signals added pursuant to must carry has been minuscule, usurping a mere 1.18 per cent of active cable channels.¹⁴⁸ Assuming no increase in the number of cable channels (an absurd assumption), doubling the must carry burden still would divert little more than two per cent of active cable channels to must carry signals. In other words, twice *de minimis* still is *de minimis*.

Second, the burden hardly is likely to exceed twice *de minimis*. No reason at all exists to believe that stations which now secure carriage for their analog signals will not gain carriage of their DTV signals on the same basis. Indeed, as shown above, the cable industry itself insists that "retransmission consent and private negotiation will be the vehicle by which the overwhelming majority of broadcasters will obtain cable carriage for their digital signals."¹⁴⁹ Therefore, the constitutionally negligible number of must carry signals may double, but no basis exists for arguing that the burden would be any greater.

Third, whereas cable interests may grouse that they have no excess capacity to carry local television stations's DTV signals and point to the burden they assume in carrying additional non-must carry DTV signals, this is a burden they assume voluntarily. It is of no constitutional

¹⁴⁸As the Court found in *Turner II*, 1997 LEXIS 2078, *61, *63:

Appellees note that only 1.18 percent of the approximately 500,000 cable channels nationwide is devoted to channels added because of must-carry....

It is undisputed that broadcast stations gained carriage on 5,880 channels as a result of must-carry.

¹⁴⁹Discovery Comments at 31.

moment.¹⁵⁰ Moreover, displaced cable networks have no cause to complain about infringement of their rights when a cable operator determines that carriage of a local television stations' DTV signal better serves the cable operator's interests.

Fourth, the very marginal increase in must carry demands will occur gradually over time and will be accompanied by increases in cable channel capacity.¹⁵¹ Indeed, if, as cable interests state, negotiations involving the large market stations first required to commence DTV transmissions are "constructive and promising," carriage of local television stations' DTV signals pursuant to a must carry requirement may be years away.¹⁵²

Fifth, none of this takes into account the considerably greater capacity of digital transmission. Cable interests are willing to let the Commission assume that the margin for decision will take place in a world of six megaHertz television channels. Local television stations' analog signals will occupy six megaHertz of bandwidth, their DTV signals another six, for a total of twelve megaHertz. At the same time, cable networks will continue to occupy the same six megaHertz of bandwidth. MegaHertz do add up quickly at that rate. However, in a digital

¹⁵⁰As the Court observed in *Turner II*, 1997 LEXIS 2078, *63[citations omitted]:

While broadcast stations occupy another 30,006 cable channels nationwide, this carriage does not represent a significant First Amendment harm to either system operators or cable programmers because those stations were carried voluntarily before 1992, and even appellants represent that the vast majority of those channels would continue to be carried in the absence of any legal obligation to do so.

¹⁵¹*See, e.g.*, Comments of the Consumer Electronics Manufacturers Association, CS Docket No. 98-120 (filed October 13, 1998) at 16-17 [hereinafter cited as "CEMA Comments"].

¹⁵²Discovery Comments at 31.

environment the arithmetic changes dramatically.¹⁵³ The analog signals of both local television stations and cable networks may be converted to digital -- just like the DBS operators do! Six megaHertz now becomes a multilane path, capable of transmitting six or more up-converted analog signals. Even assuming a more modest 4:1 capacity ratio, those 12 local stations' analog signals now occupy 18 megaHertz of bandwidth. At the same time, the 60 cable networks now occupy 90 megaHertz of bandwidth. Thus, using 108 megaHertz or 18 six-megaHertz channels, a digital cable system (or the digital portion of a hybrid system) may provide 72 channels of converted analog broadcast and cable network programming. ALTV dares suggest this would leave a staggering amount of capacity on any reasonably sized cable system for pure digital programming, including local television stations' DTV signals. For example, a 750 MHz system (approximately 120 six-megaHertz channels) would retain a hundred six-megaHertz channels for digital or other uses. Even then, local television stations' DTV signals would not occupy six megaHertz, even during HDTV transmissions.¹⁵⁴ Two HDTV broadcast signals can be carried in six megaHertz.¹⁵⁵

¹⁵³The cable industry hardly is dragging its feet into the digital era. General Instruments, for example, reports installing "over 600 digital headend systems for cable operators throughout the United States." Comments of General Instruments Corporation, CS Docket No. 98-120 (filed October 13, 1998) at 2 [hereinafter cited as "GI Comments"].

¹⁵⁴Cable systems may elect to use QAM modulation, thereby "increasing the efficient use of cable spectrum and reducing the possibility that other cable services will have to be dropped to make room for the new digital broadcast services." Comments of MediaOne Group, Inc., CS Docket No. 98-120 (filed October 13, 1998) at 12 [hereinafter cited as "MediaOne Comments"]. As MediaOne further asserts:

[A]ny RF modulation format conversion from VSB to QAM is totally transparent to broadcasters' underlying video content (including transmission of enhanced program information, such as baseball scores). The conversion from VSB to QAM causes no degradation of broadcast video quality, rather, the same digital signal quality which broadcasters deliver to the cable headend will be received by cable subscribers with digital television receivers."

MediaOne Comments at 12.

¹⁵⁵See Comments of the Consumer Electronics Manufacturers Association, CS Docket No. 98-120 (filed October 13, 1998) at 17 [hereinafter cited as "CEMA Comments"].

Thus, of those 100 remaining channels, the 12 local television stations' DTV signals in HDTV format would account for only six. On a 450 MHz system (approximately 54 channels), 36 six-megaHertz channels would remain available for digital. Again, the 12 local television stations' DTV signals would account for six channels, leaving 30 for the cable operator.¹⁵⁶ Again, only those stations securing carriage of their DTV signals via must carry are pertinent to the analysis. Therefore, the "burden" of DTV must carry rules during the transition would be but a tiny and fading blip on the constitutional radar screen.

Sixth, even analog systems with substantial capacity would have no significant difficulty carrying the DTV signals of a few additional local television stations. Again, the marginal effect of DTV must carry rules during the transition would consist only of the DTV signals of the few stations which cable systems otherwise would not carry. Cable systems by their own admission -- even insistence -- will be carrying the DTV signals of most local television stations. Thus, they will be choosing freely to carry such signals with complete awareness and acceptance of the effect on carriage of other program channels. In other words, whatever cable networks they may elect to drop in order to carry voluntarily the signals of most local television stations' DTV signals, those drops may not be laid at the feet of DTV must carry rules during the transition! Only the few signals not otherwise carried may be considered in assessing the impact of the rules on cable operators' constitutional rights.

Seventh, contrary to some cable interests' assertions, even pure analog cable systems would *not* be required to provide additional converters or set-top boxes for subscribers in order to carry the DTV signals of local television stations.¹⁵⁷ Broadcasters' DTV signals may be passed

¹⁵⁶Subject, of course, to PEG requirements, etc.

¹⁵⁷*E.g.*, NCTA Comments at 32.

through the cable system intact and fed directly to the subscribers DTV receiver. As CEMA points out:

The digital broadcast signal can be retransmitted without alteration on an analog cable system within an existing 6 MHz channel. At the consumer's television set the signal either could be bypassed through the cable box without change and connected to the DTV input jack on the receiver, or the cable can be directly connected to the DTV jack and the television set tuned to the appropriate channel. All functions of the digital signal will be processed to the full capability of the television set.¹⁵⁸

As long as the receiver is capable of demodulating and processing off-air DTV signals, it also would be capable of demodulating, processing, and displaying the DTV signal "passed through" by the cable system. Consequently, very little would be required of an analog cable system to pass through local television stations' DTV signals.¹⁵⁹

Thus, cable interests' penchant for exaggeration of the impact of must carry rules stands revealed yet again. The Commission must not be cowered by cable interests' incessant wailing about capacity constraints. They are just noise, discordant with the facts and served up only to distract the Commission from the very marginal impact of DTV must carry rules during the transition.

¹⁵⁸CEMA Comments at 21-22; *see also, e.g.*, Comments of Harris Corporation, CS Docket No. 98-120 (filed October 13, 1998) at 8 [hereinafter cited as "Harris Comments"]. As CEMA emphasizes:

While cable operators for their own reasons may wish to manipulate the digital signal and process, remodulate, or demodulate it within their systems, including in cable set-top boxes, such cable processing is purely for the benefit of the cable operator.

CEMA Comments at 13.

¹⁵⁹ALTV reiterates that it has proposed rules which would impose DTV must carry rules during the transition only on cable systems which (1) voluntarily upgrade their facilities to digital (in whole or in part) or (2) have substantial analog capacity. No system would be forced to upgrade. No analog system would be required to provide boxes to downconvert local television stations DTV signals, provided the signal was pass through intact in its off-air transmission format. *See* ALTV Comments at 22.

Excuse Number 22:

Cable System Upgrades Provide No Basis for Burdening Cable Systems with the DTV Signals of Local Television Stations.

Cable interests argue that system upgrades and channel capacity increases are immaterial *vis-a-vis* DTV must carry rules during the transition.¹⁶⁰ They allege first that cable systems upgrade their plants to accommodate new cable services (including cable networks, pay channels, pay-per-view, digital music, data, and telephone service).¹⁶¹ Such posturing neglects that cable interests also insist that they will carry most local television stations' DTV signals in the absence of must carry. One may conclude, then, that the new services for which systems are upgraded includes the DTV signals of local television stations. Indeed, because local television stations, unlike cable systems, are *required* to initiate DTV service, they likely will provide more DTV programming more quickly than cable networks and, at least, will provide some of the most popular DTV programming early in the transition. As cable systems did in the sixties and seventies, they will use broadcast programming to prime the interest of cable subscribers. The bulk of broadcast DTV signals carried will fall into the same category of program services as new cable networks, *i.e.*, new, highly attractive services desired by consumers. Therefore, they are very much part of the equation in cable systems' impetus to upgrade their systems and/or expand channel capacity.

Furthermore, cable interests engage in doublespeak in complaining that local television stations' DTV signals would be duplicative services "that can only be received by a handful of high-income consumers with expensive digital TVs."¹⁶² Will the digital versions of new cable

¹⁶⁰See, *e.g.*, MediaOne Comments at 23.

¹⁶¹MediaOne Comments at 23.

¹⁶²MediaOne Comments at 24.

networks be any different? Only the purported handful of consumers with DTV sets will be able to see them. ALTV wonders why this is such a great concern if the signal is provided by a local television station, but of no apparent moment if the signal is provided by a cable network.

Finally, as so eloquently noted by Circuit City Stores, Inc.:

Significant investment in digital cable technologies began years ago and continues to accelerate each year, calling into question any claim that the cost of carriage will be too burdensome if imposed on cable operators alone. Indeed, the ongoing transformation of cable systems into digital systems should assure that the incremental costs of ensuring that those systems can carry digital broadcast television remain low.¹⁶³

Ultimately, therefore, cable interests' suggestion that the Commission ignore new cable system upgrades and expanded capacity is easily exposed as grossly self-serving and untenable.

Excuse Number 23:

DTV Must Carry Rules During the Transition Would Disserve the Public Interest Because Some Really Good Programming on Cable Networks Would Be Supplanted by the DTV Signals of Local Television Stations.

Cable networks go to great lengths in some cases to remind the Commission that they offer consumers some really wonderful programming and bemoan its potential displacement by the DTV signals of local television stations.¹⁶⁴ ALTV has nothing but praise for the expansive variety of programming provided by cable networks, but with due respect, arguments rooted in program

¹⁶³Comments of Circuit City Stores, Inc., CS Docket No. 98-120 (filed October 13, 1998) at 14[hereinafter cited as "Circuit City Comments"].

¹⁶⁴*See, e.g.*, America's Health Network Comments at 5 *et seq.*; A&E Comments at 6 *et seq.*

content are out-of-place in this proceeding.¹⁶⁵ The issue hardly is which local television station or cable network provides the “best” programming. This is a matter for consumer choice. Programming should succeed or fail based on consumer response. The issue here is whether a monopoly gatekeeper, cable television, should be able to prevent consumers from viewing programming offered by its strongest competitor, local television stations. This has nothing to do with program content and everything to do with competition and consumer choice. The issue here is whether a system of local broadcast stations, engendered now twice in tables of television channel allocations, is to be preserved or left open to selective (or even wholesale) destruction via cable interdiction of local television stations’ analog and now DTV signals. Again, this has nothing to do with whose program is better, but everything to do with maintaining and transitioning a unique national treasure, free, universally available over-the-air broadcast television!

Therefore, let the applause ring out, the meters count households, and couch potatoes graze, but save one’s having to decide who had the best show in this proceeding! It simply does not matter here.

¹⁶⁵Broadcast interests, of course, can afford to be generous in their praise of other media’s programming. After all, local television stations almost invariably continue to draw audience shares considerably larger than any cable network’s share. For example, during the week of November 23-29, the top rated cable program, *NFL Regular Season* on ESPN, drew a 7.9 rating, would not have made it into the top 30 broadcast programs for the week. *ER*, the 36th ranked broadcast program for the week drew an 8.0 rating. *Broadcasting & Cable* (December 7, 1998) at 34, 64.

Excuse Number 24

DTV Must Carry Rules During the Transition Would Disserve the Public Interest Because Consumers Always Can Use A-B Switches to Gain Access to the DTV Signals of Local Television Stations.

Salvation, thy name is “A-B.”¹⁶⁶ So say cable operators.¹⁶⁷ They know better. They know that all the A-B switches on earth, no matter how reliable, how sophisticated, or how easy to use, are worthless without something to connect to the “A” input.¹⁶⁸ What they fail to mention is that they have systematically (as it were) removed millions of household antennas in the course of installing cable television in the majority of the nation’s television households.¹⁶⁹ Now, they reason, anyone who pays \$10,000 for a digital receiver (1) really wants to see digital pictures and (2) can afford an antenna.¹⁷⁰ This miscasts the issue. First, focusing exclusively on the “early adapters” who will pay handsomely for their DTV receivers is myopic. The subsequent rounds of DTV purchasers will not be early adapters with seemingly limitless discretionary income. They will pay less for sets; they may just purchase relatively inexpensive converter boxes. An antenna and

¹⁶⁶Not to be confused with “CDs” or the apostle “EF.” For those who missed the acclaimed film by Robert Duvall, *The Apostle*: The Duvall character took upon himself the name “the Apostle EF,” derived from his full name, “Euliss F.”

¹⁶⁷*See, e.g.*, A&E Comments at 39-40; Discovery Comments at 25 *et seq.*; Time Warner Cable Comments at 8.

¹⁶⁸ALTV would more readily appropriate the “A” for antenna input for broadcasters, but “B” for broadcaster would be quite alright, too. To avoid confusion, the reference to the “A” input herein means the input for the consumer’s antenna, assuming, of course, the consumer still has one.

¹⁶⁹As observed by Sony Electronics, Inc., “the real issue is not A-B switches, but rather antennas.” Sony Comments at 9.

¹⁷⁰Discovery Comments at 27-28.

installation will be a significant expense at the margin -- and this ignores the effect on household appearance. Thus, the "\$10,000 set crowd" is not the issue.

Second, the cost-benefit analysis for them is not whether to pay for the capability to see all local television stations off-the-air. The issue is how much they are willing to pay for access to the handful of local television stations not carried by their cable system. Again, cable claims that it will carry most stations. Thus, the antenna cost must be commensurate with the value of not all local stations' DTV signals, but with the value of the few, uncarried stations.

Third, even pre-installed remote controlled A-B switches will not provide convenient access to off-air signals. Their grazing rights, so to speak, will be circumscribed. Consumers will be required to exit their cable service to receive off-air signals. They will lose access to channels via the program guide, menu, or other navigational device employed by the cable operator. This involves more than inconvenience to the subscriber who must toggle back and forth between cable and off-air channels. Local television stations refused cable carriage will suffer a palpable disadvantage *vis-a-vis* their local station competitors. They will not be grazing fodder on the cable menu.

Thus, the utility of the A-B switch has improved, but it remains no panacea. At best, A-B switches are a very distant second-best to cable carriage and still promise to place the emphasis on futility rather than utility.

Excuse Number 25:

DTV Must Carry Rules During the Transition Would Disserve the Public Interest Because Consumers Will See Blank Screens on Analog Sets When Tuned to a Channel Carrying a DTV Signal.

In weighing the costs and benefits of DTV must carry rules during the transition, cable operators urge the Commission to consider that viewers without digital sets will gain nothing but

blank screens from carriage of the DTV signals of local television stations.¹⁷¹ The strength of such arguments quickly withers when one moves beyond the self-serving perspective of cable interests. First, the same may be said of every cable channel provided in digital format to analog sets. Indeed, cable systems today allocate channels to digital service which cannot be viewed by subscribers who elect not to pay extra for digital set top boxes.¹⁷² This does not seem to trouble them. Second, no less can be said about DTV signals provided over-the-air. If a viewer has no digital set or converter, that viewer's screen will be blank, too. Third, the whole point of the transition is to end the era of empty screens. No better way exists to promote DTV receiver sales and speed the transition than to assure that the two-thirds of the audience which subscribe to cable television have access to all the DTV broadcasting provided by stations in their communities. Therefore, ALTV respectfully suggests that cable interests' argument about blank screens themselves draw a blank.

Excuse Number 26:

DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Local Television Stations' DTV Signals Will Provide Duplicate Programming.

Cable interests baselessly argue that requiring carriage of local television stations' DTV signals would offer no appreciable public benefit in light of the requisite level of program duplication between local television stations' analog and digital signals.¹⁷³ Cable interests simply ignore that analog and DTV signals, even when they display the same program content, are far from duplicative. A major premise of converting the broadcast television system to digital is the

¹⁷¹E.g., Time Warner Cable Comments at 8.

¹⁷²Any D.C. Cable subscriber who declines to pay for the system's digital tier can confirm this.

¹⁷³E.g., Time Warner Cable Comments at 8.

superior picture and sound quality provided by DTV. Could one rationally suggest that watching Stanley Kubrick's *2001: A Space Odyssey* in a 4x3 NTSC display with even analog stereo sound really duplicates substantially the program experience of this cinema classic in 16x9 1080I HDTV with full digital sound? The same question might be posed about a PBS special on the works of Van Gogh or even a major sporting event telecast. One might answer that the NTSC and DTV experiences were comparable only at risk of questioning the basic premises of converting this nation's system of universally available, free broadcast television from analog to digital.

Excuse Number 27:

DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Only a Few Rich Viewers Will Have Sets Capable of Receiving Local Television Stations' DTV Signals.

Time Warner improperly understates the benefit of DTV must carry, alleging that its only beneficiaries would be the richest viewers, who can afford new DTV receivers, not viewers who can afford only over-the-air reception.¹⁷⁴ The fact that only a few well-off viewers might enjoy these benefits *in the near term* because the price of a DTV receiver initially will be high is irrelevant. It involves a classic attempt to focus on the trees rather than the forest. With a variety of DTV programming available from local television stations, viewers will buy DTV receivers. Some may elect to acquire only DTV-to-analog converters initially. Others may await expected reductions in receiver prices to acquire sets. As the transition progresses, DTV penetration will increase as many more viewers than the rich and famous acquire the ability to receive and convert or view local television stations' DTV signals. At the end of the transition, the vast majority of television viewers will be relying exclusively on local television stations' DTV signals. Congress's goal, therefore, was not to provide special short-term benefits to the rich, but to assure that all viewers, regardless

¹⁷⁴Time Warner Cable Comments at 20.

of economic circumstance, could enjoy the benefits of a diverse array of local DTV broadcast signals.

Excuse Number 28:

DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Local Television Stations' DTV Signals Will Provide Nothing Not Already Available on Cable Systems.

In their typically myopic fashion, cable interests take the "let them eat cake approach" in arguing that broadcasters provide nothing not already available on cable systems. Therefore, they conclude, so what if viewers are denied access to local television stations' DTV signals, they offer nothing unique anymore anyway!¹⁷⁵ ALTV must demur. First, the issue is not program content, but a system or structure of local broadcasting.¹⁷⁶ A side-by-side comparison of program service available on cable versus broadcast television, therefore, misses the point. Second, the critical distinctions between broadcasting and cable television have nothing to do with program content. What most prominently distinguishes broadcast television from cable television stems from broadcasting's free, universally available service. Suffice it to say, cable systems have gained no renown by offering free service or service in far flung areas of low population density.

¹⁷⁵*E.g.*, Ameritech Comments at 17.

¹⁷⁶*Turner II*, 1997 LEXIS 2078, *25 (" In short, Congress enacted must-carry to "preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television.").

Excuse Number 29:

DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Consumers Will Be Unable to View Local Television Stations' DTV Signals on Their Analog Receivers.

Cable interests impertinently complain that DTV signals carried on cable systems would “be received by only a small fraction of the broadcast audience.”¹⁷⁷ The alternative, of course, is depriving 60-70 per cent of the broadcast audience of the opportunity to view local television stations' DTV signals on cable.¹⁷⁸ The Commission's goal is to increase that initial “small fraction” of the audience with DTV sets to a very large fraction as quickly as possible. The absence of DTV must carry rules only will retard, if not stifle, growth in DTV set and converter penetration.¹⁷⁹ Beyond stating the obvious, therefore, cable interests' point about low initial set penetration shows only disdain for the Commission's efforts to promote rapid deployment of DTV sets and converters.

Excuse Number 30:

DTV Must Carry Rules During the Transition Would Fail to Serve the Public Interest Because Local Television Stations' DTV Signals Are Subject to No Specific Public Interest Obligations.

Cable interests and others make much ado about nothing in asserting the lack of specific public interest requirements for DTV facilities.¹⁸⁰ Have they utterly ignored that local television

¹⁷⁷A&E Comments at 33.

¹⁷⁸As noted above, offering such subscribers an A-B switch is a notorious non-solution.

¹⁷⁹ALTV Comments at 29 *et seq.*

¹⁸⁰*E.g.*, UCC Comments at 5.

stations are subject to the same ongoing public interest obligations for their analog and DTV facilities?¹⁸¹ In any event, the debate over DTV must carry rules hardly is the proper forum for quibbling about the public interest obligations of broadcast licensees. The Commission already has considered and may further consider such matters in another phase of this proceeding.¹⁸² Additionally, establishing a direct link between DTV must carry and broadcasters' precise public interest obligations might sabotage DTV must carry via a content-related time bomb. Finally, this argument ignores the sort of broadcast regulation contemplated by the Communications Act and

¹⁸¹*Fifth Report and Order* at ¶¶48-50. As ALTV recently observed:

They already are asked to provide public affairs programming, childrens' programming, and cut-rate political advertising, whether such programming is viewed or popular enough to be profitable. They already are required to build DTV facilities at considerable expense, despite the lack of appreciable audience and enormous uncertainty about the public demand for DTV service.

Comments of ALTV, CS Docket No. 98-201 (filed December 11, 1998) at 7.

¹⁸²*Fifth Report and Order* at ¶50.

tolerated by the First Amendment.¹⁸³ Therefore, the Commission must reject as baseless such notions as more detailed public interest requirements as the “price” of DTV must carry.

Excuse Number 31:

DTV Must Carry Rules During the Transition Would Be Unconstitutional Because They Constitute a Taking of Property Without Due Process of Law.

Cable interests once again decry a supposed taking of their property at the hands of DTV must carry rules.¹⁸⁴ No legal foundation exists for their argument. When all is said and done, cable interests cite no precedent for the jump from a true physical occupation of property to the occupation of bandwidth. They cite *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982); *Bell Atlantic Corp. v. FCC*, 24 F. 3d 1441 (D.C. Cir. 1996); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); and *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th. Cir.

¹⁸³ As recognized by the Court in *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 126 (1972), “Government power over licensees ... is by no means absolute and is *carefully circumscribed by the Act itself*.” The Court much more particularly to the limits of government control over broadcast programming:

Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard.

Id., 412 U.S. at 120. The Court reiterated that a station licensee is “held accountable for the totality of its performance of public interest obligations.” *Id.*, 412 U.S. at 121. Similarly, in *Turner Broadcasting System, Inc., v FCC*, 114 S. Ct. 2445, 2463 (1994), the Court pointed disavowed the notion that the Federal Communications Commission could control content of broadcast programming:

In particular, the FCC’s oversight responsibilities do not grant it the power to ordain any *particular type of programming that must be offered* by broadcast stations; for although “the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.

Thus, those who seek detailed government supervision of local television stations’ programming are destined to a futile quest.

¹⁸⁴NCTA Comments at 33-36; Time Warner Cable Comments at 27.

1978), *aff'd*, 440 U.S. 689 (1979). Each of these cases involved a true physical occupation (*i.e.*, attachment of wires, use of central office space for equipment, pole attachments, and construction of facilities to expand channel capacity, respectively). Each is readily distinguishable from the use of bandwidth. Thus, cable interests seek to stretch the takings clause of the Fifth Amendment well beyond the breaking point.

One need only consider the legal fallout of equating use of bandwidth with a true physical occupation. Any requirement that local television stations broadcast any program material would invoke a taking. This is not to suggest that use of the public spectrum would involve a taking. That is not broadcasters' property. However, like cable systems, every television station transmits audio, video, and radio frequency signals through privately-owned cables in the local station plant. Consequently, cable interests interest in expanding the scope of the takings clause brings to mind visions of cans -- of worms!

Lastly, in this regard, contrary to the assertions of Time Warner, cable operators will not have to purchase and install costly new equipment to pass through the DTV signals of local television stations.¹⁸⁵ Only if systems elect to convert the signal in some way is additional processing equipment required. Even then, the system already will have such equipment employed in the processing and transmission of cable digital channels. Furthermore, the need for additional equipment will derive from the cable operator's decisions concerning modulation and other processing elements, not from the requirement to provide a signal viewable of subscribers' DTV receivers.¹⁸⁶

Therefore, the Commission should leave the taking argument right where cable left it in the analog must carry litigation -- on the cutting room floor.

¹⁸⁵Time Warner Cable Comments at 28, n. 28.

¹⁸⁶CEMA Comments at 13; Zenith Comments at 3.

Excuse Number 32:

DTV Must Carry Rules During the Transition At Least Should Not Apply to Home Shopping/Infomercial Stations Because They Provide Only an Ancillary DTV Service and Carry Little or No Locally Originated Programming.

UCC *et al.* continue their effort to consign home shopping/infomercial stations to steerage (and even deny them the lifeboat of must carry).¹⁸⁷ They make two arguments, neither of which has merit. First, they define such stations as providing ancillary services ineligible for must carry under 47 USC §336(b)(3). The Commission already has laid this argument to rest. It expressly stated that such services are not feeable as ancillary DTV services.¹⁸⁸ Second, they contend that must carry cannot be justified because home shopping/infomercial stations provide too little of the type of programming they like, locally-originated and locally-oriented programming.¹⁸⁹ Did somebody say program content? As a justification for must carry? Not in this proceeding!

Moreover, the Commission should remind itself how the analog must carry rules affected home shopping and infomercial stations. It made them go away... PaxTV, the seventh broadcast television network, exists today because infomercial stations were accorded must carry under the 1992 Cable Act.¹⁹⁰ The same can be said of USA Television's CitiCaster format now in Miami and soon in a city near you. Stations which had stared death in the eye and hung on for dear life

¹⁸⁷UCC Comments at 16-18.

¹⁸⁸*Report and Order*, MM Docket No. 97-247, FCC 98-303 (released November 19, 1998).

¹⁸⁹Virtually all programming on local television stations is locally-oriented (*i.e.*, selected by the licensee because it is responsive to the local community's demands for programming), otherwise the station soon would fail.

¹⁹⁰See Paxson, Lowell, *Threading the Needle*, Harper Business (New York 1998) at 32-34.

with shopping/infomercial programming gained a new life with must carry. Finally, of course, no less than any other station, these stations must fulfill their basic public interest obligations. They are exempt from no public interest requirement. Likewise, they should not be exempt from must carry protection for their DTV signals.

Excuse Number 33:

DTV Must Carry Rules During the Transition Would Thwart Consumer Choice and Disrupt a Working Marketplace.

As always, cable monopolists (and their allegedly monopolist *confrere*) enlist the Commission's aid in preserving a "marketplace" where private negotiations and consumer choice will assure a sound result.¹⁹¹ This attempt to perpetuate the grand illusion of a true marketplace must fail. Cable systems remain local monopolies. Cable systems have a compulsory license to use broadcast programming. No free marketplace exists. In practical terms, how might consumer demand determine which DTV program offerings are successful if consumers are denied access to some of the local television stations' DTV signals? As so aptly stated by Thomson Consumer Electronics, Inc., "Consumers must be able to make the transition to DTV in a manner that suits their own needs, not those of their cable company." Furthermore, left to their own devices, cable operators will discount completely the needs of noncable subscribers.¹⁹² Noncable subscribers are consumers, too. Therefore, the Commission never must lose sight of the true locus of consumer interests in this proceeding.

¹⁹¹TCI Comments at 16; Time Warner Cable Comments at 11; MicroSoft's Words at 16.

¹⁹²*Economic Case* at 6.

Excuse Number 34:

**DTV Must Carry Rules During the Transition Are Unnecessary
Because They Will Not Assure That Broadcast DTV Is Successful.**

Cable interests discount the significance of DTV must carry rules during the transition because they will not assure the success of any local television stations' DTV service.¹⁹³ This is true, but it miscasts the issue.¹⁹⁴ The issue is not whether must carry will assure the success of broadcast DTV. The issue is whether cable systems can assure the failure of broadcast DTV or, at least, some DTV stations. Must carry rules only assure that local television stations can compete toe-to-toe with other stations and cable programming. If they provide popular programming, they will succeed. If not, they may well fail. If they fail, however, they will fail because they drew insubstantial audiences, not because lack of cable carriage deprived them of access to much of their audience in the first place.

In sum, this veritable cornucopia of excuses rests on a cable mythology which loses all veracity in the harsh glare of truth. ALTV urges the Commission not to be deterred. As laborious and time-consuming as it may be, the Commission must navigate through cable's flack and fulfill its mandate to the margined stations and consumers which will be stung harshly unless the Commission adopts DTV must carry rules during the transition.

¹⁹³See, e.g., Discovery Comments at 19; A&E Comments at 37-38.

¹⁹⁴Oddly enough, Time Warner seems to think that analog must carry rules have secured the viability of broadcast television. Time Warner Cable Comments at 20. ALTV respectfully suggests that a station offering lousy programming will fail even if it maintains access to much of its audience via cable. Must carry makes the programs available to consumers; it hardly makes them watch it.

PART TWO: A FEW OTHER MATTERS WORTHY OF NOTE

- **DTV Must Carry Rules Should Become Effective Immediately**

Some parties have suggested that DTV must carry rules during the transition be phased-in or implemented on a delayed basis in some instances.¹⁹⁵ ALTV opposes a delayed or phased-in approach. As a practical matter, the stations most likely to rely on DTV must carry rules during the transition would be placed at a competitive disadvantage under such proposals. Prior to a delayed effective date, stations which cable systems carry voluntarily would be establishing their digital beachhead. Meanwhile, stations left off the system would be awaiting the effective date of must carry to gain carriage. Once must carry went into effect they would be playing catch-up to their local station competitors, as well as to digital cable network channels. Once again, as independent stations or affiliates of emerging networks, these stations would face a steeper climb to a truly competitive position in their markets. This makes no sense if the Commission truly seeks to promote new networks and expanded high-quality broadcast programming. Therefore, DTV must carry rules during the transition should become effective immediately upon adoption.

- **A Cable System is a Cable System is a Cable System**

BellSouth has sought to insulate cable systems which are overbuilders from any DTV must carry rules by asserting their lack of market power.¹⁹⁶ Such an approach is self-serving and short-sighted. No exemption from the analog must carry rules exists for overbuilders. None should exist

¹⁹⁵See, e.g., Microsoft's Words at 22; Comments of The Association for Maximum Service Television, CS Docket No. 98-120 (filed October 13, 1998) at 53 (re already upgraded cable systems) [hereinafter cited as "AMST Comments"].

¹⁹⁶BellSouth Comments at 3.

from any DTV must carry rules. If overbuilders were exempt from DTV must carry rules, then their success would erode the carriage base of local television stations' DTV signals. Whatever, their market share may be today, ALTV assumes that BellSouth and other overbuilders, which operate as franchised cable systems, are in the business to expand and increase their share of the market.¹⁹⁷ With each new subscriber, their effect on the market increases.¹⁹⁸ Ultimately, they might achieve a market share comparable to the incumbent cable operator. For example, each might serve 35 per cent of the market's television households. No station will be competitive without access to 35 per cent of the households in its market. Therefore, the Commission may not assume that cable overbuilders will have a negligible effect in a market indefinitely. Finally, firms which wish to operate as cable systems should bear the regulatory requirements of cable systems. They entered the market with their eyes open, and it suits them ill to seek special treatment *vis-a-vis* their competitor cable system after the fact.

- **No Bar Should Be Placed on Exclusive DTV Signal Carriage Agreements.**

Several parties maintain that the prohibition on exclusive analog carriage agreements ought be extended to DTV signals.¹⁹⁹ ALTV, however, submits that no rational basis can be found for such a prohibition.²⁰⁰ First, the copyright law reserves to program copyright owners the right to

¹⁹⁷BellSouth might have entered the market as an open video system -- in which case, of course, it would be subject to must carry rules.

¹⁹⁸As they expand their subscriber bases, they are taking customers away from the incumbent cable operator. It hardly is as if consumers are going to maintain subscriptions to two cable systems, which inevitably offer similar arrays of programming.

¹⁹⁹BellSouth Comments at 25-28; Comments, CS Docket No. 98-120 (filed October 13, 1998 by the Wireless Communications Association International, Inc.) at 3 *et seq.* [hereinafter cited as Wireless Comments].

²⁰⁰Indeed, ALTV would question the need for the analog version of the rule, as well.

grant exclusive program exhibition licenses.²⁰¹ Second, exclusive program exhibition agreements are common in the television industry. Third, the Commission has recognized that exclusivity plays a vital role in the distribution and exhibition of television programming.²⁰² Fourth, no basis exists for finding or predicting that exclusive DTV retransmission consent agreements would threaten any valid public interest.²⁰³ Fifth, DTV signals may include multiple program channels. Stations may wish to grant retransmission consent on an exclusive basis for channels, but not others. The extent and competitive effect of any such agreements can be no more than speculation.²⁰⁴ Finally, vertical integration -- the villain lurking in the exclusivity underbrush -- involving local television stations and local cable systems not only is rare, it is prohibited by Commission rule.²⁰⁵ Therefore, every reason exists for the Commission to rein in its prohibition on exclusive retransmission consent arrangements and let the marketplace for DTV signals operate unencumbered unless and until some demonstrable harm occurs.

²⁰¹17 U.S.C. §106

²⁰²*Syndicated Exclusivity*, 64 RR 2d 1818 (1988).

²⁰³BellSouth and The Wireless Communications Association International, Inc., claim that exclusivity agreements have kept MSNBC, FX, Eye on People, the Game Show Network, Home & Garden Television, and TV Land away from cable's competitors. However, all of these networks currently are carried by or soon will be carried by the Dish Network.

²⁰⁴Unlike DTV versus analog must carry, the Commission has no experience with either analog or DTV exclusivity in retransmission agreements, given the current prohibition on such agreements. 47 CFR §76.64(m).

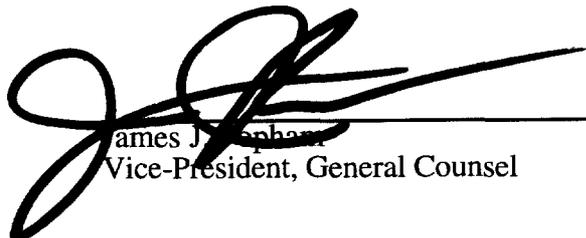
²⁰⁵47 CFR §76.501(a).

CONCLUSION

Cable interests understandably are opposed to DTV must carry rules during the transition. They have an ongoing incentive to carry only a few local DTV signals -- those which they can exploit to advance their own economic interests. Otherwise, they well know that broadcast DTV will be a formidable competitor to cable's fledgling digital programming efforts. If cable interests are successful in halting the imposition of DTV must carry rules, they know they will have the means to reduce or even eliminate broadcast DTV as a meaningful competitor. This would leave the field to cable and utterly decimate free, universally available broadcast television for the digital era. No construction of any statute or interpretation of any legislative history, much less any established public policy objective could support such an outcome.

ALTV, therefore, urges the Commission to let the winds of truth and reason blow away the chaff. None of cable interests' long list of lame excuses can obscure that nothing short of full, immediate must carry for local television stations' DTV signals will accomplish what Congress intended and the public deserves.

Respectfully submitted,



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