



NATIONAL CABLE TELEVISION ASSOCIATION

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November 30, 1999

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Room 8-B201
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CS DOCKET NO. 98-120

Dear Mr. Chairman:

You have received a letter, dated November 9, 1999, from the Association for Maximum Service Television, Inc. ("MSTV"), which purports to "identify and briefly respond to the principal questions" raised in the Commission's pending "digital must carry" rulemaking proceeding. A response is necessary because the letter unfortunately distorts and mischaracterizes the issues, the law, and the facts in that proceeding.

One would hardly guess, from reading MSTV's letter, that the broadcast industry had actually *asked* the government to provide each broadcaster with a second channel of scarce spectrum, in order to provide high-definition television in a format different from traditional analog channels. As MSTV describes it, "the conversion to digital is not a market imperative but a *government required* process that *forces* stations to build new facilities, risk their old advertiser base and forfeit their old business asset less than seven years from now." And, according to MSTV, this government-concocted plan, in order to succeed, has always contemplated a requirement that cable operators carry each broadcaster's new digital channel *in addition to* each analog channel. Thus, according to MSTV, "[i]n both 1992 and 1996, Congress realized that the DTV transition would not succeed without cable's appropriate carriage of digital broadcast stations."

Where, exactly, is the evidence of this supposed Congressional determination? MSTV doesn't say. But one thing is clear: It's not in the statute – which, as NCTA has shown in our comments filed in this proceeding, does *not* require carriage of digital broadcast stations during the transition.

Without quoting the actual language of the statute, MSTV notes that Congress "expressly included a requirement that the Commission *adapt its cable carriage rules to cover advanced television signals*." What Congress required was that the Commission adapt its rules to the extent necessary to ensure the carriage of signals that "*have been changed*" to a new advanced television standard.¹ In other words, the language of the statute shows precisely the opposite of what MSTV suggests. Congress did *not* intend – nor authorize – a double dose of must carry during the transition. Rather, Congress instructed the Commission to adapt its cable carriage rules for the period *after* the analog to digital transition has occurred.

¹ 47 U.S.C. § 534(b)(4)(B).

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Even if the statute were at all ambiguous – and it is not – a dual must carry requirement during the transition would so obviously run afoul of the First Amendment that the Commission would be required to construe the language in a way that avoided such a requirement. MSTV tells the Commission to “ask itself why, if cable carriage rules were necessary and lawful in an analog environment, they would not be even more necessary and just as lawful in a digital environment.” The question, however, is whether requiring carriage of *both* the analog *and* the digital channel of each broadcaster during the transition is necessary and just as lawful as the analog-only requirement upheld by the Supreme Court in 1997. With the assistance of Professor Laurence Tribe, NCTA’s comments explained why it is not.

Although the broadcasters and the government tried to justify the analog rules on the basis of cable operators’ supposed propensity to exclude broadcasters for anticompetitive reasons, a majority of the Court found no basis for this rationale and expressly *rejected* it. The *only* statutory interest that the Court found sufficient to justify the rules was the government’s interest in preserving the availability of a sufficient quantity and quality of broadcast stations for non-cable households that relied on over-the-air reception. A dual must carry obligation during the transition would do nothing to further that interest. Continued carriage of broadcasters’ *analog* channels during the transition ensures the continued availability of existing programming to homes that rely on over-the-air reception.

Indeed, to the extent that a digital must carry requirement were justified on the basis of hastening the return of broadcasters’ analog channels by achieving the statutory 85% penetration rate before a substantial number of households have purchased digital television sets – which seems to be the Congressional Budget Office’s hope – this outcome would *adversely* affect the availability of free television to non-cable households.² It would require non-cable households to purchase digital sets or converters – or to become cable subscribers – in order to continue receiving any television at all. That might allow the government to recover the valuable spectrum that it “loaned” at no charge to broadcasters. But, in so doing, it would disserve the only Court-approved justification for the statutory must carry provisions.

Meanwhile, double must carry would impose far more than a doubled burden on the protected speech of cable operators and program networks. With the analog rules, operators only had to make room for the relatively small number of broadcast stations not being carried. Requiring carriage of each broadcaster’s analog and digital channels during the transition forces cable operators to set aside *additional* channel capacity for *every* broadcast station in their communities. If the burden imposed by the *analog* must carry requirement presented a close call for the Supreme Court, it’s hard to see how the far greater, additive burden of double must carry during the transition could survive First Amendment scrutiny.

MSTV claims that increases in cable channel capacity will make this burden on cable operators from a double carriage obligation “small.” But data show that channel capacity is still tight. Approximately two-thirds of cable subscribers are served by cable systems with no excess channel capacity.³ More program networks are competing for channels than there is capacity to

² MSTV suggests that “facilitating the digital transition” is an additional governmental justification for the must carry requirements of the statute “that didn’t exist in the case of analog.” But the must carry requirements of the statute cannot be justified *post hoc* by government interests other than those identified by Congress in adopting or reenacting the statute. In any event, even subsequent to adoption of the must carry requirements in 1992, Congress has not identified “facilitating the digital transition” as a government interest -- much less a justification for must carry requirements. The legislative history of the Balanced Budget Act makes that clear. See H.R. Rep. No. 105-217, 105th Cong. 1st Sess. 8 (1997).

³ A.C. Nielsen, Cable Online Data Exchange (CODE) database. Data as of October 1999.

carry them. Even in a system that has been upgraded to 750 MHz, there is not unlimited channel capacity. And those upgrades – upgrades for which cable operators have expended \$20 billion over the past three years alone – are being made to provide customers with *new* video and non-video services – services that will generate new revenues to cover the cost of system upgrades.

Just like any other program network, MSTV's member stations can and do compete for cable carriage of their digital signal. Its members have advantages over others – not the least of which is their ability to leverage carriage of their analog stations through retransmission consent negotiations. Surely, MSTV isn't suggesting the government intervene every time a retransmission consent negotiation (a carriage system urged by broadcasters in 1992) doesn't go the broadcaster's way.

Yet that is their claim, that the marketplace will not guarantee double carriage of their stations. It's far too early to judge the success or failure of retransmission consent. Indeed, most broadcasters have not even finalized how they intend to use their additional spectrum.

MSTV also fails to show how digital must carry would help to speed broadcasters' give-back of their spectrum. And it selectively ignores concerns raised by CBO about factors other than cable carriage that *do* affect that transition: whether the DTV technology will work as promised; whether new digital stations will begin broadcasting in the near future; and whether consumer adoption rates will be sufficient to make digital TV pervasive.

What *will* facilitate the transition to digital? The marketplace – *if* broadcasters *and* cable program networks provide digital programming that encourages consumers to purchase digital sets. There are signs that the marketplace is working. As noted in a recent report prepared by Professor Stuart Brotman, some cable operators and broadcast networks already have reached digital retransmission agreements. And, contrary to MSTV's assertion, the affected industries are working together to ensure that compatibility issues are resolved.

In summary, the digital rollout is going more slowly than might have been expected due to a number of factors, some of which lie within the control of the broadcast industry. But nothing in statute or policy placed responsibility for the transition on the cable industry or warrants double must carry during the transition. And the FCC should not interfere with a market process that will more accurately determine the pace of digital TV development than double must carry of lesser watched TV stations.

Respectfully submitted,



Daniel L. Brenner

DLB:smp

cc: The Honorable Harold W. Furchtgott-Roth
The Honorable Susan Ness
The Honorable Michael K. Powell
The Honorable Gloria Tristani
Magalie Salas, Secretary, FCC
Deborah Lathen, Chief, Cable Services Bureau, FCC