AMERICAN PUBLIC TELEVISION STATIONS

ORIGINAL

February 10, 2000

Chairman William E. Kennard
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Harold W. Furchtgott-Roth
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
445 12th Street, SW
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Commissioner Michael K. Powell
Federal Communications Commission
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Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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FEB 10 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CS Docket No. 98-120

Ex Parte Filing

Dear Chairman Kennard and Commissioners Furchtgott-Roth, Ness, Powell and Tristani:

Enclosed please find an Ex Parte Supplemental Memorandum in support of digital carriage regulations specifically tailored to the unique needs and circumstances of public television stations. Should you have any questions or concerns, please do not hesitate to contact us.

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AMERICA'S PUBLIC TELEVISION STATIONS

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

Ex Parte Filing

To: The Commission

SUPPLEMENTAL MEMORANDUM OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, THE PUBLIC BROADCASTING SERVICE AND THE CORPORATION FOR PUBLIC BROADCASTING SUPPORTING DIGITAL CARRIAGE REGULATIONS

The Association of America's Public Television Stations ("APTS"), the Public Broadcasting Service ("PBS") and the Corporation for Public Broadcasting ("CPB") hereby submit a Supplemental Ex Parte Memorandum to the Commission in the above captioned matter. APTS is a nonprofit organization whose members comprise nearly all of the nation's 352 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch, and engages in planning and research activities on behalf of its members. PBS is a nonprofit organization that provides program distribution and other services to public television stations and is a leader in the development of new and improved television technologies. CPB is the private, non-profit corporation authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. Pursuant to its authority,

CPB has provided millions of dollars of grant monies to support the development of public broadcasting stations and programming. In this Supplemental Memorandum, APTS, PBS and CPB urge the Commission to create digital carriage regulations specifically tailored to the unique needs and circumstances of public television stations as soon as possible.

It has come to our attention that the Commission is considering delaying consideration of digital must carry regulations, to allow time to determine whether an industry-driven, market place solution can be found.[1] As explained below, this deregulatory, marketplace strategy is not appropriate for public television and is ill-suited to the broad public interest goal of providing universal access to noncommercial educational services.

APTS, PBS and CPB therefore urge the Commission to create digital carriage regulations specifically tailored to the unique needs and circumstances of public television stations as soon as possible. In addition, APTS, PBS and CPB provide further arguments in two appendices to this Supplemental Memorandum that such regulations would conform to the Commission's statutory authority (see Appendix A) and would survive any potential constitutional challenge (see Appendix B).

A. The Commission Cannot Rely on Marketplace Solutions for Public Television

In recent submissions before the Commission, the cable industry has argued that digital carriage regulations are not necessary because of the alleged success of commercial networks in negotiating retransmission consent agreements with cable

[1] "Cable Seen Favored in Delayed FCC Must Carry Rulemaking," Communications Daily, November 29, 1999.

systems.[2] APTS, PBS and CPB take no position on the alleged success or failure of commercial retransmission consent negotiations. However, the Commission must not ignore the fact that, unlike the law covering commercial stations, the statutes covering public television stations do not include a provision permitting public television stations to withhold their consent to have their signals retransmitted by cable operators.[3] While public television stations, at the Commission's encouragement, are attempting to pursue voluntary digital carriage agreements with cable systems, public television stations are operating at a fundamental disadvantage, as compared to commercial stations. Assuming the compulsory license applies to digital and analog signals alike, cable operators, by virtue of their compulsory copyright license, are free to carry the digital signal of any public television station they choose in any manner they like without public television stations having the statutory right to withhold their digital signals or command the manner of carriage. As a result, there is no free market when it comes to the carriage of noncommercial educational digital signals. Without cable carriage rules, public television stations have little ability to control degradation, placement, or navigation of their signals, much less compel carriage

As explained below, must carry/ retransmission consent and the compulsory copyright license are inextricably interwoven into a single policy fabric. The absence of both must carry and retransmission consent for public television results in imbalanced

[2] For instance, NCTA recently submitted to the Commission an ex parte report by Stuart N. Brotman, which documents retransmission consent agreements involving CBS, Fox and NBS networks. "Priming the Pump: The Role of Retransmission Consent in the Transition to Digital Television," Stuart N. Brotman (October 1999), pp. 5-9. The author predicts that retransmission consent agreements are "likely to cover at least 29.8 million cable subscribers, which represents over 44 percent of total U.S. cable subscribers today." Id. at p.6.

[3] See 47 U.S.C. §325(b)(2) as amended by "Intellectual Property and Communications Omnibus Reform Act of 1999," 106 P.L. 113; 113 Stat. 1501, (Nov. 29, 1999), Sec.1009.

federal policies and makes a marketplace solution much more difficult for public television stations to obtain.

1. Failure to Provide for Must Carry for Public Television Digital Signals Would Skew Current Federal Policy

When cable was still an emerging industry, the government affirmatively decided to support cable's development by letting it retransmit, with virtually no compensation to broadcasters, local, regional and national broadcast programming. Complementing earlier court rulings that cable could carry broadcast signals without seeking the broadcasters' consent,[4] the government essentially forced the cable television industry and the broadcast television industry into what the Commission subsequently termed "a significantly imbalanced 'contract.'"[5] As the Commission recognized and reported to Congress in 1990, "the device for this arrangement was the compulsory copyright license."[6]

Later, when the Commission's must carry regulations were invalidated,[7] the Commission reported to Congress that the imbalance between cable and broadcasters had been "critically exacerbated by the loss of must carry rights,"[8] resulting in an "unfair subsidy" for cable operators.[9] The Commission recommended that Congress

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[4] See TelePrompter Corp v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974).

[5] Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 67 Rad. Reg.2d 1771, 1990 FCC LEXIS 4103, FCC 90-276 (1990), ¶147.

[6] Id. at ¶147.

[7] See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) and Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987).

[8] Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 67 Rad. Reg.2d 1771, 1990 FCC LEXIS 4103, FCC 90-276 (1990), ¶147.

[9] Id. at ¶13.

create a must carry regime "tied to cable's continued enjoyment of the compulsory copyright license."[10] Alternatively, the Commission recommended that Congress eliminate the compulsory license and "provide local broadcast stations a clearly defined right to bargain for compensation for retransmission of their programming."[11]

With regard to public television stations, the Commission recognized that the market forces affecting noncommercial television stations were quite different from those affecting their commercial counterparts and that, because of the difference, mandatory carriage obligations were appropriate.

> The continued viability of noncommercial television (which by its very nature is affected by market forces in different ways than is commercial broadcasting) may depend on targeted mandatory carriage obligations for multichannel video providers.[12]

The Commission stated, further, that the goal of universal access to public television services also required mandatory carriage requirements.

> Because of the unique service provided by noncommercial television stations, and because of the expressed governmental interest in their viability, we believe that all Americans should have access to them. We believe that mandatory carriage of noncommercial television stations would further this important goal.[13]

It therefore recommended that Congress adopt the industry-proposed must carry provisions for noncommercial television stations, by tracking a draft agreement made on March 28, 1990 between the National Association for Public Television Stations and

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[10] Id. at ¶154. See also ¶14 ("Congress should adopt a must carry regime to safeguard local broadcast stations so long as the compulsory copyright license for local broadcast programming exists.").

[11] Id. at ¶162.

[12] Id. at ¶13.

[13] Id. at ¶163.

the National Cable Television Association.[14] This agreement was largely incorporated into the Communications Act by the 1992 Cable Act.

In its 1992 Cable Act, Congress followed the Commission's recommendations and created a regime where the compulsory copyright license was balanced against retransmission consent and must carry. The legislative history of the Act reveals that Congress agreed with the Commission that must carry requirements are intimately related to the compulsory copyright license.

> The Committee strongly supports reinstitution of the must carry requirements. These requirements further the Committees longtime view, reflected in title III of the 1934 Act, that television broadcasting plays a vital role in serving the public interest. The Committee finds that this role is in jeopardy if cable operators can use their market power either to refuse to carry local television broadcast signals or to extract favorable terms as consideration for carriage of these signals. The Committee also finds that the must carry rules are part and parcel of the Congressionally-mandated compulsory copyright license for cable operators and that provides an additional reason for codification of these rules.[15]

Thus, under the analog regulatory scheme, must carry and retransmission consent are necessary to counterbalance the benefit of cable's copyright compulsory license.

The Commission's adoption of cable's proposal to delay digital must carry rules and rely on the marketplace would disrupt this careful policy balance and severely disadvantage public television. Without retransmission consent, public stations have little leverage in any negotiation for carriage. Cable operators may be free to carry any signals under any terms or conditions, and public stations have no statutory right to withhold their signals. This regulatory imbalance is exacerbated by the considerable market power of cable.

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[14] Id. at ¶163 and ¶14.

[15] S. Rep. No. 102-92, at 41 (1991) (emphasis added).

2. Public Television Relies on Must Carry to Counteract the Considerable Market Power of Cable

Cable is still the key provider of television service in many communities, with 67 percent, or over two-thirds, of Americans subscribing to cable.[16] In addition, like certain common carriers, cable systems provide both the basic "pipeline" and much of the programming in an integrated, bundled service. As a consequence, cable service providers have possessed and still possess a strong economic incentive to prefer to carry their own programming (and advertising stream) over that of non-affiliated broadcasters, such as local noncommercial, public television stations. Indeed, as the Supreme Court,[17] Congress[18] and the Commission[19] have noted, cable providers have frequently relied on their considerable market power to refuse to carry local television stations on cable systems. While much of the concrete data derives from past experience with analog carriage of public television stations, none of the 11 public television stations currently transmitting a digital signal have had that signal carried by cable systems.[20]

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[16] Nielson Media Research, 1998.

[17] See Turner Broadcasting System v. FCC, 512 U.S. 622, 632-633 114 S. Ct. 2445, 129 L.Ed. 2d 497 (1994); and Turner Broadcasting System v. FCC, 520 U.S. 180, 187, 117 S. Ct. 1174, 137 L.Ed.2d 369 (1997).

[18] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)("1992 Cable Act"), §2(a)(7).

[19] Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments of Part 76 of the Commission's Rules, Notice of Proposed Rulemaking, FCC 98-153, CD Docket No. 98-120 (July 10, 1998), ¶5.

[20] The FCC is permitted to base a determination on a prediction of the future behavior of cable systems based on past experience. For instance, the Supreme Court and the District of Columbia Circuit have consistently held that where the FCC's factual determinations are of a judgmental or predictive nature, complete factual support in the record is not possible or required and deference should be accorded to the agency, even in the context of First Amendment rights. See Federal Communications Commission v. National Citizens Committee for Broadcasting, et al, 436 U.S. 775, 813-814, 98 S. Ct. 2096 (1978). See also, Tribune Company v. Federal Communications Commission, 133 F.3d 61, 328 U.S. App. D.C., 198 (Jan. 16,

Without a doubt, the market power of cable systems is quite disproportionate to that of local public television stations. This market power, combined with the cable compulsory license and the lack of retransmission consent for public television signals, renders any temptation to rely on the market place for the delivery of noncommercial digital signals to cable subscribers particularly inappropriate.

B. Creating Digital Carriage Obligations Tailored to Public Television Stations Is Consistent with Federal Policy and Is Constitutional

Digital carriage rules specifically tailored to the unique needs and circumstances of public television would conform to a consistent, content-neutral Commission practice of according public television stations special relief based on their unique signal delivery method, close ties to the public, financial constraints and legal obligations. Consequentially, a court would only require that an important government interest be served and that the rules not substantially burden more free speech than necessary.

As a general matter, the Commission has created several content-neutral exceptions, exemptions and special rules in the past to accommodate the special status of public television.[21] For example, when establishing these exemptions, the

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1998) (FCC's prediction that it was unlikely to expect diversity from commonly owned entities accorded deference); Melcher v. Federal Communications Commission, 134 F.3d 1143, 328 U.S. App.D.C. 319 (Feb. 6, 1998) (FCC's predictions about the effect of LEC ownership of Local Multipoint Distribution Service licenses accorded deference); Rainbow Broadcasting Company v. Federal Communications Commission, 949 F.2d 405, 411, 292 U.S. App.D.C. 230 (1991) (applying principle of deference to FCC's predictive judgment in context of policy discouraging channel-swaps, where only three exchanges of channels took place over a period of 26 years prior to the new policy).

[21] See Television Assignments, Sixth Report and Order, 41 F.C.C. 148 (1952), ¶36 et seq. (initial reservation of spectrum solely for the use of noncommercial educational stations); 47 CFR 1.1162(e) and 47 USC 159(h)(1) (exempting public television from annual regulatory fees); 47 CFR §1.1114(c); 47 C.F.R. §1.1114(e)(1) (exempting public television from application fees). In addition to several beneficial exemptions, public television stations are subject to special rules that impose unique responsibilities on their operations as well. For instance, public television stations are forbidden to broadcast promotional announcements on behalf of for profit entities in exchange for consideration. 47 C.F.R. 73.621. Public

Commission recognized that public television stations possess a unique relationship to the government by virtue of their public funding and made no distinction based on the content of programming.[22] Moreover, when the Commission established the year 2003 deadline for digital broadcasting, the FCC stated that public television stations should be accorded special relief, not because they produced distinctive programming, but because they faced unique financial difficulties.[23]

Therefore, the Commission has consistently granted public television a special status -- not to support particular views or programs, but to preserve a unique delivery system that possesses a special relationship with the federal, state and local governments as well as the American people. As the Commission has stated before, "The current dual system of broadcasting consisting of commercial and noncommercial stations is dependent upon differences in the purpose, support, and operation of the two classes of stations."[24] Accordingly, APTS, PBS and CPB ask the Commission to simply extend this tradition of special, but content-neutral treatment to the issue of

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television stations may editorialize but cannot endorse candidates. 47 U.S.C. §399 and Federal Communications Commission v. League of Women Voters of California, et al., 468 U.S. 364, 371, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984). Public television stations may not exchange or rent the names of their donors to political entities or third parties except when they follow certain procedures. 47 U.S.C. §396(k)(12), Pub. L. 106-113, 113 Stat. 1501.

[22] "We believe that the congressional exemption for noncommercial educational applicants was intended to enhance the financial support for these services beyond that provided by the Corporation for Public Broadcasting and National Telecommunications and Information Administration (NTIA) facilities grants. Indeed exacting fees from noncommercial educational applicants would dilute the financial support offered by Congress." In the Matter of Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Memorandum Opinion and Order (on reconsideration), Gen. Docket No. 86-285, FCC 88-301 (September 22, 1988), ¶16.

[23] "We ... acknowledge the financial difficulties faced by noncommercial stations and reiterate our view that noncommercial stations will need and warrant special relief measures to assist them in the transition to DTV. Accordingly, we intend to grant such special treatment to noncommercial broadcasters to afford them every opportunity to participate in the transition to digital television, and we will deal with them in a lenient manner." Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, FCC 97-116, MM Docket No. 87-268 (1997), ¶104.

[24] In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, Second Report and Order, (proceeding terminated), FCC 81-204, BC Docket No. 21136, 86 F.C.C. 2d 141 (1981), ¶15 (emphasis added).

digital carriage. For an extended discussion of the constitutionality of this approach, the Commission may refer to Appendix B of this Supplemental Memorandum.

C. Delay In Adopting Must Carry Rules for Public Television Will Deprive the American Public of Valuable Services

Any delay in establishing digital carriage rules for public television will deprive the American public of access to a broad spectrum of valuable services. Public television has been on the forefront of the digital revolution with 11 stations broadcasting in digital and 29 additional stations scheduled to be operational by the end of 2000.[25] Public television has taken a leadership role in developing innovative, informative and exciting noncommercial digital services. Throughout the country, public stations have developed concrete local service plans for digital services that generally include prime time HDTV, multicasting and enhanced television using intensive data applications. For example, public television stations plan to reach local communities with educational children's programming and curriculum development for K-12 teachers. Moreover, recognizing that learning never ends, public television stations also plan to provide adult learning and workforce training programming on separate multicasting channels. In addition, stations are engaged in developing community partnerships with school systems, community colleges, research universities, libraries, museums, culture and arts organizations, and public health agencies to use the digital channel for community based public telecommunications services.[26] To accomplish these goals and to take advantage of the promise of digital

[25] Based on data gathered from the 1999 Corporation for Public Broadcasting Annual Stations Activities Survey.

[26] For instance, WTTW, Chicago will be using its digital multicasting capabilities to develop a comprehensive, local information, news and entertainment network called "Network Chicago." It also plans to engage in multicasting partnerships with the Ravinia Jazz Festival and the Art Institute of

technology for all Americans, public television has therefore invested substantial public and private funds in equipment upgrades, partnership ventures and community outreach. However, without digital carriage regulations, this promise will go unfulfilled.

Chicago. WEDU in Tampa will be working together with Tampa's Museum of Science and Industry to create a local educational experience for children and adults through live presentations of NASA launches, Mars feeds, and interactive exhibits, to name just a few examples. Moreover, several public television stations, such as Mississippi Public Television; WUNC, North Carolina; New Jersey Network Public Television; and WBRA, Roanoke, Virginia, are planning to provide gavel-to-gavel coverage of state legislatures, and the ability to download the texts of proposed bills. Other public television stations, such as KUAT, Tucson, and Louisiana Public Television plan to devote one of four digital channels to cover local city and county government meetings. These services will use digital multicasting technology to educate and inform citizens about their state, local and regional governments and expand their participation in local cultural arts and events.

Conclusion

APTS, PBS and CPB therefore urge the Commission to create digital carriage regulations specifically tailored to the unique need and circumstances of public television stations. Cable's considerable market power, combined with the cable compulsory license and the lack of retransmission consent for public television signals, makes any reliance on the market place for the delivery of noncommercial digital signals to cable subscribers particularly unwarranted. Digital carriage rules designed to accommodate the unique needs and circumstances of public television are consistent with long-standing federal policy, fit squarely within the Commission's authority to manage the transition to digital and would survive any potential constitutional challenge (See Appendix A and B). Delaying any decision on digital carriage issues for public television would deny the American public access to the innovative digital services delivered through public television stations.

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APPENDIX A

The Commission Retains the Statutory Authority to Create Digital Carriage Obligations Tailored to the Unique Needs of Public Television Stations

The authority to create digital carriage rules specifically tailored to meet the unique needs and circumstances of public television stations can be found in the plain language, structure, purpose and legislative history of the Communications Act, as amended in 1992, 1996 and 1997. Moreover, several traditional and well-accepted canons of statutory interpretation support the interpretation that, read as a whole, the Communications Act and its amendments grant the Commission authority to create digital carriage regulations to ensure the delivery of public television signals to the American people.

A. The Plain Language of the Act Supports Carriage of Public Television's Digital Signals

Passed as part of the 1992 Cable Act,[27] Section 614 (47 U.S.C. §534) and Section 615 (47 U.S.C. §535) of the Communications Act require cable carriage for commercial and public television signals, respectively, and give the Commission authority to promulgate regulations to implement those requirements.[28] On their face, the carriage requirements are not confined to analog signals. They apply to any signal broadcast by commercial and public television stations. For instance, Section 614 states:

[27] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)("1992 Cable Act").

[28] See 47 U.S.C. §534(f) ("Within 180 days after October 5, 1992, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section.") and 47 U.S.C. §534(d)(discussing remedies available through the Commission for violations of commercial must carry rights). See also Section 47 U.S.C. §535(j)(discussing remedies for violation of noncommercial must carry rights).

> Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.[29]

And in parallel fashion, Section 615 states:

> [E]ach cable operator of a cable system shall carry the signals of qualified noncommercial educational stations in accordance with the provisions of this section.[30]

Both Section 614 and Section 615 refer to generic "signals" broadcast by qualified stations and do not specify whether these signals should be restricted to analog or digital transmission. Thus, the broad sweep of these legislative commands provides the Commission with authority to regulate cable carriage of both analog and digital broadcast signals.

B. The Structure, Purpose and Legislative History of the Communications Act Support Carriage of Public Television Digital Signals

Reinforcing the broad scope of Sections 614 and 615, the policies underlying Section 615 clearly support the authority of the Commission to promulgate digital must carry regulations tailored to public television stations in particular. For instance, Congress stated that "There is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations,"[31] and that therefore "the Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems."[32]

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[29] 47 U.S.C. §534(a)(emphasis added).

[30] 47 U.S.C. §535(a)(emphasis added).

[31] 1992 Cable Act, Section 2 (a)(7).

[32] 1992 Cable Act, Section 2(a)(8)(emphasis added).

In adopting carriage rules for noncommercial broadcasters, Congress was motivated by the facts that public television stations provide "educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens;"[33] that public television stations are intimately tied to their communities through local tax dollars and voluntary citizen contributions;[34] that the federal government has invested substantially in the public broadcasting system;[35] and that "absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services."[36] For all of the above reasons, Congress expressly stated that the Federal Government should make all nonduplicative public television signals available to the American public. Therefore, if the Commission were to limit required carriage solely to the analog signals of public television stations when such stations are broadcasting in both analog and digital, the Commission would not be ensuring access to all of a public television station's signals but only to some of those signals.[37]

In addition, Congress also stated unequivocally that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services throughout all appropriate available

[33] 1992 Cable Act, Section 2(a)(8)(A).

[34] 1992 Cable Act, Section 2(a)(8)(B).

[35] 1992 Cable Act, Section 2(a)(8)(C).

[36] 1992 Cable Act, Section 2(a)(8)(D).

[37] In addition, public television stations have established unique plans for their digital broadcasting service, including the use of multicasting and data-enhanced programming, distinct from the programming it currently carries on its analog service. Therefore, the DTV service of public television stations would not duplicate the programming currently available in analog in any substantial way.

telecommunications distribution technologies."[38] Without digital carriage rules in place, nearly two-thirds of our citizens will not have access to public television services through the technology of digital broadcasting. Thus, without must carry, the American public would have access only to public television through some of the appropriate available telecommunications distribution technologies, not all of technologies, including digital broadcasting.

Moreover, Section 614(b)(4)(B) explicitly directs the Commission to initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of advanced television signals.[39] This provision requires the Commission to proceed with a cable carriage rulemaking "at such time as" it prescribes modifications of the standards for television broadcast signals to "ensure cable carriage" of digital signals.[40] Section 614 clearly does not authorize the Commission to restrict or eliminate carriage requirements for such signals. Rather, this section reflects Congress's recognition that differences between analog and advanced television technology might require some revisions to the technical standards for cable carriage.[41] And by specifying that must carry rules be crafted "at such time as" prescribed rules for advanced television standards, Congress clearly intended the Commission to promulgate rules providing cable carriage requirements for digital broadcast signals promptly.

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[38] See 47 U.S.C. §396(a)(9).

[39] 47 U.S. C. §534(b)(4)(B).

[40] 47 U.S. C. §534(b)(4)(B).

[41] See H.R. Rep. No. 628, 102d Cong., 2d Sess. 94 (1992).

However, as the Commission notes,[42] Section 614(b)(4)(B) refers to commercial television stations, and Section 615 contains no parallel provision referring to noncommercial stations. Nevertheless, the Commission already has authority to implement requirements for the carriage of all public television signals under Section 615. Nothing in the legislative history indicates that Congress meant to negate the Commission's broad authority to modify its must carry rules applicable to analog to take account of the characteristics of digital signals.[43] The failure to include in Section 615 a provision that parallels Section 614(b)(4)(B) may have been an oversight.[44] Alternatively, it may have simply reflected the view that such a provision was unnecessary.

In any case, any uncertainty in this regard was eliminated by the Telecommunications Act of 1996. This Act added Section 336 to the Communications Act, which stated that ancillary or supplementary services provided by broadcast licensees on their digital spectrum shall not have rights to carriage under either the commercial must carry or noncommercial must carry provisions of the Act.[45] By explicitly mentioning the noncommercial provision in this context, Congress made it plain that, apart from the case of ancillary or supplementary services, it anticipated that the authority for the Commission to craft digital must carry rules applied to the digital

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[42] Carriage of the Transmissions of Digital Television Broadcast Stations, FCC 98-153, CS Docket No. 98-120, Notice of Proposed Rulemaking ("Notice") (July 10, 1998) ¶57.

[43] In fact, the committee reports describing Section 4(b)(4)(B) refer broadly to cable carriage of advanced television signals without any apparent limitation to commercial stations. See H.R. Rep. No 862, 102d Cong., 2d Sess. 67 (1992); H.R. Rep. No. 628, p. 94; S. Rep. No. 92, 102d Cong., 1st Sess. 85 (1991).

[44] "In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." Cass v. United States, 417 U.S. 72, 83, 94 S.Ct. 2167, 40 L.Ed. 2d 668 (1974).

[45] 47 U.S.C. §336(b).

signals of public television stations as well as commercial stations.[46] Indeed, the legislative history of Section 336 stated Congress' recognition of the Commission's ongoing authority to conduct a determination of appropriate must carry rules for digital signals.[47] In other words, while Section 336 directed the Commission as to what digital signals could not be subject to must carry, it reinforced the Commission's general authority to create digital must carry rules for both commercial and public television stations.

When passing the 1997 Balanced Budget Act, Congress again stated that the Commission possesses the authority to craft must carry regulations for the carriage of the digital signals of public television stations. As the Commission concluded in its NPRM,

> In the BBA's [Balanced Budget Act] legislative history, Congress stated that it was "not attempting to define the scope of any MVPD's 'must carry' obligation for digital television signals" and that the digital broadcast television must carry decision is "for the Commission to make at some point in the future."[48]

The Commission stated further,

> We read Section 614(b)(4)(B) of the 1992 Cable Act and Section 309(j) of the Balanced Budget Act, along with their respective legislative histories, to give us broad authority to define the scope of a cable operator's signal carriage requirements during the period of change from analog to digital broadcasting.[49]

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[46] For a discussion of this argument see Comments of the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting, CS Docket No. 98-120, filed October 13, 1998, p. 12-14.

[47] "Section 336 of the Act, added as part of the Telecommunications Act of 1996, provides that if the Commission determines to issue additional licenses for advanced television services, the Commission should "allow the holders of such licenses to offer such ancillary or supplementary services ... as may be consistent with the public interest, convenience and necessity." It then further provides that "no ancillary or supplementary service shall have any right to carriage under section 614 [commercial must carry] or 615 [noncommercial must carry]." In the legislative history of this provision, Congress stated that it did not intend to "confer must carry status on advanced television or other video services offered on designated frequencies" adding that the "issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act."" Notice, ¶8, quoting Telecommunications Act of 1996, Conference Report, 104th Cong., 2nd Sess., Report 104-230 at 161.

[48] Notice, ¶12, quoting H.R. Conf. Rep., 105th Cong., 1st Sess. No. 105-217, at 577 (1997)(emphasis added).

[49] Notice, ¶13.

Therefore, the Commission's authority to craft digital must carry regulations for noncommercial television stations derives not only from the 1992 Cable Act, and the 1996 Telecommunications Act, but from the 1997 Balanced Budget Act as well.

C. Principles of Statutory Interpretation Support Carriage of Public Television Stations Digital Services

Lastly, in addition to the plain language, structure, purpose and legislative history of the Communications Act, accepted principles of statutory interpretation also support the Commission's authority to adopt digital must carry regulations for public television stations. One time-honored and frequently cited principle of statutory construction is that statutes are to be read as a whole.[50] Although Section 615 may not have specifically addressed the carriage of public television's digital signals, by exempting both commercial and public television ancillary and supplementary services from must carry, Section 336 recognizes and assumes that the Commission has the authority to promulgate must carry requirements for both commercial and public television stations.[51] Read as a whole, therefore, the Communications Act grants the

[50] Beecham v. U.S., 511 U.S. 368, 372, 114 S.Ct. 1669, 128 L.Ed. 2d 383 (1993); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94, 114 S.Ct. 517, 126 L.Ed. 2d 524 (1993); Conroy v. Aniskoff, 507 U.S. 511, 515, 113 S.Ct. 1562, 123 L.Ed. 2d 229 (1993).

[51] Indeed the Commission itself has argued in a similar vein in another related proceeding. Recently it ruled that traditional home shopping, infomercials, and direct marketing services were not ancillary or supplementary services for fee purposes. It argued that Section 336, which states that "no ancillary or supplementary service shall have any rights to carriage under section 614 or 615," did not apply to home shopping, infomercials, and direct marketing services, because section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 directed the FCC to determine whether such stations served the public interest and were entitled to must carry rights. Importantly, the Commission appealed to a "basic principal of statutory construction," which was to seek to construe statutory provisions so that they are consistent with each other. In the Matter of Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, Memorandum Opinion an d Order, FCC 99-362, MM Docket No. 97-247 (November 24 1999), ¶23. And, as APTS, PBS and CPB are urging now, it construed the prohibitory language of Section 336 in a way that retained the Commission's authority to craft must carry rules for both commercial and public television stations. Id.

Commission the authority to create must carry regulations to accommodate the unique needs and circumstances of public television stations.

In addition, another accepted principle of statutory construction is that one must avoid interpretations of a statute that would result in absurd consequences.[52] First, given the strong Congressional support for public television, it is absurd to think that Congress meant to direct the Commission to create digital carriage rules for commercial stations while ignoring the need for digital carriage rules for noncommercial stations. Second, as discussed above, Congress found that that there is a substantial government interest in making all nonduplicative local public television services available on cable systems. It would indeed be absurd if the Communications Act were to be interpreted to make it more likely that some local public television services – namely digital broadcast services -- would not be available on local cable systems. Third, as we have already demonstrated, Congress's policy has been that all citizens of the United States have access to public telecommunications services throughout all appropriate available telecommunications distribution technologies. Accordingly, it would be absurd to read the statute to allow only some of our citizens to have access to only some of the available telecommunications technologies by allowing cable interests to withhold public television's innovative digital services from its subscribers.

Therefore, for the reasons articulated above, the Commission possesses ample authority to create digital carriage rules specifically tailored to meet the unique needs and circumstances of public television stations.

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[52] "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), citing United States v. American Trucking Assns., Inc., 310 U.S., at 542-543; and Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940). See also Clinton v. City of New York, 524, U.S. 417, 429, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998).

APPENDIX B

Creating Digital Carriage Obligations Tailored to Public Television Stations Would Survive Constitutional Scrutiny

Digital carriage rules specifically tailored to the unique needs and circumstances of public television would survive a constitutional challenge based on free speech concerns. Such rules would conform to a consistent, content-neutral Commission practice of according public television stations special relief based on their unique signal delivery method, close ties to the public, financial constraints and legal obligations. Consequentially, a court would only require that an important government interest be served and that the rules not substantially burden more free speech than necessary.

A. Digital Carriage Rules for Public Television Would be Content-Neutral

In evaluating content-neutrality, the Commission should take its measure from the jurisprudence established by the U.S. Supreme Court. This Court has held that content neutral restrictions on speech are to be sustained if they further an important or substantial government interest unrelated to the suppression of free speech and do not substantially burden more speech than is necessary.[53] In explaining what restrictions on free speech are content-based as compared to content-neutral restrictions, the U.S. Supreme Court has repeatedly held that content-based restrictions on speech are those which distinguish favored speech from disfavored speech based on the ideas or views expressed by such speech or which require an examination of the content of such

[53] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662, 114 S. Ct. 2445 (1994) ("Turner I") (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). See also United States v. O'Brien, 391 U.S. 367, 377(1968).

speech by governmental authorities.[54] Conversely, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral."[55]

Digital carriage rules tailored to the unique needs and circumstances of public television stations would not require an examination of programming content, nor would it favor or disfavor speech based on the ideas or views expressed by such programming. Rather, the regulation would simply be triggered by what kind of license the applicant holds. Moreover, a special must carry rule for public television stations would be content neutral, because it would not be designed to favor or disfavor speech based on the government's agreement or disagreement with the ideas or views expressed in public television programming. By creating a must carry rule tailored to the unique needs and circumstances of public television stations, the Commission

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[54] Turner I, 512 U.S. at 642-3 (1994), quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). See also Burson v. Freeman, 504 U.S. 191, 197, 119 L.Ed.2d 5, 112 S.Ct. 1846 (1992) (holding that restricting speech on the basis that it is related to a political campaign is content-based); Boos v. Barry, 485 U.S. 312, 318-319, 99 L.Ed. 2d 333, 108 S.Ct. 1157 (1988) (plurality opinion)(law forbidding picketing before an embassy where picket signs bring the foreign government into "public odium" or "disrepute," was content-based); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (statute requiring newspaper to print candidates reply was content based, because triggered only when a newspaper elected to print matter critical of political candidates); Pacific Gas & Electric Co v. Public Utilities Comm'n of Cal., 475 U.S. 1, 13, 15 (1986) (plurality opinion) (law requiring privately owned utility to include insert in its bills published by consumer group is content-based, because it confers benefits to speakers based on viewpoint); Federal Communications Commission v. League of Women Voters of California, et al., 468 U.S. 364, 383-4, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) (ban on editorializing by noncommercial broadcasters is content-based, because authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern "controversial issues of public importance.").

[55] Turner I, 512 U.S. at 643. See also See City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (ordinance prohibiting posting of any signs on public property is content-neutral when silent concerning any speaker's point of view); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (state fair regulation even-handedly requiring sales and solicitations to take place at designated locations is content-neutral); Boehner v. McDermott, 191 F.3d 463, 467, 1999 U.S. App. LEXIS 23135 (D.C. Cir. 1999) (law forbidding disclosure of all illegally intercepted communications is content-neutral, because "It reveals no governmental interest in distinguishing between types of speech based on content ... [and] neither favors nor disfavors any particular viewpoint"); Time Warner Entertainment Co v. FCC, 93F.3d 957, 977(D.C. Cir 1996) (DBS set-aside rules analogous to content-neutral cable must carry, because no restriction, burden or benefit imposed by reason of views, programs, or content of the stations that would benefit from the set-aside).

would be acting to preserve a unique signal delivery method supported by government funding and public donations. It would simply be accommodating the legal and economic restrictions that bind the public television service in this country, insofar as public television stations are forbidden from withholding the distribution of their signals from cable operators and operate without the benefit of a commercial advertising base. Must carry regulation tailored to the needs of public television stations would be no different than actions the Commission has taken in the past to create both special privileges and unique responsibilities for public television.

B. Digital Carriage Rules for Public Television Would Not Substantially Burden Free Speech More than Necessary

Special carriage rules tailored to the unique needs of public television stations would not substantially burden any more speech than necessary to advance certain important government interests.[56] In addition to the government interests associated with carriage regulations generally,[57] Congress has identified several important government interests associated specifically with public television, including:

- Ensuring that cable subscribers have access to local noncommercial educational stations;[58]

[56] See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662, 114 S. Ct. 2445 (1994) ("Turner I") (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)) and United States v. O'Brien, 391 U.S. 367, 377(1968).

[57] Congress has identified several important government interests that sustain the need for must carry regulations generally. They are: (a) preserving the benefits of free, over-the-air local broadcast television; (b) promoting the widespread dissemination of information from a multiplicity of sources; and (c) promoting fair competition in the market for television programming. Turner I, 512 U.S. at 662. The U.S. Supreme Court has held that these interests are unrelated to the suppression of free speech, Turner I, 512 U.S. at 662, and that must carry regulations do not substantially burden more speech than was necessary to accomplish these interests. Turner Broadcasting, Inc, et. al. v. FCC, 520 U.S. 180, 117 S. Ct. 1174, 137 L.Ed.2d 369 (1997).

[58] 1992 Cable Act, Section 2 (a)(7).

- Making all nonduplicative local public television services available on cable systems;[59]

- The compelling governmental interest in educating its citizens;[60]

- Encouraging the growth and development of public television;[61]

- Effectively making public telecommunications services available to all citizens of the United States;[62] and

- Ensuring that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.[63]

To accomplish these important governmental interests, APTS, PBS and CPB urge the Commission to create digital carriage regulations that are tailored to the unique needs of public television stations. Such regulations would be unrelated to the suppression of speech and would not burden cable systems more than necessary to accomplish these interests because:

- Cable systems have had a substantial time to prepare for the carriage of digital signals;

- The cable industry has been substantially investing in system upgrades to increase cable system capacity;

- The carriage of public television digital signals would require a relatively small amount of a cable system's bandwidth capacity;

- Public television will have a gradual roll-out of digital services;

- Cable systems can employ unused public educational and governmental (PEG") channels; and,

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[59] 1992 Cable Act, Section 2(a)(8). See also 47 C.F.R §76.56(a)(1)(iii).

[60] 1992 Cable Act, Section 2(a)(8)(A).

[61] 47 U.S.C. §396(a)(1).

[62] 47 U.S.C. §396(7).

[63] 47 U.S.C. §396(9).

- Any hardship cases can be accommodated through an exemption/waiver process.[64]

Therefore, if the Commission were to create carriage regulations that are tailored to the special needs and circumstances of public television stations, it would not be burdening cable systems more than necessary and would be accomplishing the important governmental interests outlined above. Consequentially, for the reasons articulated above, a court would rule that such regulations are constitutional.

[64] For a full discussion, see Comments of The Association of America's Public Television Stations, The Public Broadcasting Service, and the Corporation for Public Broadcasting, CS Docket No. 98-120 (filed October 13, 1998), pp. 28-33.