Merrimack, New Hampshire (analog channel 60),[46] proposing operation on the existing tower that currently accommodates its analog operations. The station since has discovered that the existing tower physically cannot support both the analog and digital antennas, and thus PCC is required to find a new site. After locating a suitable piece of property and initiating the FAA and local zoning process, it appears that there is local opposition to PCC's efforts to construct the new digital tower. For PCC, this process is being repeated many times around the country and probably hundreds of times for all broadcasters. If PCC (and other broadcasters) were assured, however, of full digital must carry and, thus, a clear road to clearing the analog spectrum, it would not waste valuable resources seeking to build another tower.[47] PCC simply would replace its analog antenna and equipment with new digital equipment on the existing tower – and save hundreds of thousands of dollars in the process. PCC has been informed such a switch-over would only take the station off the air for 72 hours, but the cost savings would be immense. The total cost savings for all similarly situated broadcasters would be in the millions.

It is one thing for a broadcaster to construct its digital station before May 1, 2002, but it is quite another for the station to complete all arrangements to terminate analog operation and ensure that its DTV signal can be optimally received (*e.g.*, gaining actual

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[46] FCC File NO. BPCDT-19990930AAX.

[47] PCC expects that tower construction capacity also will become an issue very soon, as inquiries into materials availability are resulting in longer and longer delivery times.

digital cable carriage). Accordingly, a timely auction protects the opportunity for accelerating the DTV transition.

Accelerated Spectrum Availability. The FCC recognizes that an accelerated clearing of the channels 59-69 band represents an important public interest objective.[48] The valuable wireless services promised by 3G and the like will prove powerful in the hands of consumers and businesses. The frequencies to be auctioned represent prime real estate in the electromagnetic spectrum. Delaying the 700 MHz auction, however, not only delays the roll-out of new wireless services, it increases the likelihood that the spectrum will remain encumbered indefinitely, which diminishes the possibility of prospective licensees building out wireless internet systems and placing this valuable spectrum into use. A delayed auction thus would depress spectrum valuations. A timely auction keeps the window open for clearing the band and making the spectrum widely available.

Sustained Prosperity and Technological Leadership. Further auction delays obstruct the public's healthy demand for more capable wireless services and is a risk to the country's continued leadership in technology and prosperity. The internal combustion engine drove the economy for the last hundred years. Likewise, economists see the 700 MHz spectrum as substantially augmenting existing CMRS systems, opening the door for ubiquitous mobile services.[49] The implications for the economy as a whole obviously are enormous. The wireless internet could drive the

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[48] *Further Notice* at ¶80.

[49] *700 MHz First Report and Order* at ¶38.

U.S. economy for decades. A timely 700 MHz auction and FCC decisions to help an ailing DTV transition with necessary Orders will help ensure that the United States remains strong economically, the technological envy of the world, and at the forefront of the information revolution.

III. THE FCC CAN AND SHOULD ESTABLISH A FRAMEWORK TO FACILITATE BAND CLEARING.

The FCC has authority to facilitate rules that would stimulate an early clearing of channels 59-69, consistent with the public interest – but does it have the will to act?! PCC supports the use of a Commission-sanctioned, but privately conducted, secondary linkage auction to help clear channels 59-69. Thus far, the FCC's inaction on band clearing – disguised as private market reliance – has given wireless bidders little hope that spectrum encumbrances will be removed. FCC mismanagement of the band has resulted in do-nothing, go-nowhere policies. The FCC must overcome its regulatory inertia and take affirmative steps to facilitate the DTV transition and thus band clearing.

A. The FCC Should Issue an Order by November 13, 2000.

The FCC must do its part to facilitate the band clearing process. To ensure that the 700 MHz auction is timely held, the FCC should issue a Report and Order in this proceeding by November 13, 2000. Likewise, the FCC should issue by November 13th the Report and Order for full digital must carry, authorize both or select either the COFDM or 8-VSB digital transmission standards, and establish operability standards for DTV sets. This will give parties sufficient time to finalize bidding plans before the March 2001 auction, allow incumbent broadcasters to evaluate band clearing possibilities, and provide wireless bidders clear indication of the availability of the 700 MHz spectrum.

B. A Secondary Auction Must Be Purely Voluntary and Cannot Involve Any Commission-Mandated Television Station Relocations.

The Commission has no authority to force a station to terminate licensed broadcast service for the sake of facilitating early band clearing. To the contrary, when establishing an early start date for the 700 MHz auction, Congress plainly was aware that analog television service in the band would be protected throughout the DTV transition period, which it explicitly permitted to extend beyond 2006 if less than 85% of households are capable of receiving digital broadcasts (via all delivery methods).[50] Congress clearly was aware of the auction structure it created.[51] If Congress had intended to permit mandatory termination, or effectively mandatory termination, of television service in the band, it would have said so. Accordingly, the FCC cannot force broadcasters to participate in a secondary linkage auction. Likewise, the FCC cannot impose a mandatory relocation of television stations to circumvent efforts of a "hold-out" broadcaster to continue serving viewers as Congress intended.

Voluntary agreements and a voluntary, incentive-based secondary auction, however, *are* consistent with the FCC's public interest obligations. Voluntary agreements and a secondary auction can accelerate the availability of the 700 MHz spectrum for innovative wireless services and, as established herein, can accelerate the DTV transition. PCC consistently has been committed to voluntary relocation of

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[50] 47 U.S.C. § 309(j)(14)(B).

[51] As a matter of statutory construction, legislative language is interpreted generally on the assumption that the legislature was aware of existing statues. A. Sutherland, STATUTORY CONSTRUCTION § 45.12, at 62 (5th ed. 1995).

incumbent broadcast licensees through private agreements and recognizes that the use of a voluntary secondary auction can reduce the aggregate transaction cost of attempting to clear approximately 140 stations. Accordingly, Congress' grant to the FCC of general authority over spectrum management issues[52] is sufficient under these circumstances for the agency to sanction voluntary efforts to clear the band – so long as such efforts substantially furthering clear public interest obligations and are consistent with existing statutes and regulations.

C. Secondary Auction Structure

PCC recommends that the FCC sanction and structure the secondary linkage auction as follows:

1. The secondary auction should be conducted by an independent third party chosen by broadcasters and wireless bidders. The party chosen shall be competent in conducting private auctions and more than sufficiently familiar with the 700 MHz proceeding. PCC recommends Spectrum Exchange and Allen & Co.

2. PCC awaits specific details for the structure of the secondary auction that are likely to be filed in this proceeding.

3. PCC will file reply comments by September 15 to note specific issues necessary for the FCC to consider, which could lead to PCC's participation in a secondary auction.

D. Three-Way Voluntary Transition Agreements.

PCC supports permitting three-party agreements as a natural extension of band clearing efforts – subject to the same conditions and public interest objectives set forth

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[52] *See, e.g.*, 47 U.S.C. §§ 301 and 303.

for two-party agreements and the secondary auction.[53] PCC would entertain requests to enter into such three-way agreements.

IV. THE FCC MUST TAKE SPECIFIC ACTIONS TO IMPLEMENT VOLUNTARY AGREEMENTS AND A SECONDARY AUCTION.

Band clearing alone is insufficient for the FCC to have authority to sanction voluntary band clearing. The voluntary agreements and secondary auction must contribute more to the public interest than simply providing accurate wireless bidding evaluations. The 700 MHz auction is born of the digital television transition, and the FCC should ensure now that the transition is advanced and protected.[54] Accordingly, the FCC should adopt the actions proposed below to ensure the early clearing has legal (and broadcaster) support. Otherwise, PCC has no plans to terminate analog service prior to the close of the transition, which may well go on into the second decade of this new century.

A. Digital Must Carry for Vacating Incumbents.

Incumbent broadcasters must receive full digital mandatory carriage rights – which would include any free, multicast video programming aired by a station. Without full digital must carry, incumbent broadcasters have no incentive to clear the band. Almost all viewers of a vacating station would lose service, a scenario that broadcasters cannot accept. Moreover, such loss of service may not be legally sustainable. By

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[53] *Further Notice* at ¶¶ 87-92.

[54] The FCC relies upon the notion of accelerating the DTV transition as a basis for its authority to sanction and review voluntary clearing agreements. *Id.* at ¶51.

establishing vacating broadcasters' must carry rights, the FCC will have done its best to ensure that service losses are minimized in a manner consistent with statutory language addressing the transition.

When PCC builds its DTV stations within the core spectrum, it is imperative that it be guaranteed full must carry rights for its DTV signals because of the audience loss it will experience by turning off its analog stations. At the present time, nearly 30% of all households are without cable or satellite and, even in cabled and satellite households, nearly half the television sets are not connected and dependent on over-the-air reception. PCC will lose this over-the-air audience immediately upon going to digital-only operations, given the almost negligible digital receiver penetration, and, thus, will lose up to 30% of its audience for **PAXTV**, its network television service. Such a loss of audience will translate into an enormous loss of revenue for the stations and the company. **PAXTV**, the nation's seventh and family-friendly television network, is at an operational break-even point. PCC has had positive EBITDA and positive cash flow for two of the last three quarters. A loss of 30% of its audience would likely plunge PCC back into further losses. Only full digital must carry of all multicast channels can lessen the devastating impact of such audience losses in any meaningful manner. Without an acceptable DTV must carry rule in place, PCC will not enter into voluntary agreements and will not voluntarily participate in a secondary auction. With a full DTV must carry rule, PCC submits that the Government will receive increased auction proceeds, the digital transition will be accelerated, full use of the 700 MHz spectrum by the wireless

companies will come earlier, and PCC will create and launch more family friendly networks.

Digital must carry rules should be established for both cable operators and direct-to-home ("DTH") satellite providers. Congress imposed mandatory carriage obligations on satellite carriers that are substantially similar to those which cable operators are subject.[55] The FCC should incorporate into its satellite must carry rules the same definitions, conditions, and requirements that it has developed in the context of the cable must carry rules (to the extent technologically feasible and legally permissible). Congress required the FCC to impose digital broadcast signal carriage obligations on DTH satellite operators that are "comparable" to those imposed on cable operators.[56] PCC urged the FCC to permit broadcasters to elect satellite carriage of DTV signals in place of analog signals (in lieu of a dual carriage requirement) and thereby accelerate the DTV transition.[57] DTH providers should be required to carry broadcasters' entire digital signal – including multicasting – on a phased-in basis. The time is now to adopt such rules, and PCC opposes the position of NAB that this Commission should delay for one year the adoption of DTH digital must carry rules. PCC and many other television broadcasters believe that the digital revolution is upon us now and that carriage provisions for the digital world are needed now – not a year from now.

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[55] *Compare* 47 U.S.C. § 534 (cable) *with* § 338 (DTH satellite).

[56] 47 U.S.C. § 338(g).

[57] PCC Comments, Implementation of the Satellite Home Viewer Improvement Act of 1999, CS Docket No. 00-96, at p.8 (July 14, 2000).

B. Expedited FCC Processing.

The FCC must give expedited processing (*i.e.*, act within 60 days of filing) to all applications (modifications, STAs, etc.) filed by incumbent broadcasters seeking to commence digital operations on the lower channels. If incumbent broadcasters are willing to terminate analog service – the format familiar to its viewers – and ramp-up DTV operations as quickly as necessary, then the FCC must eliminate regulatory processing delays. PCC understands that the FCC is burdened by an enormous number of DTV applications, predictably straining agency resources. However, PCC is seriously concerned about the scale of the delay. As noted, PCC has submitted 62 DTV construction permit applications and only 3 have been granted. The DTV construction deadline is only 21 months away. To ensure that DTV service for vacating stations commences as quickly as possible, the FCC must prioritize processing and expeditiously act on the necessary DTV filings. Accordingly, the FCC must promise to process all vacating stations' applications within sixty days of filing. In addition, all pending DTV applications must be processed as quickly as possible, but no later than thirty days after the close of the 700 MHz auction. At the present time, it appears that there are well over 1000 pending DTV construction permit applications and DTV maximization requests pending at the FCC. With a May 1, 2002 on-air date for commercial television stations, when does the FCC expect to take action on these applications and requests? Furthermore, the DTV deadline imposed by FCC is blind to the fact that DTV transmitter and antenna manufacturers cannot provide such equipment in time for all stations to meet the May 1, 2002 date. Nor can tower companies build enough new towers in that timeframe given the scarcity of special steel

that has to be imported into this country. The FCC's refusal to recognize these fundamental problems will not make them go away.

V. FCC REVIEW OF SPECIFIC CLEARING REQUESTS

PCC supports the FCC's proposed rebuttable presumption that substantial public interest benefits will arise from voluntary band-clearing agreements which meet unambiguous standards.[58] Likewise, PCC generally supports the FCC's public interest factors regarding the filing and approval of private agreements or voluntary auction, but losses of over-the-air analog service should not be a factor if digital must carry is established and/or other stations are providing over-the-air analog service. Widespread service losses of multiple stations in a community are not in the public interest, and the FCC would have no authorization to allow early band clearing at such expense. However, by establishing full digital must carry rights, correcting the transmission standards for DTV, and setting standards for DTV sets, service losses would be minimized, which, coupled with the public benefits of an accelerated DTV transition and accelerated spectrum availability, gives the FCC the authority to facilitate band clearing. Accordingly, the FCC would not need to require applicants to show there would be no loss of any of the four largest stations in a DMA or the sole service licensed to a local community.[59]

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[58] *Further Notice* at ¶60.

[59] *Id.* at ¶61.

For the reasons described herein, without full digital must carry, it is doubtful any other FCC authorizations will facilitate early band clearing. If, however, early band clearing occurred without digital must carry (which is unlikely), the proposed public interest requirements described in paragraph 61 of the *Further Notice* would be too restrictive. First, full digital must carry represents the best approach to preventing the loss of service addressed by paragraph 61. If the FCC decides not to establish full digital must carry for DTV broadcasters, as Congress plainly requires, then it would be difficult for the FCC to use the losses of service as justification for barring early band clearing. The FCC has a clearly better way, consistent with Congress' must carry requirements, to prevent those service losses. If the FCC is serious about loss of service, it will establish full digital must carry rights.

Second, television is a wide area service. The FCC recognizes this, acknowledging that where a community losing its only local, over-the-air analog service is part of a larger market, then the FCC would be confident that substantial service remains.[60] Additionally, the FCC says that the availability of a station's signal over "alternative technologies" such as cable and DBS (or "direct-to-home" or DTH) will mitigate the loss of over-the-air analog service.[61] PCC supports this view. Indeed, PCC urges the FCC to elevate such considerations beyond the proposed case-by-base analysis and create a clear rebuttable presumption that a station can be vacated even if

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[60] *Id.* at ¶63.

[61] *Id.* at ¶64.

it is a community's sole television station so long as the community receives Grade B service from three other television stations.

VI. DIGITAL MUST CARRY IS CRITICAL TO BAND CLEARING.

A. Without the Promise of Digital Must Carry, Incumbent Broadcasters Have No Incentive to Vacate the Band.

As a practical matter, it is difficult to understand from any perspective why broadcasters would clear the channels 59-69 band without assurances that they could continue serving most of their audience. Without digital must carry in cable and DTH, incumbent broadcasters otherwise tempted to vacate are faced with two unattractive options: (1) rely on an questionable transmission standards for over-the-air DTV signals (for which there are few receivers); or (2) transmit in analog and indefinitely forego the ability to participate in the DTV transition. These hardly are the circumstances that will lead any material number of responsible broadcasters to vacate 700 MHz spectrum voluntarily or early.

B. The Law Requires Digital Must Carry for Vacating Incumbent Stations.

It is beyond dispute that cable systems ultimately are obliged to carry broadcasters' digital signals. The FCC obviously recognizes as much, and stated so in the *Further Notice*.[62] Congress' must carry requirements are not conditioned upon a method of transmission, as it has made plain. A vacating incumbent, as well as all DTV broadcasters, should have enforceable full digital must carry rights for cable and DTH.

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[62] *Id.* at ¶65.

At the direction of Congress, the FCC commenced a proceeding two years ago to address digital must carry's transitional issues.[63] The FCC has failed to release a timely set of digital mandatory carriage provisions. Yet even without a Report and Order, the law is clear: "Each cable operator shall carry . . . the signals of local commercial television stations."[64] There can be no doubt that a broadcast television station transmitting on one and only one channel, be it analog or digital, has enforceable must carry rights. Congress instructed the FCC to "ensure cable carriage" of a local television station's signal that has been "changed to conform" with the DTV standards.[65] Congress has given the FCC has the authority to make changes to ensure DTV must carry. Furthermore, the FCC does not have authority to deny mandatory carriage rights to a vacating incumbent's DTV signals. Simply stated, it's time to "Clear the Air" and establish the rules for full digital must carry for all television stations.

C. The DTV Must Carry Proposal Is Based on The 1992 Cable Act.

In enacting Section 614 of the Communications Act of 1934, as amended (the "Act"),[66] Congress required cable operators to carry the signals of local commercial broadcast television stations. Congress believed that mandatory carriage was necessary to advance important government interests of promoting the continued

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[63] Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, *Notice of Proposed Rulemaking*, 13 FCC Rcd 1092 (1998).

[64] 47 U.S.C. § 534(a).

[65] 47 U.S.C. § 534(b)(4)(B).

[66] 47 U.S.C. § 534.

availability of free, over-the-air local broadcast television[67] and ensuring the widespread dissemination of information from a multiplicity of sources – especially separately owned sources.[68] After two reviews, the Supreme Court upheld the constitutionality of the must carry provisions, finding that Section 614 suitably advanced these important interests.[69] The Supreme Court's conclusions control the review of digital must carry provisions, which, in the instance of vacating incumbents, easily satisfy intermediate scrutiny.

The repeatedly filed PCC DTV Must Carry Proposal[70] permits television stations to elect to have their analog signals removed from cable systems and replaced with their primary digital signals, which would be down-converted by the cable operator to analog and carried on the analog portion of the cable system. This replacement carriage would be to the same number of cable homes and on the same channel as the basic analog carriage. In addition, television stations choosing to allow cable systems to remove their analog signal in favor of their digital signals would have their HDTV or digital multicast signals carried on the digital portion of the cable system, equipped with digital set-top boxes. The cable channel mapping protocol (PSIP) would permit the multicast channels to appear in sequence with the station's primary channel (*e.g.*, if the primary channel is 20, then the multicast channels would be 201, 202, 203, and 204). A

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[67] 1992 Cable Act, §§ 2(a)(10),(12).

[68] *Id.*, § 2(a)(6).

[69] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") (determining that intermediate scrutiny applied); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") (upholding must carry provisions under intermediate scrutiny).

cable subscriber without a set-top box simply would surf the existing channel lineup from channel 19, to 20, to 21, and so on. A cable subscriber with a set-top box would go from channel 19, to 20, and then to channels 201, 202, 203, and 204, before moving to channel 21. The primary digital signal (carried on the analog portion of the cable systems) and the additional digital signals providing free programming services would be provided as part of the basic cable services provided to all analog cable subscribers and to all subscribers with digital boxes. Thus, as digital set-top boxes are deployed and analog boxes replaced, full digital must carry would come to pass.

This is the basis of the television station must carry rules that were established by the 1992 Cable Act. Section 4 of the 1992 Cable Act clearly provides that "each cable operator shall carry on the cable system of that operator, the signals of local commercial television stations . . . as provided by this section."[71] The 1992 Cable Act goes on to define a "local commercial television station" as:

> any full power broadcast station . . . licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.[72]

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[70] *See, e.g.*, Letter from Lowell W. Paxson to William E. Kennard, Chairman, Federal Communications Commission (May 3, 2000).

[71] 47 U.S.C. § 534(a).

[72] 47 U.S.C. § 534(h)(1)(A).

This carriage requirement makes no distinction between analog and digital signals but is subject only to the cap on the number of useable activated channels that must be set aside for must carry purposes, leaving no room for Commission interpretation.[73]

Furthermore, Congress was not silent in the 1992 Cable Act with regard to the must carry rights of digital broadcast signals. Section 4 provides that:

> At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to insure cable carriage of broadcast signals of local commercial television stations which have been changed to conform with such modified standards.[74]

The legislative history of this provision makes it clear that Congress intended the Commission to take whatever steps were necessary, from a technical standpoint, to insure that television broadcasters' digital signals (just as with their analog signals) were carried by local cable systems. The House Report interpreting the above language noted that:

> The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.[75]

The Commission's directive was clear: make whatever technical changes are necessary to ensure continued must carriage of local television stations in the digital

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[73] *See Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

[74] 47 U.S.C. § 534(b)(4)(B) (emphasis added).

[75] H.R. REP. No. 102-628, at 94 (1992).

world. This directive from Congress was contained in the section of the must carry provisions of the 1992 Cable Act dealing with the technical aspects of such must carry, (*i.e.*, signal degradation). The placement of the digital must carry discussion in this same section is indicative of the Congressional intent that the question of must carry was not at issue, just the technical aspects.[76] After putting off releasing a Report and Order in the two year-old must carry proceeding,[77] the FCC has thwarted the intent of Congress and crippled the DTV transition.

The PCC DTV Must Carry Proposal implements the technical changes the Commission should make to accommodate digital must carry. Much has been made of the issue of must carry during the digital transition when some stations are broadcasting in analog only and other stations are broadcasting in digital and analog. The FCC made clear that the 1992 Cable Act requires carriage of television stations' digital signals once the transition from analog to digital is complete and stations are broadcasting in the digital format only.[78] We believe that this is only a partial interpretation of the 1992 Cable Act. PCC's proposal is more comprehensive and is clearly supported by the language of the 1992 Cable Act. Under the PCC DTV proposal, a station that elects to have its digital signal replace its existing analog signal for cable carriage purposes has, for all intents, completed its cable transition to digital broadcasting. The over-the-air

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[76] *See INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991).

[77] Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, *Notice of Proposed Rulemaking*, 13 FCC Rcd 1092 (1998).

[78] *Further Notice* at ¶65.

transition to digital broadcasting will be complete when at least 85% of households are capable of receiving digital broadcasts (via all delivery methods).[79] There is no rule or policy reason for the FCC not to recognize that stations have chosen to operate digitally and to require cable operators to honor their complete digital must carry requests.

The Conference report accompanying the 1992 Cable Act required the Commission to "conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry televisions signals complying with such modified [i.e., digital] standards in accordance with the objects of this section."[80] The FCC was directed by Congress to accomplish exactly what we have proposed in our must carry plan; namely, ensure that television stations transitioning to digital continue to have their free over-the-air broadcast services available as a part of the basic service tiers of cable systems regardless of whether the television station is broadcasting in HDTV or in digital multicast. If the FCC Chairman is worried about the First Amendment implications of full digital must carry, he must be reminded that the courts are where the issue should be decided, not on the eighth floor.

Congress did not limit such carriage rights to single program services or to analog programming only but simply to free over-the-air programming. In fact, Congress specifically directed the FCC to recognize and accommodate the carriage rules to the new digital environment of its television stations which have initiated their digital broadcasting. The legislative history of the Telecommunications Act of 1996,

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[79] 47 U.S.C. § 309(j)(14)(B).

[80] CONF. REP. NO. 102-862, at 67 (1992).

Pub. L. No. 104-104, makes it clear that congress assumed that it had already taken care of digital must carry. The 1996 Telecommunications Act was intended to address only subsidiary issues relating to such must carry – not the basic grant of digital must carry rights. PCC's DTV proposal allows individual stations to determine their digital transition, for cable carriage purposes, and, in the process, will not only hasten broadcasting's conversion to digital but will mitigate any impact on cable operators by spreading out the implementation of digital must carry as different stations elect digital must carry at different times.

D. DTV Must Carry Furthers Important Government Interests.

Digital operation by vacating analog incumbents does not change the Supreme Court's analysis that must carry rules are constitutional. In *Turner I*, the Supreme Court held that must carry requirements advance three interrelated important government interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.[81] As the Supreme Court stated explicitly in *Turner II*, "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest."[82] "[B]roadcasting is demonstrably a principal source of

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[81] *Turner I*, 512 U.S. at 662.

[82] *Turner II*, 520 U.S. at 190 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)); 1992 Cable Act, § 2(a)(12).

information and entertainment for a great part of the Nation's population"[83] and there is a corresponding "governmental purpose of the highest order" in ensuring access to a multiplicity of sources.[84]

Congress believed that the mandatory carriage was necessary to prevent "a reduction in the number of media voices available to consumers"[85] and found that the cable industry posed a threat to free, over-the-air broadcast television.[86] Evidence indicated that cable systems had both the incentive and ability to drop carriage of local broadcast stations to favor affiliated cable programmers,[87] causing Congress to predict that the "economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."[88] In *Turner II*, the Supreme Court affirmed, on the basis of a substantial record, that the must carry provisions advanced the important governmental interests in a direct and material way.

These government interests are squarely at issue with vacating analog incumbents. Without full digital must carry, the service delivered by displaced stations would not be preserved. Viewers without cable (or cable households using uncabled receivers) would be unable to receive a vacating station's signals. The multiplicity of

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[83] *Turner II*, 520 U.S. at 190 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

[84] *Id.*

[85] 1992 Cable Act, § 2(a)(4).

[86] *Turner II*, 520 U.S. at 199.

[87] *Id.*

voices would be diminished and competition for viewers and advertising would be reduced. It is difficult to imagine how or when a vacating station could rebuild its viewership if unable to obtain full digital must carry rights until the end of the DTV transition.

Moreover, the digital transition provides the government with an additional interest to satisfy the applicable standards of intermediate scrutiny set forth in *Turner I* and applied in *Turner II*. Congress identified the prompt transition to digital television as an important national interest, creating a more efficient use of the electromagnetic spectrum, recovering portions for new uses, and generating additional federal revenues.[89] The implementation of digital television precisely raises the same concerns about loss of service, economic failure, and discriminatory treatment that initially prompted Congress to enact the mandatory carriage provisions. DTV was implemented to preserve a free, universal broadcasting service and promote the full benefit of the new technology to the public.[90] Full digital must carry advances these interests as well, an importance magnified by the presently faltering nature of the DTV transition.

Cable operators' and DTH providers' technological bottleneck control provides them ample power to discriminate against DTV broadcasters. Cable operators and DTH providers have ample anti-competitive incentive to deny carriage to DTV

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[88] 1992 Cable Act, § 2(a)(16).

[89] 47 U.S.C. § 337.

[90] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry*, 10 FCC Rcd 10540, 10541 (1995).

broadcasters. Cable operators and DTH providers can again threaten the economic viability of local broadcast stations and reduce the multiplicity of separately owned voices. The government's same important interests that the mandatory carriage provisions constitutionally advance plainly apply to DTV stations and more so to the incumbents.

E. It is Time to Jump-Start the DTV Transition.

The DTV transition is faltering. By establishing full digital must carry rights for vacating incumbents, a significant number of stations would have a strong incentive to promote DTV specifically and generally. There will be a stronger impetus to resolve remaining DTV issues and obstacles. The critical mass of programming needed before consumers purchase digital receivers would be attainable. The DTV transition would be accelerated, and the FCC would recover the valuable analog spectrum more quickly. Early band clearing and full digital must carry is a win-win-win.

VII. ADDITIONAL ISSUES THAT THE FCC SHOULD ADDRESS TO FACILITATE BAND CLEARING.

A. The FCC Should Issue a Report and Order in the Cable Compatibility Proceeding.

The FCC should adopt clear and enforceable connection and copyright protection standards before the end of the year, pursuant to its open cable compatibility proceeding.[91] This action will provide vacating incumbents assurances that technical

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[91] Compatibility Between Cable Systems And Consumer Electronics Equipment, PP Docket No. 00-67, *Notice of Proposed Rulemaking*, FCC 00-137 (rel. Apr. 14, 2000) ("*Compatibility Notice*").

roadblocks will not be used to deny digital service to viewers of the stations' terminated analog service. In the *Compatibility Notice*, the FCC identified two "critical unresolved matters:" (1) requirements for a DTV receiver to be labeled "cable-compatible" (specifically, whether an IEEE 1394 "firewire" connector would be required), and (2) licensing terms for copy protection technology.[92] Compatibility between DTV receivers, cable systems, and set-top boxes is required not only for a seamless digital transition, but so that consumers easily understand the capabilities of new digital technology. Digital copy protection is important because of content creators' concerns about the ease of producing large numbers of high-quality copies of digital video content. PCC and other broadcasters have grown increasingly concerned and frustrated that cable operators, television set manufacturers, and content creators lack the incentives to establish standards promptly. The FCC recognizes that "[w]ithout resolution of outstanding compatibility issues, the transition from analog to digital broadcasting will be slowed, and the reclamation and reallocation of a portion of the spectrum now allocated for analog television service will be delayed." Accordingly, PCC urges the FCC to take the steps necessary to have compatibility and copy standards in place by November 13, 2000.

B. The FCC Should Resolve the Transmission Standard Issues.

A huge and increasing number of broadcasters are urging the FCC to revise the modulation standard for DTV transmissions and permit the use of COFDM in addition to the current 8-VSB standard. Series of tests by Sinclair Broadcast Group and others

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[92] *Id.* at ¶3.

have shown that indoor DTV reception is rendered unreliable by multipath signal reflections.[93] In last month's hearing before the House Telecom Subcommittee, the FCC reiterated its belief that, trade-offs considered, 8-VSB would remain the sole modulation standard, hoping that reception problems could be resolved by as yet undemonstrated means.[94] Given the alleged lack of superiority of either standard, PCC urges the FCC to permit the use of COFDM, as most of the rest of the world has done, in addition to 8-VSB. By November 13, 2000, the FCC should (1) definitively and conclusively determine that the existing DTV modulation standard will result in reliable replication or permit the use of the alternative COFDM standard (or sanction either modulation standard); and (2) begin adopting digital receiver standards so that viewers can obtain reliable, over-the-air digital service. Such action will ensure that all viewers are protected from loss of service once analog transmissions are terminated and, more immediately, provide incumbents with realistic incentives to vacate the band.

C. The FCC Should Permit Noncommercial Digital Stations to Air Advertiser-Supported Commercial Television Programming Via Excess Digital Spectrum.

The FCC should accommodate public broadcasters and permit their multicasting of secondary, third party, advertiser-supported commercial DTV multicast programming,

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[93] Letter from Magalie Roman Salas, Secretary, FCC, to Mr. Martin R. Leader, counsel, Sinclair Broadcast Group (Feb. 3, 2000) (FCC 00-35).

[94] *Hill Questions Slow DTV Rollout as Modulation is Debated*, COMMUNICATIONS DAILY, July 26, 2000.

as contemplated.[95] The ban against advertising on public stations should not apply to noncommercial broadcasters' entire digital spectrum. Noncommercial stations, especially educational stations, are well positioned to employ multicasting to expand programming options and reach different audiences. Permitting advertiser-supported multicasting will help facilitate such use, help the economics of non-commercial stations, and demonstrate multicasting's viability in the digital marketplace.

VIII. COST SHARING RULES FOR BAND CLEARING.

PCC will support the FCC's proposal to permit the 700 MHz auction winners to reach private cost-sharing arrangements to pay incumbent broadcast licensees in the secondary auction.[96]

IX. CONCLUSION.

Bud Paxson, the single majority shareholder and Chairman of the Board of PCC, labored in the channels 59-69 desert, and as creator and co-founder of the Home Shopping Network, Inc. ("HSN"), he built the eleven stations that USA Network, Inc. now has in the channels 59-69 band. At PCC, he has built eighteen more stations in the channels 59-69 band. Mr. Paxson has built two networks out of the upper UHF channels: HSN and now **PAXTV**. In the process, HSN, under Mr. Paxson's direction, funded the construction or acquisition of seven minority-owned television stations (all in

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[95] Ancillary and Supplementary Use of Digital Television Capacity by Noncommercial Licensees, MM Docket No. 98-203, *Notice of Proposed Rule Making*, FCC No. 98-304, at ¶¶36-37 (1998).

[96] *Further Notice* at ¶82.

the UHF band), and by June 1994, 31% of minority-owned commercial television stations in this country were HSN affiliates – and 25% of them had their construction/acquisition funded by HSN. No one should think that because broadcasters such as Mr. Paxson developed this wasteland, they are bad actors for possibly entering into private contracts with 700 MHz bidders. PCC developed this spectrum that no one else wanted and in the process added many new and minority-owned stations to the broadcast arena. This spectrum was not given to PCC or any of the other broadcasters in the band. It was purchased, developed, and nurtured into a vibrant, free, over-the-air programming service. Yet in the press, broadcasters in the channels 60-69 band are described as squatters and impediments to the future. It is the essence of the American dream for someone to find oil on your property – or other profitable or worthwhile uses for spectrum.

Over three months ago, and before the FCC began to postpone the 700 MHz auction, PCC advised the FCC Commissioners that "**there is an inevitable linkage between the Commission's decision on DTV must carry and your agency's success in maximizing the public revenue and benefits from the 700 MHz auction**." Now after three 700 MHz auction delays, the linkage that PCC noted still is the key, and the responsibility is on the FCC to utilize that linkage to break the deadlock. If the Commission fails to act, it will lose its last opportunity to save digital

television from an ugly death and lose an opportunity to create a powerful wireless internet. It is now up to the FCC to act!

Respectfully submitted,

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