

implementing retransmission consent.<sup>269</sup> In the *Notice*, we asked whether digital carriage rules adopted for the cable industry should apply to OVS Operators,<sup>270</sup> to which Paxson commented in the affirmative.<sup>271</sup> Given the statutory directive to treat OVS operators like cable operators with regard to broadcast signal carriage, we find that OVS operators must carry digital-only television stations pursuant to this *Report and Order* and 76.1506 of the Commission's rules.

## B. Subscriber Notification

89. Cable operators are required to notify subscribers of any changes in rates, programming services or channel positions.<sup>272</sup> When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified.<sup>273</sup> We sought comment on how digital broadcast television carriage requirements will affect the notification provisions described above.<sup>274</sup> Pappas believes that cable systems should be required to notify subscribers whenever a DTV signal is added or analog is withdrawn, as specified in the Commission's current rules for system notification to subscribers of channel additions or deletions.<sup>275</sup> ALTV agrees, but adds that an operator should notify subscribers whenever an SDTV programming stream is available on the cable system.<sup>276</sup> We will require a cable operator to notify its subscribers whenever a digital television signal is added to the cable channel line-up or whenever such a signal is moved to another channel location. We will not require an operator to notify subscribers of the actual programming available on each possible SDTV digital stream, if such is carried under retransmission consent, because the mix of programs and services may change frequently. We find it would be unnecessarily burdensome for operators to constantly notify their subscribers, especially in large television markets where there is a potential for dozens of possible programming streams. We also believe that EPGs, or other cable system generated guides, will provide subscribers with relevant and up-to-date information in a more convenient manner than if we were to require operators to provide separate notifications. Nevertheless, we encourage operators to alert subscribers to the possibility that a broadcaster may offer several programming alternatives over the course of the day, where applicable.

## C. Cable Antenna Relay Service

90. In the *Notice*, we recognized that cable operators are frequently dependent on cable television relay service ("CARS") microwave stations to relay broadcast television signals to and within their cable systems.<sup>277</sup> CARS stations distribute signals to microwave hubs where it may be physically impossible or too expensive to run actual cable wire. In many instances, a cable operator may not be able

---

<sup>269</sup>See 47 U.S.C. §573(c)(1)(B); 11 FCC Rcd at 18311-13.

<sup>270</sup>*DTV Must Carry Notice*, 13 FCC Rcd at 15119.

<sup>271</sup>Paxson Comments at 30.

<sup>272</sup>47 C.F.R. §76.964(a).

<sup>273</sup>*Id.*

<sup>274</sup>*DTV Must Carry Notice*, 13 FCC Rcd. at 15135.

<sup>275</sup>Pappas Comments at 37.

<sup>276</sup>ALTV Comments at 82-83.

<sup>277</sup>See 47 C.F.R. §§78.1-78.115.

to string cable through an area because of geographic impediments such as rivers, mountains or superhighways or due to other restrictions, such as the inability or the expense of laying underground cable. Under such circumstances, the cable operator may be able to use CARS band microwave for point-to-point and point-to-multi-point locations to intra-connect the cable system. For example, a cable system may run cable up to a CARS transmitter site, convert all the radio frequency (RF) channels to microwave frequencies for transmission, receive the microwave at a receive location, downconvert back to the RF channels, and complete delivery of the channels via physical wiring to the subscribers. We sought comment on whether the introduction of digital broadcast television affects the CARS system, and, if so, how. We did not receive any comments on CARS and the transition to digital television. We have no reason to expect that digital television service will interfere with CARS, and we decline to revise our Part 78 rules at this time. However, if issues arise as the transition progresses, we will revisit the matter.<sup>278</sup>

#### D. Program Exclusivity Rules

91. The program exclusivity regulations, as implemented in Sections 76.92 and 76.101 of the Commission's rules, protect exclusive distribution rights afforded to network and syndicated programming through private contractual arrangements.<sup>279</sup> Television broadcast station licensees with exclusive programming rights are entitled to protect such programming by exercising blackout rights against local cable systems importing the same programming from distant television broadcast stations. Licensees may assert their rights regardless of whether their signals are actually carried on the cable system in question.

92. Currently, television stations are entitled to exercise network and syndicated blackout rights within certain geographic areas.<sup>280</sup> In *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, Report and Order, the Commission recently applied to satellite carriers' retransmission of nationally distributed superstations the network non-duplication, syndicated exclusivity and sports blackout requirements that currently apply to cable operators.<sup>281</sup>

93. In general, a local television broadcast station may assert its exclusivity rights against cable systems located within 35 miles of the broadcaster's city of license. By exercising its rights, a local television broadcast station that has secured exclusive distribution rights to programming, can prohibit cable systems within 35 miles from importing that same programming from distant television stations. A cable operator, however, importing the same programming from an otherwise distant station, is not required to honor a blackout request from a local broadcaster if the distant station is "significantly viewed" in the cable community.<sup>282</sup> The concept of significant viewing is defined in Section 76.5(i) of

---

<sup>278</sup>The Commission is currently considering expanding eligibility for CARS licenses to include all MVPDs. To the extent issues related to the digital transition are raised in that proceeding, they will be addressed in a forthcoming Report and Order. See *Petition for Rulemaking to Amend Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, 14 FCC Rcd. 11967 (1999).

<sup>279</sup>47 C.F.R. §§76.92, 76.101.

<sup>280</sup>47 C.F.R. §§76.92(a), 76.151.

<sup>281</sup>*SHVIA Non-duplication, Syndicated Exclusivity and Sports Blackout Order*, FCC No. 00-388 (rel. Nov. 2, 2000).

<sup>282</sup>47 C.F.R. §§76.92(f), 76.156(a).

the Commission's rules.<sup>283</sup> In addition to the Commission's network and syndicated exclusivity rules, significant viewing is also applicable to the Commission sports blackout rule,<sup>284</sup> and, through incorporation by reference, to the compulsory copyright licensing process.<sup>285</sup>

94. In the *Notice*, we sought comment on how the transition to digital television may affect these rules.<sup>286</sup> We specifically asked how digital broadcast multiplexing impacts these rules and whether the cable operator will be able to accommodate such black-out requests on various programming streams.<sup>287</sup> We also asked whether these rules were applicable in the digital age, with or without must carry, and whether it would be possible to repeal these rules and instead rely on the retransmission consent provisions of Section 325 of the Act to protect the rights in question.<sup>288</sup>

95. Commenters make a strong case for preserving the exclusivity rules during the transition to digital television. Indeed, there are no comments supporting repeal of the existing rules although NAB asserts that the question of repeal should be addressed in a separate docket.<sup>289</sup> ALTV believes that the Commission should apply the existing network and syndicated exclusivity rules to a local station's TV signals because the economic rationale behind the rules is the same for digital and analog.<sup>290</sup> NAB states that there is nothing inherent in the digital transition that should result in any changes to network nonduplication, syndicated exclusivity, or sports blackout; there are, in fact, stronger reasons to apply the rules in the digital context because the transition presents greater financial challenges to local stations.<sup>291</sup>

---

<sup>283</sup>A significantly viewed station is defined as one that is viewed "in other than cable television households as follows: (1) For a full or partial network station--a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station--a share of viewing hours of at least 2 percent (total week hours) and a net weekly circulation of at least 5 percent." 47 C.F.R. §76.5(i).

<sup>284</sup>47 C.F.R. §76.67. The application of this rule to cause the deletion of certain sports events carried beyond the Grade B contour of the station broadcasting the event is through reference to Section 76.5(g) of the rules. 47 C.F.R. §76.5(g).

<sup>285</sup>17 U.S.C. §111.

<sup>286</sup>*DTV Must Carry Notice*, 13 FCC Rcd. at 15135.

<sup>287</sup>*Id.*

<sup>288</sup>*Id.*

<sup>289</sup>NAB Comments at 50-51; *accord* ABA Comments at 9-11, Hildreth Comments at 11-12.

<sup>290</sup>ALTV Comments at 83. Pappas opposes changing the exclusivity rules for several reasons: (1) retransmission consent is not practically available to a large number of stations, including all but one of its own stations, because they do not have bargaining leverage; (2) relying on retransmission consent unravels Congress's intent to provide must carry as an alternative choice for carriage on a local cable system; (3) current program exclusivity rules give stations that are not carried on cable systems the right to enforce the rules, and thus prevent an operator from sidestepping a station's exclusivity rights; and (4) a cable operator could refuse to enter into a retransmission consent agreement, and if there were no exclusivity rules in place, the station would be without a remedy to enforce its exclusive programming arrangements against imported distant network signals. Pappas also states that the Commission should treat as significantly viewed in any area a digital signal whose companion analog station has been declared to be significantly viewed in that same area. Pappas Comments at 40-41.

<sup>291</sup>NAB Comments at 50.

NAB also states that the Commission should use a station's analog status to determine exclusivity issues for a station's digital signal, at least throughout the transition.<sup>292</sup>

96. MSTV states that it makes little sense for the Commission to allocate spectrum for all local stations and then fail to allow them to enforce contractual exclusivity rights, thereby undermining their competitiveness and financial viability.<sup>293</sup> Without exclusivity rules, MSTV posits, broadcasters would be at a competitive disadvantage vis-a-vis cable operators who can enforce exclusive contracts while broadcasters who have negotiated for exclusivity face duplicative programming from distant signals imported by the local cable system, thus diverting audience and advertising revenue.<sup>294</sup>

97. With regard to the effect of Section 325 on the need for exclusivity rules, MSTV stresses that a broadcaster's exclusivity rights cannot be protected through contractual relationships because: (1) Congress enacted retransmission consent intending that network nonduplication and syndicated exclusivity would apply and (2) relegating the exclusivity rules to contract terms would reinstate the competitive imbalance that the Commission sought to eliminate when it adopted the current rules.<sup>295</sup> MSTV asserts that local stations will not have sufficient negotiating power to insist on exclusivity where the cable system wants to carry a distant television signal from a large market because Section 76.64(m) prohibits local television stations from entering into exclusive retransmission consent agreements with a cable system.<sup>296</sup>

98. We find that there is an inadequate record in this proceeding upon which to base a change or repeal of the exclusivity rules. In addition, we note that the Act, as amended by the SHVIA, required the Commission to implement program exclusivity rules for satellite carriers that import certain defined superstations.<sup>297</sup> Therefore, we agree with numerous commenters that the topic of changing the rules be addressed at a future date, where a more complete and focused record can be developed. Until that time occurs, we will maintain our existing exclusivity framework for digital television signals. In addition, we shall make the appropriate change to Section 76.5 as suggested by MSTV. With respect to how SDTV multiplexing impacts the exclusivity rules and whether the cable operator will be able to accommodate blackout requests on various programming streams, we believe that it is not necessary to resolve this issue here.

---

<sup>292</sup>*Id.* at 51.

<sup>293</sup>MSTV Comments at 21-22 and n. 59. MSTV states that if a local station cannot obtain exclusivity protection from cable operators, then the Champaign, IL cable system, for example, could import the Chicago television signal that duplicates the Champaign station's programming for which the Champaign station has negotiated exclusivity within the Champaign market. *Id.*

<sup>294</sup>*Id.*

<sup>295</sup>MSTV Comments at 24-25 and n. 67, 68.

<sup>296</sup>*Id.* ABA and Hildreth also assert that repealing the Commission's exclusivity rules, and instead relying on retransmission consent, is based on the faulty premise that most or all stations will elect retransmission consent. The repeal of the exclusivity rules is an imperfect idea because even stations that are not carried on a cable system can demand exclusivity on that system under current rules. Repeal of the rules might also lead to more carriage of "distant" television stations and less of local. ABA Comments at 9-11; Hildreth Comments at 11-12.

<sup>297</sup>47 U.S.C. §339(b)

99. As we stated in the *SHVLA Non-Duplication, Syndicated Exclusivity and Sports Blackout Order*, only those exclusive contracts that provide for exclusivity vis a vis signals delivered by satellite carriers or are broad enough to encompass the delivery of duplicating programming by any delivery means entitle a station to assert exclusivity rights under the rules.<sup>298</sup> Likewise, in the digital context, only those exclusive contracts that specifically cover digital signals entitle a station to assert exclusivity rights. We note also that, in the *SHVLA Non-Duplication, Syndicated Exclusivity and Sports Blackout Order*, we stated that we were disinclined, in the early stage of the DTV transition, to allow a broadcaster to use an exclusive contract for digital programming only to prevent a cable system or satellite carrier from providing that programming in analog form to its subscribers.<sup>299</sup> Therefore, neither satellite carriers nor cable operators are permitted to carry the digital version of a program when the contract expressly provides exclusivity for both, any or all formats.

100. **Significantly Viewed.** In the *Notice*, we stated that the significant viewing standard supplements other "local" station definitions by permitting stations that would otherwise be considered "distant," for program exclusivity purposes, to be considered local based on viewing surveys directly demonstrating that over-the-air viewers have access to the signals in question.<sup>300</sup> Because digital broadcast television stations will not, in the early stages of their deployment, have a significant over-the-air audience, we sought comment on methods to address the kinds of issues that the significant viewing standard addresses in the analog environment.<sup>301</sup> We asked, for example, whether a new method should be developed that measures viewing in places that are equipped with digital receivers.<sup>302</sup> In the alternative, we asked whether the "significant viewing" status of analog stations should be transferred to their digital counterparts.<sup>303</sup> With respect to these rules, we note that in adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to insure that a station's digital over-the-air coverage area would replicate as closely as possible its current over-the-air analog coverage area. In view of this, and consistent with the comments received on this subject, we believe that the public interest is best served by according the digital signal of a television broadcast station the same significantly viewed status accorded the analog signal. We note, however, that DTV-only television stations must petition the Commission for significantly viewed status under the same requirements for analog stations in Section 76.54 of the Commission's rules.

#### E. Tiers and Rates

101. **Tier Placement.** Sections 614 and 615 are silent on the question of where signals subject to mandatory carriage must be placed, but Section 623(b)(7), one of the Act's rate regulation provisions, requires that "all signals carried in fulfillment of the requirements of section 614 and 615" must be provided to subscribers on a "separately available basic service tier to which subscription is required for access to any other tier of service."<sup>304</sup> In the *Notice*, we sought comment on whether a cable operator must

<sup>298</sup> *SHVLA Non-duplication, Syndicated Exclusivity, and Sports Blackout Order* at para. 36.

<sup>299</sup> *Id.* at para. 76.

<sup>300</sup> *DTV Must Carry Notice*, 13 FCC Rcd. at 15136.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> 47 U.S.C. §543(b)(7)(A). See also 47 U.S.C. §534(b)(7); §535(h); § 543(c).

place a broadcaster's digital signal on the same basic tier where the analog signals are found or whether a separate digital basic service tier could be established that would be available only to subscribers capable of viewing digital broadcast signals.<sup>305</sup> Adelphia argues that cable operators should be allowed to create a separate digital tier that could be purchased as an accompaniment to the analog basic tier for an extra fee.<sup>306</sup> ALTV, on the other hand, submits that the Act applies to local television stations' DTV signals just as it applies to analog signals; that is, DTV signals must be placed on the cable system's basic service tier and made available to every subscriber.<sup>307</sup>

102. In the context of analog must carry, it has been the Commission's view that the Act contemplates there be one basic service tier.<sup>308</sup> We believe that in the context of the new digital carriage requirements, it is consistent with the statutory language to require that a broadcaster's digital signal must be available on a basic tier such that all broadcast signals are available to all cable subscribers at the lowest priced tier of service, as Congress envisioned. The basic service tier, including any broadcast signals carried, will continue to be under the jurisdiction of the local franchising authority, and as such, will be rate regulated if the local franchising authority has been certified under Section 623 of the Act.<sup>309</sup> We note, however, that if a cable system faces effective competition under one of the four statutory tests,<sup>310</sup> and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital service tier. This finding is based upon the belief that Section 623(b)(7) is one of those rate regulation requirements that sunsets once competition is present in a given franchise area. We believe that the decision in *Time Warner v. FCC* supports this interpretation.<sup>311</sup>

103. **Rates.** As noted above, digital broadcast signal carriage also has potential consequences for the cable television rate regulation process. In communities where there has not been a finding of effective competition or where there is no local rate enforcement, rates for the basic service tier ("BST") are subject to regulation by local franchise authorities.<sup>312</sup> Regulated cable systems have established initial

---

<sup>305</sup> *Digital Must Carry Notice* at 15126-27.

<sup>306</sup> *Adelphia et. al. Comments* at 32.

<sup>307</sup> ALTV Comments at 71; *accord* Golden Orange Comments at 8, Morgan Murphy Comments at 15, and UPN Affiliates Comments at 5.

<sup>308</sup> In its *First Rate Report and Order*, the Commission, citing provisions in the 1992 Cable Act that consistently refer to "basic tier" in the singular, concluded that the Act contemplates that each cable operator must offer only one basic tier. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 5631, 5744 (1993) ("*First Rate Report and Order*"). The U.S. Court of Appeals for the District of Columbia Circuit found that the Commission's single basic tier requirement constituted a permissible interpretation of the 1992 Cable Act. See *Time Warner v. FCC*, 56 F.3d 151, 199 (D.C. Cir. 1995).

<sup>309</sup> See 47 U.S.C. §543(a)(3).

<sup>310</sup> See 47 U.S.C. §543(i)(1).

<sup>311</sup> *Time Warner*, 56 F.3d at 192 (holding that other provisions of Section 623, such as the Act's tier buy-through requirements, apply only in the absence of effective competition).

<sup>312</sup> 47 U.S.C. §543(b)(7)(B); see also 47 C.F.R. §76.901 *et seq.* The rates of cable programming service tiers ("CPST") were subject to Commission regulation on a complaint basis, but these regulations sunsetted on March 31, 1999. See 47 U.S.C. §543(c)(4).

regulated rates using either the "benchmark" or "cost of service" methodologies pursuant to the Commission's rules.<sup>313</sup> Once initial rates are established, cable operators are permitted to adjust rates for changes in external costs and inflation. Regulated cable operators seeking to adjust their BST rates to reflect these changes must justify rate increases using the applicable forms.<sup>314</sup> There are also cost pass-through mechanisms for defined categories of "external" costs, including franchise fees and certain local franchise costs, as well as fees paid for programming, retransmission consent, and copyright.<sup>315</sup> Compliance costs associated with must carry are not covered by the definition of external costs.<sup>316</sup>

104. The Commission is charged with adopting a rate regulation scheme appropriate for the BST.<sup>317</sup> The present rate rules take into account, *inter alia*, "the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier . . . and changes in such costs."<sup>318</sup> In the *Notice*, we sought comment on what, if any, changes in the Commission's rate rules may be necessary or desirable.<sup>319</sup> We also asked parties to refresh the record on the specific technical modifications needed to enable cable systems to deliver digital broadcast television to subscribers.<sup>320</sup> Relatively few parties addressed the rate regulation issues we raised or provided data on the anticipated costs of providing digital broadcast programming to subscribers. Therefore, it is difficult to specify how costs attributable to providing digital programming, if any, might be reflected in cable rates. Armstrong, a mid-size cable operator, states that the costs for digital conversion will include upgrading tower capacity, building or leasing additional tower space, and adding new digital antennas.<sup>321</sup> SCBA estimates the cost for digital broadcast signal carriage will be at least \$2,000 per digital channel at the headend, which would amount to \$10,000 or more for the average television market with five local stations.<sup>322</sup> In contrast, ALTV contends there is only a marginal cost to add a few additional DTV signals.<sup>323</sup> As to the issue of whether the carriage costs could be passed along to subscribers, ALTV cautions that the

---

<sup>313</sup>See 47 C.F.R. §76.922(a). Initial rates recover the costs of the cable network and are adjusted for inflation. A "cost of service" mechanism is also available to cable system operators that believe the benchmark process fails to adequately account for system costs. See 47 C.F.R. §76.922(i).

<sup>314</sup>FCC Form 1210, Updating Maximum Permitted Rates for Regulated Cable Service (May 1994), FCC Form 1240, Annual Updating for Maximum Permitted Rates For Regulated Cable Service (July 1996); see also 47 C.F.R. §§76.922(d), (e), 47 C.F.R. §76.933, and FCC Form 1235, Abbreviated Cost of Service Filing for Cable Network Upgrades.

<sup>315</sup>47 C.F.R. §§76.922(c)(3), (f).

<sup>316</sup>See 47 C.F.R. §76.922(f).

<sup>317</sup>See 47 U.S.C. §543(b)(1).

<sup>318</sup>47 U.S.C. §543(b)(2)(C)(ii).

<sup>319</sup>*DTV Must Carry Notice*, 13 FCC Rcd. at 15134-35.

<sup>320</sup>*Id.* at 15134-35.

<sup>321</sup>Armstrong notes that digital towers require a 1:1 ratio for channels to antennas, so that five digital signals carried would require five more additional antennas. Armstrong states that it has no room on some of its towers and will need new \$100,000 stand-alone towers in certain circumstances. Armstrong Comments at 40.

<sup>322</sup>SCBA Comments at 6. SCBA adds that if each of the five stations chose to broadcast three digital signals and the cable system had to carry all of them, the cost could increase to \$30,000 at the headend. *Id.*

<sup>323</sup>ALTV Comments at 82 and n. 191.

Commission should not allow the cable industry to exploit fears of rate increases due to digital carriage.<sup>324</sup> AAPTS asserts that even without must carry requirements, cable operators will be buying equipment to carry digital signals, so there is no basis to impose these costs on smaller broadcasters, especially noncommercial educational television stations.<sup>325</sup>

105. With regard to the rate issues, we first note that there are costs for carrying digital television signals at different stages of the cable system transmission process. First, antennas and/or other equipment necessary to receive the broadcast signal at the cable headend are required. In the must carry context, these costs are the broadcasters' responsibility under the Act.<sup>326</sup> In the retransmission consent context, the broadcaster and the cable operator may agree to any cost arrangement that is mutually agreeable. Then there are costs for processing the digital television signal in the cable headend and at other points in the cable system up to the point in which the cable is installed inside the cable subscribers' premises. The treatment of these kinds of costs is considered below. Finally, there are costs associated with providing subscribers with customer premises equipment, such as set top boxes. As explained below, we find no need to change the rules relating to such equipment. We also note that we are considering adopting a per channel adjustment methodology for those operators that add digital broadcast signals to their channel line-ups. This topic is discussed in the *FNPRM*.

106. In general, rate adjustments for channels added to the BST are limited to the recovery of external costs, including a 7.5% mark-up for new programming costs. "External costs" have been specifically limited to taxes, franchise fees, franchise compliance costs (including PEG), retransmission and copyright fees, other programming costs, and Commission regulatory fees.<sup>327</sup> There are also rules and forms in place that address situations where cable systems are upgrading physical plant to provide digital programming to cable subscribers. Section 76.922(j)(1) of the Commission's rules states: "Cable operators that undertake significant network upgrades requiring added capital investment may justify an increase in rates for regulated services by demonstrating that the capital investment will benefit subscribers."<sup>328</sup> FCC Form 1235 is an abbreviated cost of service filing used for network upgrades pursuant to Section 76.922(j). This form permits operators to adjust rates by reporting the cost of a system upgrade, which is added to a system's tier rate to generate a maximum permitted rate.<sup>329</sup> The benchmark rates and price cap adjustments for inflation will generally allow systems to recover normal capital costs, but cable operators may use Form 1235 to recover costs for "significant" upgrades, such as expansion of bandwidth, conversion to fiber optics, or system rebuilds, without doing a cost of service analysis for the whole system.<sup>330</sup> The original goals of the abbreviated cost-of-service showing for

---

<sup>324</sup> *Id.*

<sup>325</sup> AAPTS Comments at 52.

<sup>326</sup> 47 U.S.C. §534(b)(10)(A).

<sup>327</sup> See 47 C.F.R. §76.922(f).

<sup>328</sup> 47 C.F.R. §76.922(j)(1).

<sup>329</sup> See *Rate Regulation and Adoption of Uniform Accounting System for Provision of Regulated Cable Service*, Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 2220, 2295 (1996) ("Final Cost Order"); see also *Marcus Cable Associates, L.P.:City of Glendale*, Memorandum Opinion and Order, 12 FCC Rcd. 23216 (1997) ("Marcus") (upgrade form allows cable operators to justify rate increases related to significant capital expenditures to improve rate-regulated services).

network upgrades, to "promote the availability of diverse cable services and facilities [and] encourage economically justified upgrades," are as relevant now as they were in 1994.<sup>331</sup>

107. For an operator to justify rate adjustments using the FCC Form 1235, the Commission currently requires: (1) that the upgrade be 'significant' and require added capital investment, such as expansion of bandwidth capacity, conversion to fiber optics or system rebuilds; (2) that the upgrade actually benefit subscribers through improvements in the regulated services subject to the rate increase; (3) that the upgrade rate increase not be assessed until the upgrade is complete and providing benefits to subscribers of regulated services; (4) that the operator demonstrate its net increase in costs, taking into account current depreciation expense, projected changes in maintenance and other expenses, and changes in other revenues; and (5) that the operator allocate its costs to ensure that only costs allocable to subscribers of regulated services are imposed upon them.<sup>332</sup> Based on the lack of comment about the need for rate adjustments, we expect that many cable systems will be able to accommodate digital television signals through the normal improvements and expansions of service that are reflected in the rate adjustments allowed by FCC Forms 1210 and 1240. However, some systems are also undertaking significant overall system upgrades, a part of which will include a digital buildout, and for which a Form 1235 upgrade rate adjustment would be appropriate.

108. There may also be systems, requiring significant technical improvements to carry digital signals, that do not necessarily qualify as an "upgrade" under FCC Form 1235. For these kinds of systems as well, we believe it will be appropriate for operators to use FCC Form 1235 for a rate adjustment. Allowing operators to pursue this option may hasten the digital transition as it will provide an incentive to add headend and other system equipment to accommodate the carriage of digital television signals.

109. The current instructions for Form 1235 require the cable operator to qualify for an upgrade rate adjustment by (1) certifying that the upgrade meets the Minimum Technical Specifications<sup>333</sup> or (2) describing how the upgrade will be significant and will benefit subscribers. The instructions for the second option include, where applicable, the number of channels added to a tier and the level of improvement in picture quality.<sup>334</sup> Thus, we find that Form 1235 can be an appropriate vehicle for allowing a cable operator to adjust rates commensurate with their upgrade costs to the extent such upgrades are necessary to provide digital broadcast programming to its subscribers. We note, however, that an operator may file a Form 1235, even if it had done so before, if it can demonstrate new costs are

---

(...continued from previous page)

<sup>330</sup> See *Rate Regulation and Adoption of Uniform Accounting System for Provision of Regulated Cable Service*, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd. 4527, 4675 (1994) ("*Interim Cost Order*").

<sup>331</sup> *Id.* at 4674.

<sup>332</sup> *Id.*; see also *Marcus*, 12 FCC Rcd. at 4.

<sup>333</sup> The Minimum Technical Specifications are (1) an increase in usable bandwidth to at least 550 MHz capacity with upgrade capability to 750 MHz, fiber to the node or beyond, and no more than 1,500 homes per node; or (2) for "small systems," an increase in usable bandwidth to at least 550 MHz, fiber to the node or beyond, and no more than 3,000 homes per node. See FCC Form 1235, p. 5.

<sup>334</sup> *Id.*

not being recovered through the surcharge calculation on a previous Form 1235. Section 76.922(j) is amended to clarify that it is appropriate to use the network upgrade form in these circumstances.<sup>335</sup>

110. While these upgrades will make digital broadcast programming available to all basic cable television subscribers, we believe the rate adjustments should only apply to those that purchase digital programming. We note that rate increases based on upgrades shall not be assessed on these subscribers until the upgrade is complete and the subscriber is receiving digital television signals.<sup>336</sup> If the digital broadcast programming were offered on the BST, the basic tier rate would consist of the maximum permitted rate for the basic tier plus the FCC Form 1235 surcharge which represents the portion of the digital upgrade cost allocated to the basic tier. An operator could continue to allocate all of its digital upgrade costs to the CPST.

111. Finally, we note that regulated cable systems may charge subscribers for customer premises equipment, such as the set-top box, that may likely be necessary for digital subscribers.<sup>337</sup> In communities where there has not been a finding of effective competition, these equipment rates are subject to regulation. Our rules permit cable operators to charge subscribers for set top boxes and other equipment provided the charges do not exceed actual costs.<sup>338</sup> In addition, the Act provides that cable operators can aggregate their equipment costs on a franchise, system, regional, or company level and can aggregate the costs into broad categories, regardless of the varying levels of functionality of the equipment within these broad categories.<sup>339</sup> As we find that the regulatory framework in place for cable subscriber premises equipment is adequate to account for the costs of adding digital television signals, there is no need to make rule adjustments here.

## VII. FURTHER NOTICE OF PROPOSED RULEMAKING

112. As noted above, after reviewing the comments submitted in this proceeding, we arrive at the tentative conclusion that, based on the current record, a dual carriage requirement may burden cable operators' First Amendment interests more than is necessary to further the important governmental interests they would promote. However, we seek to gather substantial evidence on this matter so that we may evaluate the issues on a complete and full record. Accordingly, we request further information on a number of matters, including, but not limited to: (1) the need for dual carriage for a successful transition to digital television and return of the analog spectrum; (2) cable system channel capacity; and (3) digital retransmission consent. Much has changed since we first opened this docket in July of 1998, and it is necessary to update the record to reflect events pertinent to the carriage issues being debated. In addition,

---

<sup>335</sup> See amended rule in Appendix D (cable operators that undertake significant network upgrades requiring added capital investment may justify an increase in rates for regulated services by demonstrating that the capital investment will benefit subscribers, including providing television broadcast programming in a digital format).

<sup>336</sup> See 47 C.F.R. §76.922(j)(2). The process whereby operators can file for pre-approval based on projected costs at any time before the upgrade services become available is unchanged. The pre-approval upgrade incentive add-on may be charged to subscribers as subsections of the system are completed and the upgraded service is provided to subscribers. Operators using this option must refile the Form 1235 when the upgrade is complete, using actual costs where applicable. See FCC Form 1235, Instructions for Completion of Abbreviated Cost of Service Filing for Cable Network Services at 2 (Feb. 1996).

<sup>337</sup> See 47 U.S.C. §543(b)(3)(A), 47 C.F.R. §76.923.

<sup>338</sup> See 47 C.F.R. §76.923(a)(2).

<sup>339</sup> 47 U.S.C. §543(a)(7).

we ask whether cable operators should be allowed to increase subscriber rates for each 6 MHz of capacity devoted to the carriage of digital broadcast signals.

113. To date in this proceeding, we have received comments arguing that the statute requires dual carriage or that the statute forbids it. It is our view, having deliberated extensively on this question, that neither of these views prevail. Based on the record currently before us, we believe that the statute neither compels dual carriage; nor prohibits it. It is precisely the ambiguity of the statute that has driven this policy debate. In order to weigh the constitutional questions inherent in a statutory construction that would permit dual carriage, we believe it is appropriate and necessary to more fully develop the record in this regard. Because any decision requiring dual carriage would likely be subject to a constitutional challenge, and because an administrative agency can consider potential constitutional infirmities in deciding between possible interpretations of a statute, we are compelled to further develop the record on the impact dual carriage would have on broadcast stations, cable operators and cable programmers, as well as consumers. We believe that more evidence is necessary because the Supreme Court sustained the Act's analog broadcast signal carriage requirements against a First Amendment challenge principally because Congress and the broadcasting industry built a substantial record of the harm to television stations in the absence of mandatory analog carriage rules.<sup>340</sup> We are also mindful that the record must substantially reflect how Commission action in this proceeding will serve the three identified governmental interests supporting mandatory carriage in *Turner*, which are: (1) the preservation of the benefits of free over-the-air television; (2) the promotion of the widespread dissemination of information from a multiplicity of sources; and (3) the promotion of fair competition.<sup>341</sup>

114. We also recognize that the intermediate scrutiny factors established in *U.S. v. O'Brien*<sup>342</sup> and applied in the *Turner* cases, for determining whether a content-neutral rule or regulation violates the Constitution, must also be satisfied here. A content-neutral regulation will be upheld if: (1) it furthers an important or substantial government interest; (2) the government interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>343</sup> In sum, under the *O'Brien* test, a regulation must not burden substantially more speech than is necessary to further the government's legitimate interests. Thus, a dual carriage rule must satisfy the *Turner* factors and meet the *O'Brien* test. We invite commenters that support a dual carriage requirement to provide specific empirical information to demonstrate how mandatory dual carriage would satisfy the requirements of both *Turner* and *O'Brien*. We request that commenters that have previously submitted legal arguments on these points in response to the *Notice*, not repeat these arguments.

115. In the case of dual carriage, we believe that the record is insufficient to demonstrate the degree of harm broadcasters will suffer without the carriage of both signals. In addition, we must carefully consider the burden such a requirement would impose on the cable operator. We seek information on digital retransmission consent agreements to determine the degree to which cable operators are carrying digital signals on a voluntary basis. If broadcasters are being carried by agreement, then they may not be harmed in the absence of a digital carriage requirement. In addition, First Amendment precedent requires that we tailor the carriage requirement to avoid burdening more speech

---

<sup>340</sup>*Turner Broadcasting System, Inc. v. U.S.*, 117 S. Ct. 1174, 1189, 520 US 180 (1997) ("*Turner II*").

<sup>341</sup>*Turner Broadcasting System, Inc. v. U.S.*, 512 U.S. 622, 662 (1994) ("*Turner I*"); *Turner II*, 117 S.Ct. at 1186.

<sup>342</sup>391 U.S. 367, 377 (1968).

<sup>343</sup>*Id.*

than necessary. In this regard, the impact of mandatory carriage on cable systems was relevant in *Turner*. We therefore seek substantive information to determine cable system channel capacity.

116. Concurrently with this *FNPRM*, we are sending out a survey to cable operators that asks specific questions concerning retransmission consent as well as cable system channel capacity.<sup>344</sup> We believe that this form of inquiry is necessary because we need particularized system information that can only be obtained through a survey. The answers to this survey will be used to supplement the general responses we receive as a result of the questions we ask in the *FNPRM*. The cable operators' answers to the survey questions will be included in the record and available for public comment. We expect that the information provided by the cable operators will provide further insight regarding the constitutional questions inherent in the dual carriage discussion.

#### A. Digital Television Transition and Mandatory Carriage

117. Both Congress and the Commission have worked to develop a digital television transition that accounts for the needs of the broadcast industry, while recognizing the government's interest in the prompt return of the analog broadcast spectrum. The Commission's stated expectation when the DTV rules were adopted was that analog television broadcasting would cease no later than the end of 2006. With passage of the *Balanced Budget Act of 1997*, Congress codified the December 31, 2006 analog television termination date, but also adopted certain exceptions to it.<sup>345</sup> The *Notice* in this proceeding

<sup>344</sup>We note that the National Association of Telecommunications Officers and Advisors ("NATOA") commented that the Commission should carefully study channel capacity and retransmission consent issues before acting on the issue of dual carriage. NATOA Reply Comments at 3-4.

<sup>345</sup>Section 309(j)(14) of the Communications Act now provides:

(A) Limitations on terms of terrestrial television broadcast licenses. - A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006.

(B) Extension. - The Commission shall extend the date described in subparagraph (A) for any station that requests such extension in any television market if the Commission finds that--

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

(ii) digital-to-analog converter technology is not generally available in such market; or

(iii) in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market--

(I) do not subscribe to a multichannel video programming distributor (as defined in section 522 of this title) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either--

(a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or

(continued....)

discussed must carry rules for possible application during a temporary transitional period prior to the cessation of analog broadcasting. Because of the nature of the exceptions set forth in the *Balanced Budget Act of 1997*, questions have arisen as to how long the transition period might last either with or without a dual carriage requirement. Some have expressed doubt that the return of the analog broadcast spectrum will be completed by the end of 2006, regardless of whether there is a digital carriage requirement.<sup>346</sup> Others have argued that dual carriage is necessary to enable broadcasters to meet the statutory tests and complete the transition on time.<sup>347</sup> None of the participants in this proceeding, however, have provided a concise plan for how and when the transition will be completed. As such, a number of questions concerning the transition have arisen. For example, under what circumstances and statutory interpretations will the statutory criteria for the auction of recaptured broadcast television spectrum be satisfied? Will the analog television license be returned when 85% or more of the television households in a market *either* subscribe to an MVPD that carries all of the digital broadcast stations in the market *or* have a DTV receiver or digital downconverter to receive the digital signal over the air? Or is there a different interpretation of the statutory exceptions? Will the spectrum be returned if some of the MVPD subscribers are unable to receive and view the DTV programming notwithstanding that it is carried by the MVPD because they do not have a digital receiver or converter? How does the growth of competitive non-cable MVPD's change the analysis? Alternatively, would the analog licenses be returned in a market in which 85% of the television households had a DTV receiver or digital-to-analog converter, but only 30% subscribed to a MVPD that carried all of the digital television stations in the market?

118. Understanding how the affected parties expect to complete the transition, and exactly how the law applies, substantially affects the Commission's policy approach to the digital television transition as well as to the overall issue of cable carriage. A mandatory dual carriage requirement, for example, would place a more significant and lasting burden on a cable operator's constitutional rights if in fact there will be a substantially extended transition to a digital-only environment. We seek comment on these transition issues and ask for more specific comment on when the analog spectrum is likely to be returned under both mandatory and non-mandatory dual carriage scenarios. We also seek comment on whether and how the dual carriage burden on cable operators may be lessened by using a transitional approach limiting dual carriage to a specified period of time. For example, in this regard, how would a three year limit on dual carriage affect the constitutional question?

119. There are several other issues concerning the rollout of digital broadcast television that still remain. For example, a number of digital television licensees in markets 11-30, that were required to begin digital broadcasting on November 1, 1999 have asked for extensions of time to build out their facilities.<sup>348</sup> Such petitions assert that these extensions may have been necessary because local zoning requirements have hindered the construction of digital broadcast towers or because there are construction and equipment delays. Whatever the case may be, it is difficult to proceed with the dual carriage question

---

(...continued from previous page)

(b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

<sup>346</sup> *Ex Parte* meeting between NAB and Commission Staff, October 26, 1999; *see also*, Peter J. Brown, 2006: A DTV Odyssey—Broadcasters, Manufacturers Agree Spectrum Giveback in Six Years Highly Unlikely, *Digital Television*, December, 1999 at 1, 6.

<sup>347</sup> ALTV Comments at 23-34.

<sup>348</sup> DTV Application Processing Status—November 15, 2000, <http://www.fcc.gov/mmb/vsd/dtvstatus.html>.

if it remains unclear how and when digital signals will become available in any particular market. Because an operator is only required to carry broadcast signals up to one-third of its channel capacity, to rule on the dual carriage issue now may result in on-air digital signals being carried, at the expense of those yet-to-air digital signals that may not be carried because the operator's one-third cap has been met and the operator is reluctant to disrupt viewers by changing signals carried. In this regard, we ask whether we should wait for all or a more significant number of broadcasters to build out their facilities before considering a dual carriage rule to avoid this potential disruption.

120. We also note that there appears to be a limited amount of original digital programming being broadcast. This calls into question the practicality of imposing a dual carriage rule at this time. Cable subscribers would not immediately benefit from a dual carriage rule if there is little to view but duplicative material. In addition, there is a risk that if carriage were mandated, cable subscribers would lose existing cable programming services that would be replaced on the channel line-up by digital television signals with less programming. It is difficult to decide definitional issues, such as what would be considered a "duplicative signal" without more information.<sup>349</sup> We ask broadcasters to describe what part of their planned digital programming streams will be devoted to simulcast of their analog programming and what parts are, or will be used, for other programming.<sup>350</sup> We ask broadcasters to provide us with information on the exact amount of digital programming, on a weekly basis, being aired in a high definition format and the exact amount of original digital programming. We also seek comment on the number of hours, in an average day, that a broadcaster currently airs digital television, and specifically high definition digital programming.

121. We also seek further comment on issues relevant to the carriage of digital signals by small operators. As described in the Order, above, the SCBA expressed concern that allowing broadcasters to tie analog and digital retransmission consent could have a negative financial effect on small cable operators.<sup>351</sup> The current record does not contain adequate evidence on this point. We specifically request information on small cable operators' equipment costs to deliver digital signals to subscribers and experiences thus far with retransmission consent negotiations involving both analog and digital signals.

122. **Program-related.** In addition, as discussed above, cable operators are required to carry "program-related" material as part of the broadcaster's primary video.<sup>352</sup> We seek comment on the proper scope of program-related in the digital context. As we note in the Order above, we believe that digital television offers the ability to enhance video programming in a number of ways. For example, a digital television broadcast of a sporting event could include multiple camera angles from which the viewer may select. In addition, a digital broadcast could enable viewers to select other embedded information such as sports statistics to complement a sports broadcast or detailed financial information to complement a financial news broadcast. We seek comment on whether such information or interactive enhancements like playing along with a game or chatting during a TV program should qualify as "program related." What are broadcasters' plans in this regard? What are the technical requirements for broadcasting, receiving and viewing this programming material? Would they be viewed on a screen simultaneously or

---

<sup>349</sup>47 U.S.C. §534(b)(5), see also *DTV Must Carry Notice*, 13 FCC Rcd. at 15123.

<sup>350</sup>See *DTV Fifth Report and Order*, 12 FCC Rcd. at 12832 (requiring broadcasters to begin phasing in simulcasting in 2003 (50%) and complete 100% simulcasting in 2006).

<sup>351</sup>See discussion at ¶ 34, *supra*.

<sup>352</sup>See, *supra*, ¶ 57.

is it necessary to change channels or select a different view on the same screen? What is the proper relationship between “program-related” and “ancillary or supplementary” in terms of the statutory objectives? To what extent, if any, is “program-related” limited by ancillary or supplementary? We also note that the statutory language that describes “program-related” in the context of NCE stations differs in some respects from the language regarding program-related content for commercial stations.<sup>353</sup> Specifically, Section 615(g)(1), establishing the content of NCE stations to be carried by cable operators, tracks the language of Section 614(b)(3)(A), the provision for commercial broadcasters, except that the NCE provision goes on to include in the definition of “program related” material: “that may be necessary for receipt of programming by handicapped persons or for educational or language purposes.”<sup>354</sup> In light of the foregoing, we seek comment on how to define “program related” material for NCE stations. How, if at all, should it differ from “program-related” in the context of commercial stations? For example, some commenters have argued that if an NCE station multicasts programming for “educational” purposes the cable operator should carry all such program streams.<sup>355</sup> We seek comment on whether these “educational” program streams should qualify as “program related” in the context of must carry, particularly in light of the language in 615(g)(1) noted above.

## B. Channel Capacity

123. In the *Notice*, we sought quantified estimates and forecasts of available usable channel capacity.<sup>356</sup> We asked whether there were differences in channel capacity that are based on franchise requirements, patterns of ownership, geographic location, or other factors.<sup>357</sup> We also inquired about the average number of channels dedicated to various categories of programming, such as pay-per-view, leased access, local and non-local broadcast channels, and others that would assist us in understanding the degree to which capacity is, and will be, available over the next several years.<sup>358</sup> We sought system upgrade information.<sup>359</sup> For example, we asked for comment on whether 750 MHz is the proper cutoff for defining an upgraded system or should a lower number, such as 450 MHz, be used instead.<sup>360</sup> We also asked commenters to provide information on the expected growth rate for cable channel capacity between now and 2003.<sup>361</sup> In addition, we sought comment about cable programmer plans to convert to digital and what additional carriage needs these programmers would have in the future.<sup>362</sup> These questions were posed to generate a record on available channel capacity for digital carriage purposes and help the Commission determine the speech burden on cable operators under the First Amendment and the *Turner* cases.

---

<sup>353</sup> Compare Section 614(b)(3)(A) and 615(g)(1).

<sup>354</sup> 47 U.S.C. § 535(g)(1).

<sup>355</sup> See e.g., *Letter from the Association of America's Public Television Stations*, January 18, 2001.

<sup>356</sup> *DTV Must Carry Notice*, 13 FCC Rcd. at 15121.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* at 15115.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

124. We received widely divergent information concerning cable channel capacity availability. For example, NAB asserts that current channel capacity is substantial and a significant number of channels are unutilized, particularly in large markets where the Commission has required the construction of the first DTV stations.<sup>363</sup> NCTA disputes this claim and asserts that what matters is not whether a cable system has adequate capacity to add new digital must carry signals during the transition, but whether a significant number of actual systems serving a significant number of customers will be forced to remove services to accommodate both analog and digital must carry signals.<sup>364</sup> We find the comments and analyses provided by the commenters are useful for establishing the framework for this inquiry. However, a number of the commenters rely on data sources that are either incomplete, or draw upon an unrepresentative sample of cable systems.<sup>365</sup> Moreover, some of the data is outdated, for future channel capacity estimates. For all of these reasons, as well as the fact that accurate capacity information is essential for a well articulated and constitutionally sustainable dual carriage decision under *O'Brien* and *Turner*, we seek further information on current capacity and forecasts for capacity growth in the future.

125. We first reiterate the questions we posed in the *Notice*, as summarized in paragraph 121, above. We then note that the NCTA, on its website, has stated the following: "It is estimated that 82% of all cable homes now are passed by at least 550 MHz plant—with 65% of cable homes passed by systems with 750 MHz or higher, positioning cable to compete more effectively with DBS companies, who typically offer more than 100 channels."<sup>366</sup> While this information is more recent than the data submitted by the NAB, it is still tabulated from reports in 1999. Thus, we ask for any information on system upgrades current through this month. We specifically seek comment on the number of cable systems nationwide, on a percentage basis, that are now, or soon will be, upgraded to 750 MHz. With regard to these kinds of systems, we ask how many channels are now, or soon will be available for video programming. We seek comment on whether it is possible for 750 MHz systems to be channel-locked and have no capacity to carry additional digital broadcast signals. We seek comment on cable industry plans to build systems of greater capacity in the future.

126. We also seek comment on techniques that conserve or recapture cable channel capacity. Data on this matter is important because it may belie the cable industry's claim that there is, or will be, no channel capacity to add more programming. For example, an operator that uses 256 QAM will have 40% more capacity than an operator that does not. With this noted, we ask how many cable systems are now, or soon will be, using 256 QAM. In addition, we ask if there are certain set top boxes or related software that can further increase capacity for systems using 256 QAM. Some operators are also using specialized techniques that can comb packages of digital cable programming sent by digital compression operations such as Headend in the Sky ("HITS") or other digital compression program delivery services.<sup>367</sup> Using such filtering technology, an operator can select the digital cable programming it wants to carry and

---

<sup>363</sup>NAB Comments at 27.

<sup>364</sup>*Id.* at 53.

<sup>365</sup>See Time Warner Comments at Exhibit E (listing a select few cable system clusters to exemplify the burden a dual carriage requirement would impose).

<sup>366</sup>See <http://www.ncta.com/glance.html> (citing Paul Kagan Associates, Inc., *Cable TV Technology*, May 28, 1999, p.3).

<sup>367</sup>Digital programming packages sent via satellite come in clusters of services known as "pods." A pod may consist of 3-8 thematically similar programming services, such as sports or movies. Until recently, cable operators had to receive the entire pod and could not parse out individual services.

discard that programming it prefers not to carry.<sup>368</sup> Through this process, an operator can save as much as 10 MHz of cable channel capacity.<sup>369</sup> We seek comment on how many operators are currently using combing technology to recapture spectrum. A third technique used by some cable operators to save channel capacity is to shift certain services from an analog tier to a digital tier where such programming will be digitally compressed. By doing this, an operator could free up additional analog space for other uses. We seek comment on this technique and ask how many operators are now exercising this option.

127. In its comments, New World Paradigm ("NWP") states that the Commission should adopt digital carriage rules that allow or motivate cable operators to deliver services from video servers through the internet's channel addressing methodology. According to NWP, channel addressing uses existing capacity very efficiently and asserts that adoption of the internet's channel addressing method would serve the public interest because it expands cable channel capacity to accommodate an infinite amount of services.<sup>370</sup> NWP believes that accessing programming residing in a video server, and then sending that specific programming to the subscriber, is a far more efficient way of using channel capacity than shipping all channels to the subscriber at the same time.<sup>371</sup> NWP states that a channel should be defined as "any internet addressable video service engineered for the electromagnetic spectrum carried solely in wired networks from the producer of the video service and delivered through a video server and made available for and to subscribers of a cable system."<sup>372</sup> NWP argues that expanding the definition of "cable channel" would position cable to be a communications medium merging voice, internet and video services into a characterless digital data stream.<sup>373</sup> We seek comment on NWP's proposal, in general, and ask whether it is technically feasible for cable operators to cache broadcast programming in this manner. We also ask what statutory or rule changes would be necessary to accomplish what NWP proposes. Finally, we ask what copyright issues may arise in this context, how this approach would affect the advertising rate structure for broadcasters, and whether cable operators are contractually or otherwise restricted from implementing a video server model of distributing local broadcast programming.

### C. Voluntary Carriage Agreements

128. In the *Notice*, we recognized that most commercial broadcast stations, at least 80% in 1993 for example, were carried by cable systems through retransmission consent and asked whether this general pattern would be repeated with respect to digital broadcast television signals during the transition period.<sup>374</sup> We stated that the broadcasters that are most likely to elect must carry are those stations that are not affiliated with the four major networks. Many of these stations will not commence digital operations until 2002 when they are required to do so under the Commission's rules.<sup>375</sup> We sought comment on these general suppositions and on the effect these market factors would have on the need to

<sup>368</sup> Imedia is one such company that provides cable operators with the technology to filter digital program packages.

<sup>369</sup> This statistic was taken from *ex parte* comments made by Cox Communications on November 15, 1999.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 3.

<sup>374</sup> *DTV Must Carry Notice*, 13 FCC Rcd. at 15110.

<sup>375</sup> *Id.*

implement a digital carriage requirement.<sup>376</sup> We also asked what effect not setting rules would have on television stations not affiliated with the top four networks that want to commence digital broadcasting before 2002.<sup>377</sup> We sought comment on how retransmission consent, rather than mandatory carriage, could speed the transition to digital television.<sup>378</sup>

129. According to the cable commenters, several digital retransmission consent agreements have been reached. For example, AT&T Broadband has arrangements with NBC and FOX to carry their owned and operated stations' digital signals for the next several years.<sup>379</sup> Time Warner states it has digital carriage arrangements with all four major networks some network affiliate owners,<sup>380</sup> as well as a group of public broadcasters.<sup>381</sup> While we are encouraged that some broadcasters, such as those noted above, have been able to obtain cable carriage through retransmission consent agreements, outstanding questions remain concerning the scope and pace of the retransmission consent process. For example, MSTV reports that cable operators have negotiated digital carriage with network owned and operated stations but have refused to discuss digital retransmission consent with several network affiliated station groups.<sup>382</sup> We seek comment on whether this statement is correct. If so, why haven't cable operators entered into negotiations with network affiliated broadcast groups?

130. With regard to the retransmission consent deals already concluded, we seek comment on the scope of such agreements. For example, while Time Warner has deals with CBS, ABC, NBC, FOX, and several PBS affiliates, we seek comment on how many digital television signals are now available for purchase by subscribers. Moreover, on what tier of service are these signals being carried? We also ask whether such signals are being carried in 8 VSB or in QAM. What television markets do these deals affect? And in those markets, what percentage of cable subscribers are served by a Time Warner system? And of those systems, do the deals apply only to upgraded 750 MHz systems or all systems regardless of capacity? At first glance, Time Warner's efforts seem to satisfy our goal of providing cable subscribers' access to digital television signals on a voluntary basis, but if the agreements only concern certain areas and certain systems, it would call into question the extent to which the marketplace is actually working. We pose the same set of questions and concerns to the other publicly announced arrangements involving other cable operators, such as AT&T and its respective broadcast station partners.

131. We also note that in August of 1999, the Commission adopted new ownership rules that affect the number of television stations in any given market that can be owned or controlled by a single

---

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 15111.

<sup>378</sup> *Id.*

<sup>379</sup> See AT&T-NBC's Digital Dance, *Broadcasting & Cable*, June 14, 1999, at 9; AT&T Broadband & Internet Services and Fox Entertainment Group Enter Into Long-Term Retransmission and Digital Agreement for Fox Owned-and-Operated Stations, AT&T News Release, September 2, 1999.

<sup>380</sup> See, e.g., *Time Warner Cable and Belo Announce Texas News Partnerships*, Press Release, September 25, 2000; *Hearst-Argyle Television and Time Warner Cable Reach Agreement on Carriage of Local Television Stations*, Press Release, August 14, 2000.

<sup>381</sup> See *Public Television and Time Warner Cable Agree on Digital Carriage*, Press Release, September 19, 2000.

<sup>382</sup> *Ex Parte* letter submitted by MSTV, November 9, 1999.

broadcaster.<sup>383</sup> We seek comment on the effect of these ownership changes on carriage of broadcast signals and ask how the potential changes in the broadcast industry will affect the retransmission consent process.

#### D. Tier Placement

132. As discussed above, Section 623(b)(7)(A) of the Act requires that the basic tier on a rate regulated system include all signals carried to fulfill the must carry requirements of Sections 614 and 615 and "any signal of any television broadcast station that is provided by the cable operator to any subscriber. . .".<sup>384</sup> We believe that it would facilitate the digital transition to permit cable operators that are carrying a broadcast station's analog signal on the basic tier to carry that broadcast station's digital signal on a digital tier pursuant to retransmission consent. We seek comment on permitting such carriage and whether it would encourage more cable operators to voluntarily carry a broadcaster's digital signal. We believe that such an approach, which is necessarily limited to the duration of the transition in a given market, is consistent with the flexibility given the Commission by Section 614(b)(4)(B) to prescribe rules for the transition. We seek comment on this interpretation. We also seek comment on limiting this approach to those situations in which the digital programming is a simulcast of the analog programming available on the basic tier. We reiterate that, as discussed above, if a cable operator is carrying only the broadcaster's digital signal, and not the analog signal, the digital signal must be available to subscribers on a basic tier to which subscription is required for access to any other tier.

#### E. Per Channel Rate Adjustments

133. We recognize that cable operators will be adding digital broadcast services to their channel line-ups in the years ahead. While the addition of such channels implicates our rate regulation rules, we received no comment on what impact this occurrence will have on our per channel rate adjustment methodology.<sup>385</sup> Thus, in addition to providing for the direct recovery of costs associated with adding digital broadcast programming, as explained above, we now propose to permit cable operators to adjust BST rates to reflect the addition of channels of digital broadcast programming, if the operator decides to place such programming on that tier. When developing rate regulations pursuant to the 1992 Cable Act, the Commission recognized that pricing incentives were important to encouraging voluntary increases in the number of channels of programming offered to cable subscribers.<sup>386</sup> The Commission also recognized that, even in a competitive environment, service increases would result in higher prices, just as service decreases should result in lower prices. The Commission developed a table of per channel rate adjustment factors based on an econometric model of the pricing behavior of systems facing competition.<sup>387</sup> The amount of the permitted adjustment varied with the number of channels offered on the system, the permitted adjustment per channel decreasing as the number of channels increases.<sup>388</sup> After

---

<sup>383</sup> See *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd. 12903 (1999).

<sup>384</sup> 47 U.S.C. § 543(b)(7)(A).

<sup>385</sup> See 47 C.F.R. § 76.922(g).

<sup>386</sup> See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd. 4119, 4237 (1994) ("*Second Rate Reconsideration Order*").

<sup>387</sup> See 47 C.F.R. 76.922(g); see also *Second Rate Reconsideration Order*, 9 FCC Rcd. at Table A-3.

<sup>388</sup> *Second Rate Reconsideration Order*, 9 FCC Rcd. at 4239-45.

gaining experience with rate regulation, the Commission concluded that optional additional incentives should be available to stimulate the addition of new services to the CPST or to the BST when it was the only tier of service offered.<sup>389</sup> The Commission also recognized that the base cost for a tier should be adjusted under some circumstances to reflect the reallocation of system costs to programming tiers when channels are moved between tiers.<sup>390</sup>

134. We believe that cable operators should have sufficient incentives to add digital television broadcast programming, particularly where operators carrying a broadcast station's analog signal during the transition period must assign spectrum to accommodate digital signals. Because the cable industry operates in an increasingly competitive environment, we tentatively conclude that subscribers who purchase digital programming, including digital broadcast programming, should bear a fair share of the overall system costs associated with the number of channels delivered on the tier relative to the system's overall capacity, and that subscriber rates be reasonable. Thus, we propose to allow cable operators adding digital broadcast signals to their channel line-ups, to increase rates for each 6 MHz of capacity devoted to carriage of such signals. We seek comment on this general policy and ask for comment on the proper adjustment methodology the Commission should adopt. For example, should the Commission revise Section 76.922(g), and the accompanying per channel adjustment table, for this purpose? Alternatively, is the Form 1235 process outlined above, adequate to account for such costs? We also seek comment on how channels should be counted in light of the sunset of CPST rate regulation. What methods are there for valuing cable channels? How would they work?

#### F. Satellite Home Viewer Improvement Act of 1999

135. Section 338 of the Act, adopted as part of the SHVIA,<sup>391</sup> requires satellite carriers, by January 1, 2002, "to carry upon request all local television broadcast stations' signals in local markets in which the satellite carriers carry at least one television broadcast station signal," subject to the other carriage provisions contained in the Act. Until January 1, 2002, satellite carriers, such as DirecTV and EchoStar, are granted a royalty-free copyright license to retransmit television broadcast signals on a station-by-station basis, subject to obtaining a broadcaster's retransmission consent. This transition period is intended to provide the satellite industry with time to begin providing local television signals

---

<sup>389</sup> The Commission established a per channel adjustment factor of up to 20 cents per channel exclusive of programming costs for channels added to CPSTs, subject to a cap of \$1.20 on rate increases through December 31, 1996 and \$1.40 through December 31, 1997. An additional capped amount was allowed for license fees associated with the channels. Operators were required to offset any revenues received from a channel from the programming costs and per-channel adjustment associated with the channel. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 FCC Rcd. 1226, 1248-57 (1994) ("*Sixth Reconsideration Order*"). The Commission limited the per channel adjustment incentive to the CPST to maximize subscriber choice where cable operators could choose between the BST and the CPST when selecting a tier for a new nonbroadcast service and also to avoid increasing the complexity of the regulatory task faced by local regulatory authorities.

<sup>390</sup> See *Sixth Reconsideration Order*, 10 FCC Rcd. at 1256-57.

<sup>391</sup> Pub. Law 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999). The Commission adopted the *Notice of Proposed Rulemaking* to implement Section 338 on May 31, 2000. See *Implementation of the Satellite Home Viewer Improvement Act of 1999—Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 15 FCC Rcd 12147 (2000).

into local markets, otherwise known as “local-into-local” satellite service. We recently adopted rules to implement the satellite carriage provisions contained in Section 338.<sup>392</sup>

136. The rules we adopted in the satellite carriage proceeding specifically concerned the carriage of a television station’s analog signal by a satellite carrier. While issues related to the carriage of a television station’s digital signal were discussed, the Commission stated that the digital carriage requirements for satellite carriers should be addressed in the context of this docket.<sup>393</sup> Herein, we have adopted policies governing the cable carriage of digital television signals. Given the SHVIA’s general thrust that the Commission issue satellite carriage rules comparable to the cable carriage rules,<sup>394</sup> we seek comment on how we should apply the digital cable carriage rules to satellite carriers. We note that satellite carriers provide video programming on a national basis through a space-based delivery facility while cable operators provide video service on a local franchise-area basis through a terrestrial delivery facility. Given these distinctions, we ask whether we should take into account the differences between the two technologies when implementing digital broadcast signal carriage rules for satellite carriers. Interested parties need not file additional comments on the constitutional or public policy aspects of satellite digital broadcast signal carriage, as we shall incorporate the relevant statements made in the satellite carriage proceeding into this docket.

137. Pursuant to the SHVIA, the Commission also adopted rules implementing Section 339(b) of the Act. This provision directs the Commission to apply the cable television network non-duplication, syndicated program exclusivity, and sports blackout requirements to satellite carriers.<sup>395</sup> Congress directed the Commission to implement the new satellite rules so that they will be “as similar as possible” to the rules applicable to cable operators.<sup>396</sup> In general, the new network non-duplication, syndicated program exclusivity, and sports blackout rules require a satellite carrier to delete programming when it retransmits a nationally distributed superstation to a household within the relevant zone of protection, and the nationally distributed superstation carries a program to which the local station or the rights holder to a sporting event has exclusive rights. In addition, the SHVIA requires that the Commission apply the sports blackout rule to satellite carriage of network stations. In all cases covered by the statute and the rules, the entity holding exclusive rights may require the satellite carrier to black out these particular programs for the satellite subscriber households within the protected zone. In the Report and Order implementing Section 339(b), the Commission noted that it would consider the application of the satellite exclusivity rules to digital broadcast signals in another proceeding.<sup>397</sup> We now seek comment on the application of the Section 339(b) provisions, and our implementing rules, to the carriage of digital television signals by satellite carriers. We specifically seek comment on the application of the exclusivity requirements in light of the statements made above. The comments filed on this subject in CS Docket 00-2 will be incorporated by reference in this proceeding.

---

<sup>392</sup>*Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Report and Order*, FCC 00-417 (adopted November 29, 2000).

<sup>393</sup>*Id.* at paras. 125-129.

<sup>394</sup>47 U.S.C. §338(g).

<sup>395</sup>*See SHVIA Non-duplication, Syndicated Exclusivity, and Sports Blackout Order* FCC No. 00-388 at para. 36.

<sup>396</sup>Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106<sup>th</sup> Cong., 145 Cong. Rec. H11793, H11796 (daily ed. Nov. 9, 1999). *See also*, 47 U.S.C. 339(b)(1)(B).

<sup>397</sup>*See SHVIA Non-duplication, Syndicated Exclusivity, and Sports Blackout Order* at para. 75.

## VIII. PROCEDURAL MATTERS

### A. Paperwork Reduction Act of 1995 Analysis

138. The requirements contained in this *Report and Order and Further Notice of Proposed Rulemaking* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and would impose new and modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the proposed information collection requirements contained in this *Report and Order and Further Notice of Proposed Rulemaking*, as required by the 1995 Act. Public comments are due 60 days from date of publication of this *Report and Order and Further Notice of Proposed Rulemaking* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Written comments by the public on the new and/or modified information collections are due on or before 60 days after the date of publication in the Federal Register. Any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 12th St, S.W., Room 1-0804, Washington, D.C. 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov). For additional information on the proposed information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

### B. Ex Parte Rules

139. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the rules.<sup>398</sup> *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.<sup>399</sup> Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

### C. Filing of Comments and Reply Comments

140. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on the *Notice* on or before the date 45 days from the date of publication in the Federal Register and reply comments on or before the date 90 days from the date of publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies.<sup>400</sup>

---

<sup>398</sup>47 C.F.R. §1.1206(b) (as revised).

<sup>399</sup>See 47 C.F.R. §1.1206(b)(2) (as revised).

<sup>400</sup>See *In re Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd. 11322 (1998) (amending Parts 0 and 1 of the Commission's rules to allow electronic filing of comments and other pleadings).

Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form<your e-mail address.>" A sample form and directions will be sent in reply.

141. Parties who choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. If more than one docket or rulemaking number appears in the caption of this proceeding commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. The Cable Services Bureau contact for this proceeding is Eloise Gore at (202) 418-7200, TTY (202) 418-7172, or at [egore@fcc.gov](mailto:egore@fcc.gov).

142. Parties who choose to file by paper should also submit their comments on diskette. Parties should submit diskettes to Eloise Gore Cable Services Bureau, 445 12th Street N.W., Room 4-A803, Washington, D.C. 20554. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible form using MS DOS 5.0 and Microsoft Word, or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the party's name, proceeding (including the lead docket number in this case [CS Docket No. 98-120]), type of pleading (comments or reply comments), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, referable in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, 1231 20th Street, N.W., Washington, D.C. 20036

**D. Final Regulatory Flexibility Act Analysis**

143. The Regulatory Flexibility Analysis for the *Report and Order* is found in Appendix B, attached.

**E. Initial Regulatory Flexibility Act Analysis**

144. The Regulatory Flexibility Analysis for the *FNPRM* is found in Appendix C, attached.

**F. Ordering Clauses**

145. Accordingly, **IT IS ORDERED** that, pursuant authority found in Sections 4(i) 4(j), 303(r), 325, 336, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 325, 336, 534, and 535, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix D.

146. **IT IS FURTHER ORDERED** that the Consumer Information Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order and Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

147. **IT IS FURTHER ORDERED** that the rules adopted in this *Report and Order and Further Notice of Proposed Rulemaking* **SHALL TAKE EFFECT** upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary