

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Carriage of Digital Television) CS Docket No. 98-120
Broadcast Stations)

PETITION FOR PARTIAL RECONSIDERATION

The National Cable Television Association (“NCTA”), by its attorneys, hereby petitions for partial reconsideration of the Commission’s First Report and Order in the above-captioned proceeding.¹ NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving more than 90 percent of the nation’s cable customers. It also represents over 200 cable program networks, as well as equipment suppliers and providers of other services to the cable industry.

DISCUSSION

For the most part, this Report and Order establishes must carry “rules of the road” that apply to a situation where a broadcaster transmits only a digital signal. We agree with many of the FCC’s determinations in that regard. Today, though, virtually no stations fall into this category. And, by most accounts, the new rules will not come into play for many more years to come because no one really expects broadcasters to relinquish their analog spectrum and transmit only in digital any time soon.

The critical issue, then, is how carriage of digital stations will be treated during this transition period when cable systems are still required to carry analog stations. On

¹ 66 Fed. Reg. 16533 (Mar. 26, 2001) (hereinafter “Report and Order”).

the fundamental issue of whether cable operators can be required to carry both the analog and digital signals of a broadcaster, we concur with the FCC's tentative conclusion that forcing carriage of each broadcaster's analog and digital signal during this transition would violate the First Amendment.²

Our disagreement – and our reason for filing this Petition for Partial Reconsideration – stems from the Commission's treatment of new stations that broadcast only a digital signal with no paired analog channel. The FCC not only gave these new stations the right to demand carriage of their primary video prior to the time when all other stations in the market completed their transition to digital. It also gave each such station the right to “[d]emand that one of its HDTV or SDTV television signals be carried on the cable system for delivery to subscribers in an analog format.”³

This preferential treatment for new digital-only stations is wholly unjustifiable, both as a matter of law or policy. The Commission should reconsider its determination to grant new digital-only stations rights to demand analog cable carriage.

² Report and Order at ¶2. We disagree, however, with the Report and Order's suggestion that the statute otherwise would grant the FCC the ability to impose dual must carry. The Report and Order “do[es] not accept the arguments of either those commenters who say that the statute forbids dual carriage; nor those who argue that the statute compels dual carriage.” Report and Order at ¶ 14. The Report and Order fails to explain the origin of the agency's supposed discretion to act here. As NCTA's Comments and Reply Comments in this proceeding make clear, the Commission would be hard pressed to find any such authority in Sections 614 or 615 or elsewhere. While Section 614 does address carriage of stations that “have been changed” from one method of transmission to another, nothing in that section expressly provides for dual carriage during the transition period. Absent express authority, Section 624(f) makes clear that the FCC lacks implied authority to fashion any sort of transitional rules.

³ Report and Order at ¶74. The Commission limited this ruling to only “the early stages of the transition period.” It committed to “revisit this policy after 2003 to ensure that this policy is fostering the conversion to digital television service and to determine when equipment is available so that broadcast signals can be delivered and carried in digital format.” Id.

A. The FCC Lacks Statutory Authority to Require Analog Cable Carriage of a Digital-Only Station

The must carry provisions of the 1992 Cable Act⁴ nowhere suggest that Congress intended the Commission to give a special hand-out to new digital-only television stations in the form of analog cable carriage. Nor does the Report and Order demonstrate otherwise. Instead, it reasons only that a requirement to carry a digital station in analog is “not precluded by the nondegradation requirement in Section 614(b)(4)(A) and 615(g)(2).”⁵ But simply because a local broadcaster and cable operator could agree to carry a digital broadcast signal in analog without violating this specific statutory provision⁶ does not provide authority for the FCC to impose a requirement to do so.

Section 614 does not authorize such a requirement. The plain language of the statute limits the FCC’s authority to requiring carriage of “[b]roadcast signals of local commercial television stations which have been changed to conform with such modified standards.”⁷ The signal of a digital-only station is obviously not in analog. And nothing in the statute compels – or provides any statutory authority for the Commission to compel – a cable operator to carry a feed of that digital broadcaster’s programming in a totally

⁴ 47 U.S.C. §§ 534 and 535.

⁵ Report and Order at ¶74.

⁶ The FCC essentially took this approach in its 700 MHz Proceeding. Memorandum Opinion and Order, WT Docket No. 99-168 at ¶65 (June 30, 2000) (clarifying that a broadcaster that is a party to a 700 MHz band clearing agreement could provide its digital signal in an analog format for cable carriage and “in these circumstances, nothing prohibits the cable system from providing such signals in analog format to subscribers, in addition to or in place of the broadcast digital signal, pursuant to an agreement with the broadcaster.”) Moreover, at least with respect to those signals, carriage in analog imposed no additional burden on the cable system. That would not be true in the case of new digital-only stations.

⁷ 47 U.S.C. § 534(b)(4)(B) (emphasis supplied.)

different format than that transmitted over the air. Absent that express authority, Section 624(f) bars the FCC from imposing such a requirement.⁸

Even if the statutory language were ambiguous, any other interpretation would be at odds with the First Amendment. It would force cable operators with scarce channel capacity to make room for the analog feed of a digital broadcaster's programming, devouring channel capacity that could otherwise be used to carry desirable, consented-to broadcast services, nonbroadcast networks or other non-video services. It would provide unwarranted priority status to digital-only stations with no over-the-air audience – doubling the burden on cable program networks by first forcing carriage of a station that virtually no one can see over the air, and by then forcing preferential analog carriage. And, as we now show, it would do so without furthering the government interests underlying Section 614 – or, for that matter, any rational policy interest at all.

B. Forcing Carriage of New Digital-Only Stations In Analog Serves No Rational Policy Purpose

The Report and Order not only glosses over the language of the must carry provisions in ordering carriage of a new digital-only station in analog. It also fails to articulate a policy rationale that can justify forced analog carriage of a new digital-only station.

The Report and Order suggests that its action is based on the supposed “purposes of supporting the ultimate conversion to digital signals and facilitating the return of the analog spectrum...” These, of course, are not any of the intended purposes of Sections 614 or 615. But even if they were, the analog carriage required would not further those

⁸ Section 624(f)(1) provides that “any federal agency . . . may not impose requirements regarding the provision of content of cable services, except as expressly provided in this title.” 47 U.S.C. §544(f)(1).

interests. Indeed, the Report and Order asserts that “allowing digital-to-analog conversion for a limited time during a critical stage of the transition period will further the digital transition because a television station would be more willing to return its analog spectrum to the government, and convert to digital service, knowing that cable subscribers without digital equipment may still be able to view the relevant programming.”⁹ But whatever its applicability to existing analog stations that choose to vacate their spectrum early, this policy rationale fails to support analog carriage rights for a new digital station.

New digital-only stations have no analog spectrum to return. Granting them a preferred berth on a cable system imposes an additional burden on cable operators – plain and simple. It does nothing to advance the government’s purported interest in freeing up additional spectrum for auction for other uses. Rather, in that respect it arguably runs counter to the Commission’s spectrum policy by providing artificial incentives for broadcasters who might otherwise have no viable business model to use the digital spectrum simply to gain a toehold on a cable system’s analog tier of service.

Nor does application of this policy to new digital-only stations advance the overall goal of the transition to digital. The Commission speculates that transmission of a digital signal over the air at a time when virtually no one has a digital set might advance the digital transition. But requiring cable carriage of such a signal in analog is untethered from any policy rationale. The Report and Order recognizes this obvious fact: “[d]igital-to-analog conversion will not provide an impetus for cable subscribers to purchase digital television sets, but will allow new digital stations and stations that return their analog

⁹ Report and Order at ¶74.

spectrum to continue to reach cable subscribers who have only analog receivers while commencing over-the-air service to attract and reach non-cable viewers who purchase digital television sets.”¹⁰

Thus, even assuming, arguendo, that the digital transition is at all implicated, cable carriage of a new digital station converted to analog does nothing to advance that policy. It is simply an unjustified subsidy provided by the government at the expense of cable operators, programmers and cable customers.

CONCLUSION

For the foregoing reasons, the Commission should not require cable operators to give preferential analog carriage rights to new digital-only stations.

Respectfully submitted,

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April 25, 2001

¹⁰ Id.