

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

In the Matter of)	
)	
Carriage of Digital Television Broadcast Signals)	
)	
Amendments to Part 76 of the Commission's Rules)	CS Docket No. 98-120
)	
Implementation of the Satellite Home Viewer Improvement Act of 1999)	
)	
Local Broadcast Signal Carriage Issues)	CS Docket No. 00-96
)	
Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals)	CS Docket No. 00-2
)	

To: The Commission

**JOINT PETITION FOR RECONSIDERATION OF
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS,
THE PUBLIC BROADCASTING SERVICE, AND
THE CORPORATION FOR PUBLIC BROADCASTING**

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EXECUTIVE SUMMARY

Imagine it is the year 2010. The transition to digital television is complete. You turn on your over-the-air digital television set and are able to receive from your local public television station, not only the more traditional local broadcast programming you watched on your analog set 10 years earlier, but also a local public affairs programming service, all-day children's programming, distance learning programming that allows you to take classes at a local college or university from home, and a variety of foreign language programming – all of these programming streams being accessed through a single 6 MHz DTV channel. Now imagine that you turn on the same over-the-air digital television set to the same public television channel and receive no programming at all, or at most the single traditional local broadcasting service that you received 10 years earlier.

Today, the Commission stands at a crossroads in the digital transition with the power to make decisions that will determine which of these two scenarios will prevail. In fact, the Commission has already made a number of recent decisions that lead down the path toward the blank or minimal digital television screen. None is more destructive than the set of decisions the Commission adopted on January 17 in the hurried transition between administrations and in the immediate aftermath of the approval of the AOL/Time Warner merger. But it is not too late for the Commission to reverse course, because many of its earlier decisions launching the transition were wise and forward-looking and provide a good platform for a successful roll-out of DTV services.

As demonstrated by the above example, the many capabilities of digital television technology have created opportunities for broadcasters to offer new and innovative services to viewers. Seizing on this potential, public broadcasters in particular have developed ambitious, concrete plans for (1) multicasting a variety of programming streams in SDTV, including local,

educational, and children's programming; and (2) for presenting in HDTV popular noncommercial programming such as Great Performances and Scientific American Frontiers, with the possibility of a special second primetime SDTV channel as well. These plans simply will not come to fruition, and much of the promise of DTV will go unrealized, if the Commission lets stand its overly narrow interpretation of the term "primary video" as encompassing only a single stream of video programming. Without cable carriage of their multicast streams, noncommercial stations will be unable to deliver this programming to the 70 percent of American households served by cable. The fact that fewer than 30 percent of households will have access to multicast programming streams will discourage stations from investing in such programming services. It also means that without the additional viewing and funding from multicast services, some resource-strained public stations may not be able to construct digital stations at all. This is even more true for noncommercial stations in smaller markets, for whom the transition to digital already poses an extreme financial hardship. Disincentives to invest in multicast programming will have the net effect of depriving *all* television viewers, regardless of how they receive broadcast signals, of the full benefits of digital technology and will further handicap a transition that is already stalled and in jeopardy.

The Commission can help reverse this course and ensure that a rich and diverse menu of noncommercial digital programming will be available to over-the-air viewers and cable subscribers alike by reconsidering some of the hasty decisions in the digital must carry order that it rushed to release last January. By altering its interpretation of "primary video" to comport with the legislative intent that cable operators retransmit all of a broadcaster's free, over-the-air programming, the Commission will both carry out Congress's directive and serve the public interest by allowing noncommercial stations' varied and innovative program offerings to reach

the viewing public. The Commission should also reverse its conclusion that the must carry statute does not mandate a transitional digital carriage requirement. Finally, the Commission should (i) adopt a clear definition of “material degradation”; (ii) require cable carriage of all material in the broadcast PSIP; (iii) reconsider the good quality signal standard; and (iv) prohibit cable operators from carrying only a portion of a station’s digital signal. In doing so, the Commission will help facilitate an effective transition that will allow the public to reap the many benefits that digital television offers.

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The Association of America's Public Television Stations ("APTS"),¹ the Public
Broadcasting Service ("PBS"),² and the Corporation for Public Broadcasting ("CPB")³

¹ APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation's 354 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members.

² PBS is a nonprofit membership organization of the licensees of the nation's public television stations. PBS distributes national public television programming and provides other program-related services to the nation's public television stations.

³ CPB is a private, nonprofit corporation created and authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. *See* 47 U.S.C. § 390 *et. seq.*

(collectively, “Public Television”) submit this petition for reconsideration of the Commission’s *First Report and Order* concerning various critical issues relating to the carriage of digital broadcast television signals by cable television operators.⁴ Public Television urges the Commission to reconsider a number of its interpretations of the cable carriage statute, which threaten to damage irreversibly the digital transition. In particular, the Commission should reconsider: (1) its definition of “primary video” as a single stream of video programming; (2) its finding that the Cable Act does not compel adoption of a transitional digital carriage requirement; and (3) various other decisions related to cable carriage of digital signals. Left uncorrected, these decisions would: (1) frustrate public broadcasters’ plans to provide multicast educational and public service program offerings; (2) delay or thwart altogether viewer access to prime time public television HDTV programming; (3) exacerbate the financial and technical challenges public broadcasters face in transitioning to digital; (4) and contradict or undermine clear Congressional mandates.

Although Congress had initially projected that the digital transition would end in 2006, it is now well-recognized that the transition will not be concluded until much later than originally hoped. Broadcasters have followed through on their commitment to the transition by meeting the early construction deadline in almost all of the top 30 markets and beginning aggressive digital operations in various smaller markets as well. Public television has done its share, with 29 stations now operating digitally; other public stations have been constructed and

⁴ See *In re Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking*, CS Docket Nos. 98-120, 00-96 & 00-2, FCC 01-22 (rel. Jan. 23, 2001) (“*First Report & Order*” and “*Further Notice*”).

will soon be operational; and PBS is offering primetime HDTV programming. But the other industries necessary to a successful transition faltered almost immediately, and the Commission has not always assumed the leadership role that Congress enabled and directed it to take and that is essential if the transition is to succeed.

The Commission's *First Report & Order* further threatens to cripple, not merely delay, the transition. This is because, as determined by the Congressional Budget Office study devoted to analyzing the prospect for achieving a timely transition, the "most important factor" to the success of the transition is cable carriage of digital signals during the transition.⁵ That is why the CBO Report concluded that a "strong must-carry requirement" during the transition was "necessary."⁶

The *First Report & Order* ignores the importance of a strong transitional digital carriage requirement and thus flies in the face of the 1992 Cable Act. First, the Commission misreads Congress's clear direction to the Commission to fashion and impose digital carriage rules for the transition and finds, instead, that its adoption of such rules is discretionary.⁷ Second, having misinterpreted the Congressionally-mandated digital carriage requirement as applying only post-transition (that is, when a station is only operating digitally), the *First Report & Order* further misinterprets this requirement as being limited to only a single stream of video

⁵ Completing the Transition to Digital Television, Congressional Budget Office Paper, at x (Sept. 1999) ("CBO Report").

⁶ *Id.* at xi.

⁷ This interpretation led the Commission in the *Further Notice*, to ask for more debate on whether such a requirement would be inconsistent with the First Amendment – a debate that it would have avoided had it interpreted the statute as requiring digital carriage. If the Commission is bound by statute to take a certain action, as was the case here, it cannot refuse to act on the basis of its own determination that the statutory mandate is unconstitutional; that role is left to (continued...)

programming. Of course, even this carriage requirement, the limitations of which are so devastating to public television's plans for multicast educational services, may never come into play because the *First Report & Order's* misinterpretation of the transitional digital carriage requirement may doom the public's television service to wasteful, expensive, and spectrum-inefficient dual-mode operations. Third, in addition to correcting the above two critical mistakes, other carriage-related decisions contained in the *First Report & Order* must be corrected and clarified. They are unclear, contain serious loopholes, and fail to protect consumers against anticompetitive practices by cable operators, who have both the incentive and opportunity to disadvantage free television services.

I. "PRIMARY VIDEO" IS NOT LIMITED TO A SINGLE STREAM OF VIDEO PROGRAMMING.

Sections 614 and 615 of the Communications Act require cable systems to carry "in its entirety . . . the primary video, accompanying audio, and line 21 closed caption transmission" of commercial and noncommercial television broadcast signals.⁸ In the *Notice*, the Commission inquired as to how it should define the term "primary video" in the digital context, particularly with respect to broadcast stations engaged in multicasting for at least part of the broadcast day, and how its interpretation of "primary video" would impact the development of digital broadcasting.⁹ Despite receiving into the record, but apparently not taking into account, significant information about public broadcasters' ambitious multicasting plans and the

the courts. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539 (1958).

⁸ 47 U.S.C. §§ 534(b)(3) & 535(g)(1) (as added by the 1992 Cable Act).

⁹ See *In re Carriage of the Transmissions of Digital Television Broadcast Stations: Amendments to Part 76 of the Commission's Rules, Notice of Proposed Rulemaking*, 13 FCC Rcd. 15092, ¶ 71 (1998) ("Notice").

importance of cable carriage to the success of those plans,¹⁰ the Commission concluded in the *First Report & Order*:

“[P]rimary video means a single programming stream and other program-related content. . . . [I]f a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video, and the cable operator is required to provide mandatory carriage to only such designated stream.”¹¹

This is an overly constrained reading of the term “primary video” that is not supported by the statutory language, the context, or the legislative history of the cable carriage provisions. It is in tension with other portions of the Communications Act and disserves the nation’s DTV policy objectives. While in other parts of the *First Report & Order* the Commission is careful to adapt the meaning of analog provisions to the new digital context, here the Commission interprets the term “primary video” from an analog perspective and then woodenly imports the analog interpretation to the digital environment. The Commission’s narrow interpretation of “primary video” fails to give effect to the Congressional directive to assure cable carriage of advanced television signals. Moreover, this incorrect regulatory interpretation prematurely discourages full and creative development of the multicast capabilities of digital television. Quite simply, broadcasters do not have the resources to develop programming that few viewers will see. This, in turn, will deprive all television viewers,

¹⁰ See, e.g., *Ex parte* filing of APTS in CS Docket No. 98-120 (June 19, 2001); *Ex parte* notice of APTS in CS Docket No. 98-120 (Dec. 6, 1999); Reply Comments of the Association of America’s Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting in CS Docket No. 98-120, at 9-10 (Dec. 22, 1998); Comments of the Association of America’s Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting in CS Docket No. 98-120, at 5-8 (Oct. 13, 1998).

¹¹ *First Report & Order* ¶ 57.

whether they receive their broadcast signals over-the-air or by cable or other MVPD, of the full benefits of digital technology. Creating a disincentive to the development of one of the most promising uses of DTV technology can only further delay the DTV transition and is a misguided exercise of the Commission's spectrum management responsibilities.

A. "Primary" Means A Broadcaster's "Principal" Free, Over-The-Air Service, Not A Single Program Stream.

The Commission based its interpretation of "primary video" on an oversimplified reading of the dictionary definition of the word "primary," concluding that the word "primary" referred to a *single* item. This is simply not the case. While the term "primary" does refer to a "principal" or "leading" item,¹² it is not a singular term. Instead, the word "primary" is singular if the noun it modifies is singular and plural if the noun it modifies is plural.¹³ The phrase "primary colors" is illustrative. The word "colors" is plural, and there is not a single primary color, but three. The word "primary" distinguishes the three primary colors from other, secondary colors; it does not single out one color as *the* primary color. Since "video" is neither singular nor plural but is instead a "collective" noun, the linguistic approach relied on by the Commission is non-determinative, and the Commission's linguistic conclusion is dubious.

In the absence of a determinative, plain meaning interpretation, the Commission must look to the surrounding language and the must carry statute as a whole (as well as context and legislative history) to determine what Congress meant by a broadcaster's "primary video." This approach leads to a conclusion opposite to the one reached in the *First Report & Order*. The "primary video" term appears in a statutory provision entitled "content to be carried," which

¹² Black's Law Dictionary (1983 ed.) (defining "primary" as "[f]irst; principal; chief; leading").

¹³ See, e.g., Webster's New Collegiate Dictionary (using the examples of its first two definitions, "the primary causes of the war" and "primary planets").

specifies the elements of the broadcast signal that cable operators are and are not required to carry. The statute requires cable operators to carry “in its entirety” a broadcast station’s “primary video” and “accompanying audio,” but requires carriage of only specified types of information carried in the non-visual portion of the broadcast signal or on subcarriers – namely closed captioning and “program-related” material.¹⁴ Thus, the statute draws a distinction between “primary video and audio” and other, secondary material transmitted in the broadcast spectrum.

Taking into account this context and the ordinary meaning of the term “primary” as “principal,” the most reasonable interpretation of the term “primary video” in the analog environment is the single video and audio programming stream distributed free over the air. In the digital context, however, the most reasonable interpretation is the *package* of video and audio digital services transmitted by the broadcaster free and over the air to viewers. This “primary video” package can consist of a single HDTV stream and accompanying audio, an HDTV stream and a simultaneously transmitted SDTV stream and accompanying audio, or as many as six multicast SDTV program streams. Each of these packages will use roughly the same capacity, which will be less than a single analog programming stream, and each will be available over the air to essentially all viewers in the broadcaster’s service area – in no way will any programming streams be identified by the broadcaster or made to appear to an over-the-air viewer as “secondary.” This *package* of video and audio services offered free and over the air constitutes the broadcaster’s “primary” service. As such, cable subscribers denied access to any portion of

¹⁴ 47 U.S.C. §§ 534(b)(3), 535(g)(1). Noncommercial stations must also carry program-related information that may be necessary for receipt of programming by handicapped individuals or transmitted for “educational or language” purposes. 47 U.S.C. § 535(g)(1).

these free, over-the-air programming streams could reasonably conclude that they did not have full access to their local station.

The same distinction between the visual and non-visual portion of the analog signal made by the term “primary video” in the analog context has meaning and can be applied to the carriage of digital signals. In the digital context, “primary video” differentiates a broadcaster’s “primary” service, available free to all viewers, from: (a) program-related services also entitled to carriage; and (b) non-program-related, fee-based ancillary and supplementary services not entitled to carriage. Congress heightened this distinction in the 1996 Telecommunications Act. By the time Congress enacted the 1996 Act, it was aware that the increased flexibility of digital technology gives broadcasters the opportunity to offer a variety of non-traditional services in the digital broadcast signal. While Congress confirmed in the Act that broadcasters could use digital spectrum to offer ancillary and supplementary services not traditionally associated with broadcast television (such as subscription data transmission),¹⁵ it expressly provided that such ancillary services (which are delivered through the broadcast spectrum but available only to those who have paid a subscription fee and/or acquired special equipment) are not entitled to mandatory cable carriage. In contrast, though Congress was also aware at that time of the multicasting capabilities of DTV,¹⁶ it made *no* parallel effort to exclude multiple video streams from cable carriage.¹⁷

¹⁵ See 47 U.S.C. § 336.

¹⁶ See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry*, 10 FCC Rcd 10540, 10546 (1995).

¹⁷ It is a canon of statutory interpretation that the expression of one thing excludes the other (*expressio unius est exclusio alterius*). See *Freightliner Corp v. Myrick*, 514 U.S. 280, 288 (1995); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. (continued...)

An accepted principle of statutory construction is that one must avoid interpretations that would result in contradictory consequences.¹⁸ Yet the Commission's interpretation of "primary video" will have such inconsistent results in at least two respects. First, Congress has made clear that public telecommunications services should be made available to *all* citizens of the United States¹⁹ and that *all* citizens should have access to public telecommunications services through "all appropriate available telecommunications distribution technologies."²⁰ However, the Commission's narrow interpretation of "primary video" as a

163, 168 (1993); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1357 (6th Cir. 1995) ("[T]he mention of one thing implies exclusion of another."). *But see Custis v. United States*, 511 U.S. 485, 501-02 (1994) (expressing some doubt about the use of *expressio unius* but maintaining that its application depends on the context). Therefore, by specifically excluding ancillary and supplementary services from cable carriage, Congress conveyed its intention to include everything else, including multiple programming streams.

¹⁸ See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (explaining that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); see also *Clinton v. City of New York*, 524 U.S. 417, 429 (1998); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940); *Haggard Co. v. Helvering*, 308 U.S. 389, 394 (1940).

¹⁹ See 47 U.S.C. § 396(a)(7).

²⁰ 47 U.S.C. § 396(a)(9). The Commission has been steadfast in ensuring the availability of public television in particular by, for example, defending noncommercial reservations over the years, see, e.g., *Television Assignments in New Smyrna Beach, Fla.*, 50 RR 2d 1714 (1982); *Television Assignments in Houston, Tex.*, 50 RR 2d 1420 (1982); *Table of Assignments in Ogden, Utah*, 26 FCC 2d 142 (1970), *recon. denied*, 28 FCC 2d 705 (1971), and reserving additional channels to further the reach of public television. See, e.g., *Television Channel Assignment at Anchorage, Alaska*, 68 RR 2d 1121 (1990); *Television Channel Assignment at Victoria, Tex.*, 52 RR 2d 1508 (1983); *Television Channel Assignment at Seaford, Del.*, 43 RR 2d 1551 (1978). Most recently, the Commission carried over its channel reservation policy to its allotment of digital television channels to broadcasters by committing to reserve noncommercial educational DTV channels for existing public broadcasters and to preserve vacant noncommercial allotments in its allotment plan. See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Second Report and Order/Further Notice of Proposed Rulemaking*, 7 FCC Rcd 3340, 3350 (1992) ("*DTV Second Report & Order*"); *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Memorandum Opinion & Order/Third Report and Order/Third Further Notice of Proposed* (continued...)

single stream of video programming ensures that only *some* citizens (namely, non-cable subscribers) will have access to *some* of public television's offerings (namely, its multicast streams). This result is clearly not contemplated by the Communications Act and provides further justification for rejecting the Commission's narrow interpretation of "primary video" as a single stream of video programming.

The Commission's interpretation will also yield a second absurd result. Public television stations plan to transmit HDTV and multicast program services. Under the Commission's current interpretation, cable systems are required to carry the full HDTV program stream whenever it is transmitted, and only a part of the multicast program package whenever it is transmitted. The HDTV program stream will occupy most of the 3 MHz of cable capacity required to carry a full digital signal,²¹ while a single multicast digital stream could occupy as little as 1/2 MHz of cable capacity. The Commission's decision to define "primary video" as a single stream of video programming will result in a significant amount of unused cable capacity when a broadcaster is not transmitting in full HDTV. It will be nearly impossible for cable operators to reallocate such unused capacity on a regular and consistent basis, because the operator must make the full 3 MHz of cable capacity available to the broadcaster when the broadcaster chooses to transmit an HDTV program stream. This leads to the absurd and wasteful result that public television's educational multicast broadcast streams go uncarried while the cable capacity those streams would occupy goes unused.

Rulemaking, 7 FCC Rcd 6924, 6950-51 (1992). In so doing, the Commission recognized "the important role noncommercial educational stations play in providing quality programming to the public and the financial constraints they face in building and running their stations." *DTV Second Report & Order*, 7 FCC Rcd at 3350.

²¹ An analog broadcast signal occupies 6 MHz of capacity, but the same signal in digital format will fit into 3 MHz of cable capacity.

B. The Commission's Understanding Of The Term "Primary Video" Is Unworkable And Contrary To The Public Interest.

Unless the Commission reconsiders its hyper-narrow definition of "primary video," consumers, broadcasters, and the DTV transition will suffer. As both the Commission and Congress have recognized, one of the most beneficial and dynamic features of digital television is that it allows broadcasters to multicast. This capability allows a digital broadcaster to offer: (1) a single channel of HDTV; or (2) HDTV plus a single channel of SDTV simultaneously; or (3) as many as six channels of SDTV, all using the same capacity occupied by a single analog programming stream. Many broadcasters, especially noncommercial broadcasters, are developing and implementing plans to broadcast enhanced HDTV features for part of the day, while using multicasting in other dayparts to bring a rich variety of services to the public. However, broadcasters' plans will be severely undermined if the Commission refuses to reconsider its restrictive definition of "primary video," according to which a cable operator need carry only one of a broadcaster's program streams.

1. Public Television Stations Are Developing Exciting Multicasting Plans That Will Serve The Public Interest.

Diverse local noncommercial stations already benefit the public by providing unique and valuable programming that responds to the different audiences and distinct needs of each community. Multicasting has the potential to expand noncommercial broadcasters' ability to provide such services sixfold, and it is a key element of public broadcasting's plans for the future. Virtually every public station is planning to multicast in digital for at least part of the broadcast day.²² For example:

²² See Jim Rutenberg, *A Digital Divide Threatens Public TV; Some Have-Not Stations Wonder How to Pay for Required Technology*, N.Y. Times, Apr. 15, 2001, § 3, at 1 ("PBS has long-term (continued...)

- More than 95 percent of public television stations plan to carry at least one formal educational multicast service;
- 75 percent of public stations plan to carry at least two formal educational multicast services, such as adult continuing education, K-12 instructional programming, workforce development and job training, and college and university telecourses;
- About 85 percent of public stations plan to multicast a children’s channel; 78 percent have plans to broadcast university-level or post-secondary telecourses; and 66 percent plan to multicast instructional programming for students in grades K-12.

Other public television stations plan on multicasting local public affairs (similar to C-SPAN but on a local level), foreign language programming, an all-day children’s programming channel, and a channel devoted to teacher training. Florida public television stations have committed to devoting a multicast channel to the Florida Knowledge Network, which will offer classrooms electronic field trips, distance learning, and other high quality programming, as well as provide teacher training. Noncommercial stations in New York have made a similar commitment to the Empire Channel, which will offer teacher training, Regents exam review, and vocational, instructional, and public affairs programming. Two Arizona stations are teaming up to stream a variety of educational programming to hundreds of schools throughout the geographically diverse state. But public television’s ability to invest scarce resources in such services will be challenged if nearly 70 percent of viewers will not have access to the multicast services.

plans for digital broadcasting that are ambitious enough to put a strain on even the best-endowed stations. . . . Aside from offering high-definition and interactive programming, the system’s member stations have generally agreed to use their digital spectrum to spin out additional channels of PBS programming when possible.” (*Digital Divide Threatens Public TV*); Aaron Heffron & Daniel Odenwald, *Multicasting breaks down 24-hour limit on a day*, Current, Mar. 26, 2001, at 18 (“Virtually every PTV station plans to multicast diverse streams of educational programming during daytime hours and then consolidate those streams during primetime to broadcast high definition programming.”). In fact, several public television stations across the (continued...)

2. Lack Of Cable Carriage For Multicast Programming Streams Will Hamper Stations' Ability To Generate Funding To Support Educational Services.

Because the federal monies that public television receives average only 15 percent of a station's budget, its survival depends primarily on voluntary contributions from its viewers.²³ Public television stations plan to support their multicast services through a combination of funding sources. By providing more targeted programming and services to particular audience segments, public stations hope to increase their total audiences and, concomitantly, their membership base. Public stations are actively engaging in partnerships with local community institutions – schools, museums, libraries, and cultural institutions – and are seeking foundation support to develop content for multicast digital delivery. Stations have made commitments to their state legislatures, in exchange for state funding, to deliver multicast educational services in partnerships with state agencies (*e.g.*, Florida and New York). However, if cable operators do not carry local noncommercial stations' multicast offerings, cable subscribers will not be able to view and benefit from the programming targeted to them,²⁴ and the station will be unable to generate the funding, partnerships, and grants to support the multicast content. Ultimately, stations that are unable to take full advantage of the opportunities

country have already begun multicasting, providing viewers with multiple streams of non-commercial, non-violent educational programming. *See id.*

²³ *See Digital Divide Threatens Public TV* at 1 (discussing burden of digital transition on noncommercial stations and explaining that “[s]maller stations in smaller markets, where philanthropy is scarce and the population less affluent, face more trouble”).

²⁴ Although technically viewers could switch between cable service for most video programming and an antenna for multicast programming, studies have shown that viewers in this situation choose not to switch between services and instead forego watching local, over-the-air signals, thereby decreasing viewership of local stations. *See, e.g.*, Pub. L. No. 102-385 § 2(a)(18) (finding that an input selector switch that allows cable subscribers to alternate between local and cable programming “is not an enduring or feasible method of distribution and is not in the public interest”).

created by digital technology to generate the increased funds needed to transition to and then operate digitally may fall victim to the technology, fail to transition, and eventually go dark. To prevent this, the Commission must appropriately adapt the analog cable carriage rules to ensure cable carriage of the full complement of public broadcasters' free, over-the-air digital television service.

II. THE CABLE ACT REQUIRES THE COMMISSION TO ADOPT A TRANSITIONAL DIGITAL CARRIAGE REQUIREMENT.

In the *First Report & Order*, the Commission concludes, without support or explanation and in spite of its “need [for] further information on a range of issues,”²⁵ that the must carry “statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station’s digital and analog signals.”²⁶ The Commission then goes further to reach the tentative conclusion that a transitional digital carriage requirement would be unconstitutional.²⁷ While Public Television will address the Commission’s tentative conclusion in its comments on the *Further Notice*, it here seeks immediate reconsideration of the Commission’s initial conclusion that Congress did not require carriage of digital signals during the transition. In fact, Congress gave the Commission quite clear direction to adopt digital carriage rules to apply during the transition.

The Communications Act requires cable operators to carry “the signals” of qualified local commercial and noncommercial broadcast stations on their cable systems.²⁸ As the Commission correctly observes in the *First Report & Order*, this provision does “not

²⁵ *First Report & Order* ¶ 12.

²⁶ *First Report & Order* ¶ 2.

²⁷ *See id.*

²⁸ 47 U.S.C. §§ 534(a) & 535.

distinguish between analog and digital signals.”²⁹ Despite this clear statutory directive, which applies equally to analog and digital signals, the Commission decided not to “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.”³⁰ But, by its terms, the Act’s cable carriage rules apply to the “signals” of qualified stations regardless of whether they are in analog or digital format.³¹ Therefore, the Act’s must carry requirements apply on their face to both analog and digital commercial and noncommercial television broadcast signals. The Commission’s holding that this statutory mandate does not compel carriage of digital signals is patently wrong.

Other considerations compel the same conclusion. When Congress enacted the 1992 Cable Act, it said:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, [it] shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.”³²

At that time, the Commission anticipated that the giveback of second channels would occur 15 years after the standard was set,³³ and Congress knew this to be the case. Accordingly, in directing the Commission to act promptly upon adoption of the DTV standard (which occurred over three years ago) to initiate a rulemaking on digital carriage requirements, the Cable Act

²⁹ *First Report & Order* ¶ 13.

³⁰ *First Report & Order* ¶ 14.

³¹ 47 U.S.C. §§ 534(a) & 535(a).

³² 47 U.S.C. § 534(b)(4)(B). The Commission correctly determined in the *First Report & Order* that this provision applies to both commercial and noncommercial stations. *See First Report & Order* ¶ 21.

³³ *See id.*

must have meant for the resulting rules to apply *during* the transition.³⁴ If the digital carriage rules were to apply only after the transition – 15 years thereafter – it would have been nonsensical for Congress to order immediate initiation of a proceeding. Yet the Commission has now decided that this is what Congress meant. By failing to adopt a transitional carriage requirement in the *First Report & Order*, the Commission has also failed to “establish . . . changes . . . necessary to ensure cable carriage” of digital broadcast signals.³⁵ The Commission should therefore correct this mistake.

Although the legislative history of the must carry statute contemplates that the Commission should consider the burden on cable operators in fashioning digital carriage rules to implement the statutory directive, that only means that these burdens should be taken into account by, for example, phasing in the requirements, adjusting them for smaller systems or those with lower capacity, or making adjustments for special circumstances.³⁶ The Commission used this sort of flexibility in crafting and applying analog must-carry rules. Congress’s message that the Commission should consider cable’s burdens in designing and implementing the rules is not the same as authorizing the Commission to refuse to adopt any transitional rules at all.

Moreover, technically the burden of carrying a digital channel is less than the burden of carrying an analog channel because a cable operator can carry two or more, six MHz

³⁴ According to the Conference Report accompanying the 1992 Cable Act, the purpose of Section 614(b)(4)(B) was to ensure that digital signals would be carried “in accordance with the objectives” of the cable must carry provisions. *See* H. Conf. Rep. No. 102-862, at 67 (1992). This language likewise does not give the Commission the discretion to wait until after the transition to adopt digital cable carriage rules. By directing the Commission to “initiate” a digital carriage proceeding, Congress assumed the FCC would conclude such a proceeding and adopt appropriate rules in a timely manner, before the end of the digital transition, which was, in 1992, contemplated to be at least fifteen years away.

³⁵ 47 U.S.C. § 534(b)(4)(B).

digital channels in the same amount of spectrum required for a single analog channel.³⁷ In addition, cable operators have been and are currently significantly upgrading their systems, thereby doubling or tripling their capacity to accommodate new channels. Therefore, it is likely that a transitional carriage requirement would occupy a smaller proportion of cable operators' total capacity than the original analog-only, must-carry requirement that the Supreme Court upheld against constitutional challenge four years ago. In those specific circumstances where a transitional digital carriage requirement posed a greater and excessive burden, exceptions to the transitional requirement could be made. Public Television is sympathetic to the need for reasonable accommodation but is convinced that the Commission can craft rules that would provide effective flexibility to limit the burdens.

* * *

The Commission's decision regarding how much of a public television's digital signal must be carried once the requirement becomes effective has devastating implications for public television's delivery of educational multicast services. However, without digital carriage during the transition, broadcasters may never reach this post-transitional digital carriage requirement because it is unlikely that DTV receivers will reach the 85 percent penetration of digital broadcast signals that will trigger release of the analog spectrum. Public broadcasters are seeking to negotiate digital carriage agreements with MSOs, a process that, with the exception of an agreement with Time Warner, continues to be slow and difficult. In any discussions that may

³⁶ See H. Conf. Rep. No. 102-862, at 66-75 (1992).

³⁷ See John M. Higgins, *Ready to Hatch: MSOs are Finally Making Room for Long-Incubating Networks*, *Broad. & Cable*, Mar. 19, 2001, at 64, 65 ("The primary benefit of digital cable is compressing eight to 10 channels into the 6 MHz slot occupied by a conventional analog channel.").

go forward, Public Television is very concerned that cable systems will not agree to carry more of a public station's digital signal than they would otherwise have to carry under the post-transition carriage requirement. Thus, in very practical and immediate ways the *First Report & Order* is already hurting public television's interests by undercutting its already weak bargaining position in voluntary carriage negotiations. The *First Report & Order* thus undermines even the Commission's express support for voluntary carriage agreements between public television stations and cable operators.³⁸

III. OTHER ISSUES.

The Commission addresses a number of other carriage issues in the *First Report & Order* that merit reconsideration, including material degradation, carriage of PSIP information, signal quality, compatibility/interoperability, and carriage of partial digital signals. At the outset, the Commission should clarify that these principles should apply to carriage under any regime (*i.e.*, negotiated carriage or carriage pursuant to the cable compulsory license or a must carry scheme):³⁹

- **Material degradation**: The Commission's material degradation requirements are unclear, fail to provide technical guidelines to determine when "material degradation" has occurred, and would allow a cable operator to degrade the quality of a broadcaster's HDTV signal by downconverting a 1080I broadcast to 720p format, for example, without the broadcaster's consent. The Commission should clarify its rules

³⁸ See *First Report & Order* ¶ 36 ("An NCE station, however, is free to negotiate with cable systems and other MVPDs for voluntary carriage.").

³⁹ See, *e.g.*, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues, Report and Order*, 8 FCC Rcd 2965, 3003-05 (1993) (explaining that, for example, cable operators must carry the entire program schedule of stations with whom it negotiates retransmission consent agreements).

to prevent cable operators from technically degrading broadcasters' digital signals (for example by downconverting signals to other formats without broadcasters' consent) to ensure that subscribers receive via cable the same quality signal they would receive over the air. The Commission should also prohibit cable operators from using set-top boxes to materially degrade broadcast signals.

- **PSIP carriage:** The *First Report & Order* recognizes that the program and system information protocol (“PSIP”) that contains, *inter alia*, channel mapping data, is a “critical component of digital broadcast television.”⁴⁰ Nonetheless, the *First Report & Order* holds that only PSIP information that “is considered to be program-related to the primary digital video signal” is entitled to cable carriage.⁴¹ In the digital environment, PSIP data (comparable in some respects to data carried in the analog VBI) is critical for providing foreign language closed captioning, V-chip information, and broadcast program information. Therefore, the Commission should explicitly hold that all PSIP information is entitled to mandatory cable carriage.
- **Signal quality:** The Commission’s determination that a digital station must provide a good quality digital signal at a cable system’s principal headend of at least –61 dBm is an overly demanding requirement for broadcasters. The Commission should take a closer look at this requirement to ensure that it is truly parallel to the requirement for analog stations and not a ratchet up. It should also consider how this rule comports with the principal city requirement adopted in the *Biennial Review*, which provides

⁴⁰ *First Report & Order* ¶ 49.

⁴¹ *Id.* ¶ 83.

that a broadcaster must provide a signal over its principal community that is 7 dB stronger than its channel's DTV service contour value.

- **Compatibility/Interoperability**: In the *Notice*, the Commission said that in this proceeding it would focus comprehensively on the interoperability issue; however, it failed to do so in the *First Report & Order*. Without a satisfactory resolution to this issue, the transition will not succeed. Digital viewers need to be able to plug into cable systems or set-top boxes. Otherwise the 70 percent of viewers who receive local television via cable simply will not buy the sets.
- **Carriage of Partial Digital Signals**: The *First Report & Order* concludes that because a local noncommercial station is not covered by the Cable Act's retransmission consent provisions, it may enter into an exclusive digital carriage arrangement for any service or programming stream that is not subject to mandatory carriage.⁴² However, the Commission's position poses a very serious threat of cherry picking, allowing cable operators to choose to carry more popular noncommercial programming such as *Jazz* or *Nova* but exclude other niche programming.⁴³ Such specialized programming, while it might be less popular among some viewers, is a hallmark of public television's mission to fulfill the needs of underserved populations. This is yet another reason why a decision not to impose a transitional digital carriage requirement would be a disaster.

⁴² See *First Report & Order* ¶ 36.

⁴³ See *First Report & Order* ¶ 31; see also Comments of ALTV in CS Docket No. 98-120 at 18-19 (Oct. 13, 1998) (discussing risks and consequences of cherry picking).

IV. CONCLUSION

For these reasons, the Commission should remain true to Congressional intent and (1) define “primary video” in the digital context so as to encompass all of a broadcaster’s free, over-the-air video programming; (2) acknowledge that the Cable Act compels adoption of a transitional digital carriage requirement; and (3) clarify the material degradation definition, PSIP carriage requirements, interoperability solutions, and good quality signal standard to ensure the delivery to cable subscribers of full-quality digital broadcast programming and related services in both the must-carry and negotiated carriage contexts.

Respectfully submitted,

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