

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

**PETITION FOR PARTIAL RECONSIDERATION**

Adelphia Communications Corporation ("Adelphia"), by its attorneys, hereby files a petition for partial reconsideration of the Commission's Report and Order in the captioned proceeding.<sup>1</sup> In the Report and Order the Commission established the rules which will govern mandatory carriage of the digital signals transmitted by television broadcasters. By and large these rules seem fair and balanced. However, in Adelphia's view, one aspect of these rules was wrongly decided. The Commission held that a new digital-only television station has the option of choosing either carriage in a digital format or carriage in a converted analog format.<sup>2</sup> This so-called "transitional" rule has no statutory basis and cannot pass constitutional scrutiny.

**I. THE COMMISSION LACKS THE STATUTORY AUTHORITY TO ORDER A DIGITAL SIGNAL TO BE CARRIED IN CONVERTED ANALOG FORMAT.**

Even assuming that the Commission has the statutory authority to mandate cable carriage of a digital broadcast signal, this authority cannot be stretched to require carriage of the signal in a converted analog format. Section 614(b)(4)(B) of the Communications Act of 1934, as amended (the "Act"), requires the Commission to revise its must carry rules "to ensure cable carriage of

<sup>1</sup> 66 Fed. Reg. 16533 (March 26, 2001) (hereinafter "Report and Order").

<sup>2</sup> Report and Order at ¶ 74.

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[digital] broadcast signals of local commercial television stations which have been changed to conform with such modified standards." It is abundantly clear from this language that cable operators are required to transmit a broadcaster's *signal*. If a broadcast station is transmitting in a digital format, its signal is a digital signal, not an analog signal. Whatever the Commission's authority to mandate carriage of a signal broadcast in digital format, there is no comparable authority for the Commission to require a cable operator to carry a digital signal in an analog format. The converted analog format version of a station's programming is not a broadcast signal at all since the digital signal would have to be converted to analog at the cable operator's headend. The Commission's authority to require carriage of a broadcaster's signal is limited to the authority expressly granted by the must carry provisions in the Act.

Moreover, mandating carriage of a digital signal in a converted analog format is not consistent with the basic policy underlying the statutory must carry requirements which is to preserve the availability of broadcast stations for free over-the-air reception.<sup>3</sup> Granting must carry rights to a digital-only broadcast station well before the vast majority of households can receive it over-the-air clearly does not preserve the availability of such a signal for those households. It is also obvious that the analog option does nothing to promote the public's acceptance of digital broadcasting. The only possible rationale for the converted analog carriage option is that, since a new digital signal will have virtually no over-the-air viewership during its initial period of operation, the only way to ensure its survival is to require carriage of the station as an analog basic cable program service. The fatal flaw in this rationale is that it does not square with the policy underlying the statutory must carry requirements. Even conceding that mandatory cable carriage

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<sup>3</sup>See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*").

of a new station's signal in digital format would promote the transition to digital, carriage of such a station's signal in an analog format could not possibly promote the digital transition. In other words, carrying the analog version of a digital signal will provide absolutely no incentive to viewers to purchase digital television sets, to say nothing of HDTV television sets.

Finally, carriage of a digital broadcaster's signal in analog format would impose an unfair burden on affected cable operators as well as on cable program networks. Most cable systems are channel-locked on their analog capacity. If forced to carry an additional station in analog format, a cable operator would have to either delete an existing program service or move it to a less desirable position on a digital tier. While it is true that the Commission's analog must carry requirements frequently result in a similar dislocation of a cable program service, carriage of an analog broadcaster's signal is at least consistent with the purpose of the must carry requirements, i.e., preserving the availability of such broadcast stations for existing over-the-air viewers. No such nexus can be found in the present case.

The Commission is wrong to require cable operators to support, via analog carriage, a broadcast station that applied for a digital license in the full knowledge that it would be a long time, if ever, before it acquired a meaningful over-the-air viewing audience. Given these facts and the clear lack of explicit statutory authority to mandate carriage of a digital-only signal in analog format, Adelphia submits that the Commission should reverse that portion of its rulemaking decision which gives a new digital-only station a choice of format in a must carry context.

## **II. ANALOG CARRIAGE RIGHTS FOR DIGITAL-ONLY STATIONS DO NOT PASS CONSTITUTIONAL MUSTER.**

The Commission's decision to allow digital-only broadcast television stations to demand analog carriage of their digital signal also transgresses First Amendment principles. It is well-

established that cable programming is constitutionally protected speech.<sup>4</sup> It is equally well-established that must carry requirements burden speech by "reduc[ing] the number of channels over which cable operators exercise unfettered control, and . . . render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining."<sup>5</sup>

The constitutionality of the existing analog must carry requirements does not extend to any must carry requirement that allows a digital-only broadcast television station to demand analog carriage. The constitutionality of the analog must carry requirements, which were established as part of the 1992 Cable Act, was examined in two United States Supreme Court decisions and survived by the narrowest of margins.<sup>6</sup>

Concluding that the must carry provisions were "content-neutral restrictions that impose an incidental burden on speech," the Court held that intermediate scrutiny under the *O'Brien v. United States* test would determine the constitutionality of the analog must carry provisions.<sup>7</sup> Under the *O'Brien* test, the Court will sustain a content-neutral restriction only if (i) the restriction furthers an important or substantial government interest; (ii) that government interest remains unrelated to the suppression of free expression; and (iii) the incidental restriction on First Amendment freedoms is not greater than is essential to further that interest.<sup>8</sup> In other words, a content-neutral regulation must advance important governmental interests unrelated to free expression and may "not burden

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<sup>4</sup>See *Leathers v. Medlock*, 499 U.S. 439 (1991)

<sup>5</sup>See *Turner I*, 512 U.S. 637.

<sup>6</sup>See *Turner I*; see also *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") (upholding the must carry requirements by a 5-4 decision).

<sup>7</sup>See *Turner I*, 512 U.S. at 661-662 (discussing *O'Brien v. U.S.*, 391 U.S. 367 (1968)).

<sup>8</sup>*Turner I*, 512 U.S. at 662.

substantially more speech than necessary to further those interests."<sup>9</sup> An analog carriage right for digital-only stations fails to meet this test.

**A. The Existing Record Is Inadequate to Support a Finding that Analog Carriage of Digital-Only Stations Passes Constitutional Muster.**

The existing record in this proceeding is inadequate to support a finding that analog carriage rights for digital-only stations passes constitutional muster. Unlike the instant matter, the *Turner* decisions rested on a well-developed record, consisting of "tens of thousands of pages" that included "materials acquired during Congress' three years of pre-enactment hearings, . . . as well as additional expert submissions, sworn declarations and testimony, and industry documents."<sup>10</sup> The Commission's decision here, however, is devoid of any discussions, testimony, or evidence relating to the need for analog carriage rights for digital-only stations.

Significantly, the Report and Order lacks any meaningful discussion of constitutional questions, at most suggesting that (1) analog carriage of digital signals supports "the ultimate conversion to digital signals and facilitating the return of the analog spectrum,"<sup>11</sup> and (2) minimally noting that the Commission must develop a record to consider how dual carriage requirements would mesh with the interests upheld in the *Turner* decisions and otherwise satisfy the *O'Brien* test.<sup>12</sup>

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<sup>9</sup>See *Turner II*, 520 U.S. at 189.

<sup>10</sup>See *Turner II*, 520 U.S. at 187.

<sup>11</sup>See Report and Order at ¶ 74.

<sup>12</sup>See Report and Order at ¶¶ 113-115.

**B. Analog Must Carry for Digital-Only Broadcast Television Stations Does Not Further Important Government Interests.**

To withstand judicial scrutiny, the Commission's decision to give analog carriage rights to digital-only stations must advance important governmental interests. For example, the *Turner* Courts concluded that the "three interrelated interests," which must carry was intended to advance, constituted important governmental interests. These interests were (1) "preserving the benefits of free, over-the-air local broadcast television," (2) "promoting the widespread dissemination of information from a multiplicity of sources," and (3) "promoting fair competition in the market for television programming."<sup>13</sup> The Commission's decision here lacks any discussion of constitutional limitations with respect to analog carriage rights for digital-only stations.<sup>14</sup>

The Commission may not simply rest on prior articulations of interests that analog must carry would protect or speculate as to the importance of analog carriage rights for digital-only stations. As the *Turner I* Court explained,

That the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests. When the Government defends a regulation on speech as a means to address past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.<sup>15</sup>

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<sup>13</sup>See *Turner I*, 512 U.S. at 662; *Turner II*, 520 U.S. at 189.

<sup>14</sup>As noted below, the Report and Order makes passing reference to the importance of analog carriage rights for digital-only stations to help facilitate the transition to digital television. See Report and Order at ¶ 74. The Commission's decision, however, fails to provide any meaningful discussion of this interest, making it speculative at best. Similarly, the Report and Order provides a brief recitation of the interests upheld by the *Turner* Courts in connection with digital carriage issues only. See Report and Order at ¶ 113.

<sup>15</sup>See *Turner I*, 512 U.S. at 664 (internal citations omitted).

The Commission must therefore articulate demonstrable interests that will be advanced by permitting digital-only stations not only the right to assert digital carriage but the right to assert analog carriage instead.

Even assuming that the Commission clearly articulated interests that would support digital carriage of digital-only stations, the record does not support any possible interests underlying the Commission's decision to grant digital-only stations analog must carry rights. The Commission makes a vain attempt at rationalizing the importance of analog carriage rights for digital-only stations – claiming that it will help "foster[] the conversion to digital television" but citing not a single evidentiary source demonstrating that such carriage will expedite the transition to digital television.<sup>16</sup>

Finally, the interests articulated in support of analog must carry that the *Turner* Courts upheld do not have equal application to analog carriage rights for digital-only stations. An analog carriage right for digital-only stations goes beyond concerns for promotion of free, over-the-air broadcasting and multiplicity of sources. Analog carriage for digital-only stations is nothing more than an attempt to build a market for a new station in any way possible. The Commission has gone too far with its decision to permit digital-only stations to demand analog carriage. It has not met its burden of proving that this restriction furthers any important governmental interest. The Commission must therefore rescind the portion of its rulemaking decision that allows digital-only stations the ability to demand analog carriage.

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<sup>16</sup>See Report and Order at ¶ 74.

**CONCLUSION**

For the foregoing reasons, Adelphia respectfully requests the Commission to reconsider that portion of its decision in the captioned proceeding whereby new digital-only stations have been given the option to request cable carriage of their digital signals in an analog format.

Respectfully submitted,

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