

KELLOGG, HUBER, HANSEN, TODD & EVANS, PLLC.

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL

SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900

FACSIMILE:
(202) 326-7999

HENK BRANDS
SEAN A. LEV
EVAN T. LEO
ANTONIA M. APPS
MICHAEL J. GUZMAN
AARON M. PANNER
DAVID E. ROSS
SILVIJA A. STRIKIS
RICHARD H. STERN, OF COUNSEL

April 25, 2001

VIA HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

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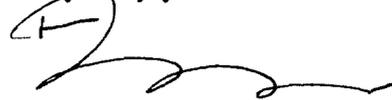
Re: *In the Matter of Carriage of Digital Television Broadcast Signals;
Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120*

Dear Ms. Salas:

Please find enclosed for filing in the above-referenced proceeding the original and 11 copies of Time Warner Cable's Petition for Reconsideration.

Thank you for your assistance in this matter. If you have any questions, please call me at 202-326-7945.

Very truly yours,



Henk Brands

Enc.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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OFFICE OF THE SECRETARY

In the Matter of)
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Carriage of Digital Television) CS Docket No. 98-120
Broadcast Signals)
)
Amendments to Part 76 of the)
Commission's Rules)

TIME WARNER CABLE'S
PETITION FOR RECONSIDERATION

Time Warner Cable respectfully requests that the Commission reconsider certain aspects of its First Report and Order in this proceeding. *See Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 01-22 (rel. Jan. 23, 2001) ("*Order*").¹ In the *Order*, the Commission correctly concluded "that . . . a dual carriage requirement appears to burden cable operators' First Amendment interests substantially more than is necessary." *Order* ¶ 3. We thus applaud the thrust of the *Order*. There are, however, certain aspects with which we do not agree. We here respectfully ask the Commission to reconsider two of them.

1. In the *Order*, the Commission determined that cable operators must carry the digital signals of digital-only broadcasters in analog format if requested to do so. *See id.* ¶ 74. But the Commission failed to identify any specific statutory basis for imposing this digital-to-analog-conversion requirement. Because there is no express statutory basis, the structure of the must-carry provisions as well as the text of Section 624(f)(1) of the Communications Act

¹The *Order* was published at 66 Fed. Reg. 16533 (Mar. 26, 2001).

prohibit imposing this requirement. *See* 47 U.S.C. §§ 534, 535, 544(f)(1). The Commission’s suggestion that Section 614(b)(4)(B)’s express mention of digital signals implies the necessary authority is mistaken. If that were right, one could argue as easily that the Commission has unbridled discretion with respect to the carriage of analog signals, which is an argument that the Commission has expressly rejected. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 27 (1993).

Moreover, the requirement cannot survive scrutiny under either the First Amendment or the Administrative Procedure Act. The Commission apparently imposed it on the theory that, with a digital-to-analog-conversion requirement in place, “a television station would be more willing to return its analog spectrum to the government.” *Order* ¶ 74. Apparently, the ultimate objective underlying that rationale — which is different from the rationale endorsed in *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) — is to generate auction revenue. That objective is simply not sufficiently important to justify burdening First Amendment rights.² Moreover, giving a digital-to-analog-conversion right to new digital-only broadcasters does nothing to promote the objective: such new broadcasters have no analog spectrum to return. Indeed, there is no reason to believe that the requirement by itself would make even an existing broadcaster “more willing to return its analog spectrum.” *Order* ¶ 74. Broadcasters

²*See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977). That is particularly so because, if the goal is to generate auction revenue, a much simpler way of promoting it would have been to auction the spectrum earmarked for digital broadcasting. *Cf. Turner Broadcasting Sys. v. FCC*, 910 F. Supp. 734, 774 n.19 (D.D.C. 1995) (Williams, J., dissenting) (“Congress cannot invoke a problem created by [Congress itself] as a justification for the remedy”), *aff’d*, 520 U.S. 180 (1997).

are unlikely voluntarily to surrender access to over-the-air viewers without receiving anything in return for it.

2. The Commission also determined that all “program-related material” in a must-carry-eligible digital signal must be carried. *See Order* ¶ 60. The statutory provision on which the Commission relied, however, requires carriage only of “program-related material carried *in the vertical blanking interval.*” 47 U.S.C. § 534(b)(3)(A) (emphasis added). As the Commission acknowledged, “there is no VBI in a digital signal.” *Order* ¶ 60. That should have been the end of the matter. Because digital signals can carry vastly more material than analog VBIs,³ any reading that unties the “program-related material” concept from its VBI moorings threatens to expand must-carry obligations in a way that Congress could not have intended and that unduly burdens protected speech.

³*See Order* ¶ 57 (“With the advent of digital television, broadcast stations now have the opportunity to include in their video service a panoply of program-related content. Indeed, far more video content is possible broadcasting a digital signal than broadcasting in an analog format.”).

Conclusion

For the reasons set forth above, this petition for reconsideration should be granted.

Respectfully submitted,



HENK BRANDS
KELLOGG, HUBER, HANSEN, TODD
& EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7945

April 25, 2001

Counsel for Time Warner Cable