

RECEIVED

APR 25 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Carriage of Digital Television Broadcast Signals)	CS Docket No. 98-120 /
)	
Amendments to Part 76 Of the Commission's Rules)	
)	
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 Retransmissions of Broadcast Signals)	CS Docket No. 00-2
)	

NAB/MSTV/ALTV PETITION FOR RECONSIDERATION AND CLARIFICATION

**NATIONAL ASSOCIATION OF
BROADCASTERS**

Henry L. Baumann
Jack N. Goodman
Valerie Schulte

Lynn Claudy
Arthur Allison
NAB Science & Technology

**ASSOCIATION OF LOCAL
TELEVISION STATIONS, INC.**

David L. Donovan
Vice President, Legal and Legislative Affairs

**ASSOCIATION FOR MAXIMUM
SERVICE TELEVISION, INC.**

Victor Tawil
Senior Vice President

Jonathan D. Blake
Jennifer A. Johnson
COVINGTON & BURLING
Its Attorneys

April 25, 2001

Number of Copies rec'd
M A B C D E

014

TABLE OF CONTENTS

	<u>Page</u>
EXECUTIVE SUMMARY	ii
I. THE COMMISSION'S DTV CARRIAGE DECISIONS ARE CONTRARY TO THE LETTER AND SPIRIT OF THE COMMUNICATIONS ACT	4
II. THE COMMISSION'S DECISION TO DENY MUST CARRY TO DTV SIGNALS DURING THE TRANSITION CONTRADICTS THE PLAIN LANGUAGE AND CLEAR COMMAND OF THE STATUTE.....	6
III. THE COMMISSION SHOULD RECONSIDER AND/OR CLARIFY SPECIFIC DTV SIGNAL CARRIAGE REQUIREMENTS.....	10
A. The Commission Should Require, As The Statute Intended, Carriage Of The Entirety Of The Free Video Signal.....	10
B. The Commission Should Reconsider Its Decision On Partial Signal Carriage, Which Ignores Strong Congressional Policy.....	16
C. Carriage Priority Should First Be Afforded To One Signal Of Every Local Broadcaster.....	17
D. The Commission Must Revise Its Decision On Material Degradation To Comply With The Statute's Clear Command And To Avoid Permitting Precisely What The Statute Sought To Prevent.....	18
E. The Commission Should Revise And Add To Its Requirements Concerning PSIP To Achieve The Statutory Mandate For On-Channel Positioning Of Broadcast Signals Carried On Cable.....	22
CONCLUSION.....	24

EXECUTIVE SUMMARY

NAB, MSTV and ALTV seek reconsideration and clarification of the Commission's *First Report and Order* in the DTV cable carriage proceeding. If left unchanged, the Commission's decisions will undermine the statutory directives and intent of the 1992 Cable Act, impair the DTV transition, and permanently hobble broadcast DTV service.

Congress directed the Commission to "ensure cable carriage" of DTV signals once a DTV standard had been adopted. That time has passed and the Commission must meet its statutory obligation consistent with Congress's explicit directives and its core objectives – chief among them, preserving the benefits of free, over-the-air local broadcast television. If the public is ever to benefit from the broadcast DTV service mandated by Congress, the Commission must ensure carriage of DTV signals during the transition as well as after. The Congressional Budget Office has called cable carriage the "most significant single determinant" of when the digital transition will be completed, concluding that "a strong must-carry requirement for cable systems to carry DTV signals . . . will be necessary to achieve the mandated market penetration level by 2006 and end the transition." The failure to adopt DTV carriage requirements already has impeded a swift and successful DTV transition. And, as several Congressional leaders have acknowledged, government intervention is needed to get the transition back on track.

The Commission's failure to require carriage of broadcast DTV signals during the transition contravenes the Cable Act's basic command – that *each cable operator shall carry the signals of local commercial television stations*. While the Commission properly found that "digital broadcast signal carriage fits within the express requirement" of the statute, it refused to implement digital carriage rights during the transition. While the Commission can and should adapt the basic carriage requirement to accommodate the circumstances of the DTV transition, it does not have discretion to refuse to apply digital carriage requirements during the transition.

It is critical that the Commission also reconsider several specific decisions that will define the baseline obligations of cable operators that carry broadcast DTV signals and that will affect cable viewers' experience of digital television both during the transition and after its

conclusion. In particular, the *First Report and Order*'s narrow construction of the term "primary video" to require carriage of only a single stream of video programming contravenes Congressional intent by depriving cable subscribers access to free broadcast programming selected to reflect the tastes and needs of their local communities. The Commission's restrictive reading will discourage the development of innovative digital programming services and undermine the viability of local broadcast stations in the digital age. Under basic principles of statutory construction, the term "primary video" should be understood in the digital context to include all of the broadcaster's free video programming, whether delivered in one stream or many.

In a number of other respects, the Commission's carriage decisions fail to meet the Commission's statutory obligation to meaningfully protect broadcast DTV signals from discriminatory and anticompetitive cable conduct:

- The decision to allow partial carriage of digital broadcast signals, contrary to the statute and the analog carriage rules, would permit cable operators to "cherry pick" broadcasters' DTV programming and would discourage the availability of digital program service to the public.
- The decision regarding material degradation fails to protect consumers from substantial reductions in DTV picture quality that could result from both format changes and changes in bit rate. Only a "pass all the content bits" standard will satisfy the statute's prohibition on material degradation in the digital context.
- The Commission's decision regarding carriage of PSIP information does not go far enough to adapt the channel positioning requirements to the digital television context. To achieve virtual on-channel positioning, the Commission must require not only carriage of the PSIP information in the broadcaster's signal, but must require cable operators to use broadcasters' PSIP information in their set-top boxes and in their construction of electronic program guides and must preserve broadcasters' historical channel positioning rights in the digital age.

Without these modifications, the Commission will have failed to meet its statutory obligation to ensure carriage of DTV signals consistent with the language and objectives of the statute. As a result, American consumers will be denied the robust DTV service Congress and the Commission have committed to foster.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Carriage of Digital Television Broadcast Signals)	CS Docket No. 98-120
)	
Amendments to Part 76 Of the Commission's Rules)	
)	
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 Retransmissions of Broadcast Signals)	CS Docket No. 00-2
)	

NAB/MSTV/ALTV PETITION FOR RECONSIDERATION AND CLARIFICATION

The National Association of Broadcasters ("NAB"), the Association for Maximum Service Television, Inc. ("MSTV"), and the Association of Local Television Stations, Inc. ("ALTV")¹ request reconsideration and clarification of the Commission's *First Report and Order*² in this proceeding concerning cable carriage of local digital television broadcast signals under the terms of the Communications Act of 1934 ("Act"), specifically under the terms of the 1992 Cable Act.³

¹ NAB serves and represents the American broadcast industry as a nonprofit, incorporated association of radio and television stations and broadcast networks. MSTV represents nearly 400 local television stations on technical issues relating to analog and digital television services. ALTV is a nonprofit trade association representing local television broadcasters across this country.

² *First Report and Order and Further Notice of Proposed Rule Making*, CS Docket No. 98-120, CS Docket No. 00-96, CS Docket No. 00-2 (rel. Jan. 23, 2001) ("*Report and Order*" or "R&O").

³ Cable Television Consumer Protection & Competition Act of 1992, Pub.L. No. 102-385 ("1992 Cable Act" or "Cable Act").

If left unchanged, the Commission's decision will undermine the statutory directives and intent of the 1992 Cable Act, impair the DTV transition, and permanently hobble broadcast DTV service. It will thwart realization of what the Congressional Budget Office ("CBO") said could be the "most significant single determinant" of the pace of the transition – namely, cable carriage of broadcasters' digital signals.⁴ The CBO concluded that "a strong must-carry requirement for cable systems to carry DTV signals . . . will be *necessary* to achieve the mandated market penetration level by 2006 and end the transition."⁵ In its *Notice of Proposed Rulemaking* in this proceeding, the Commission similarly noted that "cable industry participation is likely to be *essential to a successful transition.*"⁶

Congress knew that cable carriage would be essential for digital broadcast signals and was particularly explicit with respect to the Commission's obligation to adopt cable carriage rules for DTV signals during the transition. Congress directed the Commission to implement DTV carriage requirements once technical standards had been established for digital signals. That time has passed and the need for cable carriage grows ever more evident as policymakers increasingly point to the status of the DTV transition as a cause for concern. House Commerce Committee Chairman Billy Tauzin recently said he would ask the Committee "literally to do a top-down review of the transition," including must carry, standards, and manufacturing, and noted that the transition "is really off track now."⁷ On March 4, 2001, Senate Commerce Committee Chairman John McCain, said: "We're going to reach [digital penetration of] 85 percent of the homes in America by the year 2006 There's no one in America who

⁴ Completing the Transition to Digital Television, Congressional Budget Office, Chapter I (Sept. 1999).

⁵ *Id.* at Summary (emphasis added).

⁶ *In the Matter of Carriage of the Transmissions of Digital T.V. Broadcast Stations; Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, 13 FCC Rcd. 15092, 15101 (rel July 10, 1998).

⁷ "Tauzin Ready to Ease Sec. 271, Reform FCC, Review DTV Roles," *Communications Daily*, Jan. 25, 2001.

believes that.”⁸ And at the March 15, 2001, House hearing on the digital transition, Congressman Dingell said that the impediments to DTV transition may be “too great to overcome” without additional government intervention.⁹ By adopting the DTV carriage requirements mandated by statute, the Commission will go far to address these Congressional concerns.

On reconsideration the Commission must reverse itself and find that it lacks the discretion to hold back on DTV carriage requirements for the digital transition. The Cable Act’s basic command is that *each cable operator shall carry the signals of local commercial television stations*. The plain language of the statute, which makes no distinction between qualifying analog and digital signals, leaves no room to deny cable carriage to local stations’ DTV signals *during the transition* as well as after. This is not to say that the Commission could not and should not adapt the basic principle to accommodate the particular circumstances of the transition and various special situations, but it is to say that the Commission did not have the discretion to determine that *no* digital carriage requirements would apply during the transition. Moreover, Congress would not have been so explicit in the statute that the proceedings to adopt digital must carry rules should be launched immediately if it had contemplated that they would not take effect until 15 years later – after the transition was complete. Congress clearly directed the Commission to adopt carriage rules that would apply *during* the transition.

Petitioners also urge the Commission to reconsider several specific decisions that will define the baseline obligations of cable operators in their carriage and presentation of local broadcast DTV signals, whether under voluntary carriage agreements or pursuant to must carry. It is these decisions about the manner and content of carriage that will determine how two-thirds

⁸ “No DTV Lovefest in Committee; Senators Looking at Troubled Transition,” *Electronic Media*, March 5, 2001.

⁹ Digital T.V.: A Private Sector Perspective on the Transition Before the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy & Commerce, 107th Legis., 1st Reg. Sess. (2001) (Statement of Congressman Dingell).

of American households will experience the extraordinary new television service Congress has directed local broadcasters to provide. And these decisions will affect cable viewers' experience of digital television far beyond the DTV transition.

Congress, in the 1992 Cable Act, expressly prescribed the terms and conditions of carriage for the analog world. And it directed the Commission to adapt those provisions for application in the advanced television world. It is these Congressional decisions and intentions that have *not* been implemented faithfully in the instant *Report and Order*, and which thus should be reconsidered.

I. THE COMMISSION'S DTV CARRIAGE DECISIONS ARE CONTRARY TO THE LETTER AND SPIRIT OF THE COMMUNICATIONS ACT.

When Congress adopted mandatory cable carriage requirements, it sought to serve "three interrelated interests" – (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.¹⁰ In implementing these statutory requirements, including the requirement to adopt DTV carriage requirements, the Commission must stay true to the language and the intent of the statute. This it has not done.

The Commission's departure from its statutory directives emerges in the first few paragraphs of the *Report and Order*, where it identifies "a number of statutory and public policy goals inherent in Section 614 and 615, and other parts of the Act" that guided its decisions: "(1) maximizing incentives for inter-industry negotiation; (2) minimizing disruption to cable subscribers as well as the cable industry; (3) promoting efficiency and innovation in new technologies and services; (4) advancing multichannel video competition; (5) maximizing the introduction of digital broadcast television; and (6) maintaining the strength and competitiveness of broadcast television."¹¹ The Commission's ordering of these goals is telling and is reflected in

¹⁰ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189.

¹¹ R&O ¶ 4.

its DTV carriage decisions – *the central goals underlying the 1992 Cable Act – embodied in points (5) and (6) – are dead last.* Moreover, the Commission’s decisions fail to advance and, in several cases dangerously compromise, its first four goals.

Thus, the *Report and Order* refused to grant carriage rights to local broadcasters’ DTV signals during the transition – except in rare circumstances where a broadcaster operates only in digital mode – despite the explicit statutory directive that it do so. This decision is a devastating blow to the public’s free, local broadcast service and, potentially, a death blow to an effective DTV transition.

The Commission then made a series of decisions regarding the manner and terms of DTV carriage (once obtained) that will impair digital broadcast service during the transition and beyond. By narrowly construing the term “primary video” to *exclude* from carriage all but one free, video programming stream, the Commission created a powerful disincentive for broadcasters to develop multiple streams of locally-oriented programming or innovative video services and ensured that cable subscribers and non-subscribers alike would be deprived of the full benefits that digital technology enables. The Commission departed from the statutory prohibition and Commission policy against partial carriage agreements, granting cable operators the opportunity to pick and choose the particular broadcast digital programs that will reach subscribers, thereby dismantling the television service developed by the local licensee for its community. The Commission failed to adopt technical standards to protect broadcasters against signal degradation, as required by the statute’s prohibition on material degradation by cable systems. And it failed adopt rules that will adequately ensure functionality of program system and information protocol (“PSIP”) information critical to maintaining “virtual on-channel positioning” consistent with the statutory channel position requirement.

In sum, the Commission’s *Report and Order* not only fails to promote the objectives established by Congress, but seriously undermines them. These decisions, if left uncorrected, will thwart the DTV transition and *permanently* impair digital broadcast service. Congress tasked the Commission with adopting requirements to “ensure cable carriage” of DTV signals,

according to the statute's explicit directives and consistent with Congressional intent. On reconsideration, the Commission should modify its decisions to achieve this task.

II. THE COMMISSION'S DECISION TO DENY MUST CARRY TO DTV SIGNALS DURING THE TRANSITION CONTRADICTS THE PLAIN LANGUAGE AND CLEAR COMMAND OF THE STATUTE.

The explicit terms and plain language of the must carry statute direct that "each cable operator shall carry, on the cable system of that operator, the *signals* of local commercial television stations."¹² The *Report and Order* acknowledges that "[t]his section does not distinguish between analog and digital signals and supports the argument that digital signals are entitled to mandatory carriage."¹³ Nonetheless, the *Report and Order* concludes that the statute does not compel carriage of both the analog signal and the digital signal of the same local station.¹⁴ The Commission offers no rationale for this conclusion.¹⁵ It simply states that "[w]e do not accept the arguments of . . . those who argue that the statute compels dual carriage."¹⁶ It does not say why the Commission disagrees that both analog and digital signals are entitled to carriage under the plain language of the statute. Indeed, there is no other permissible interpretation of the plain statutory language.

The Commission's fundamental obligation is to explain its decisions and provide a rational justification grounded in Congressional determinations, appropriate policy analysis, and findings of fact.¹⁷ This obligation is fundamental to the validity of the administrative process,

¹² Section 614(a) of the Act (codified as amended at 47 U.S.C. § 534 (1996)) (emphasis added).

¹³ R&O ¶ 13.

¹⁴ *Id.* ¶ 14.

¹⁵ *Id.* The *only* further analysis in this part of the *Report and Order* is that rejecting cable commenters' claim that digital carriage may be required only after the transition.

¹⁶ *Id.*

¹⁷ See generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Schurz Communications v. FCC*, 982 F.2d 1043 (7th Cir. 1992); *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

for in its absence there would be no check on the actions of non-democratically selected agency officials.¹⁸ By reaching a conclusion about digital carriage without any citation to statute or policy, the Commission entirely failed to meet this fundamental burden. This alone justifies reconsidering the *Report and Order*.

The *Report and Order* acknowledges that Congress contemplated digital broadcast signals and carriage thereof, yet makes no mention that Congress declined to exclude DTV signals from carriage during the time that the companion analog signal would be carried. Section 614(h)(1)(A) of the statute, in the definitional section, reads:

[T]he term 'local commercial television station' means *any* full power television broadcast station, other than a qualified noncommercial educational television station . . . *licensed and operating on a channel regularly assigned to its community by the commission* that, with respect to a particular cable system, is within the same television market as the cable system.¹⁹

The following paragraph, Section 614(h)(1)(B), containing "Exclusions" to the term "local commercial television station," does not exclude in any fashion the (then expected) DTV signals of "local commercial television stations."

Thus, by its clear and unambiguous terms, Section 614 applies to *the signals of any full power commercial television broadcast station licensed and operating on a channel regularly assigned to its community by the Commission*, not otherwise excluded by the terms of Section 614. The new DTV *signals of full power television broadcast stations* here at issue were, at the time of the 1992 Cable Act, anticipated to be *licensed and operating on a channel regularly assigned to its community by the Commission*. If Congress intended to exclude these DTV signals from carriage requirements during the transitional period when stations would be

¹⁸ See *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) ("a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of authority delegated to the agency by statute").

¹⁹ 47 U.S.C. § 534(h)(1)(A) (emphasis added).

transmitting both analog and DTV signals, it would have so indicated here, or otherwise in Section 614. The statute contains no such exclusion.

The *Report and Order* recites that “[g]iven that Congress has spoken to the issue of digital broadcast signal carriage in Section 614(b)(4)(B), and given such carriage is not barred under another statutory provision, digital broadcast signal carriage fits within the *express requirement* of Section 614(a),”²⁰ but it fails entirely to address why the Section 614(a) “shall carry” command does not apply to both digital and analog signals during the transition. The *Report and Order* states that the plain, unambiguous language of the must carry statute includes DTV signals, without exception or distinction, but concludes without explanation that the Commission need not follow the statutory command where dual carriage would result.²¹ This is an improper reading of the statute that calls for reconsideration and revision consistent with the statute’s express command.²²

Because the statutory mandate to carry broadcasters’ DTV signals is clear, the Commission lacks discretion to water down or modify the *express requirement* that cable operators carry DTV signals. The Commission knows how to engage in proper “plain language” statutory interpretation. It did so in its *Further Notice of Proposed Rule Making* in the DTV Biennial Review, which it adopted the same day as the instant *Report and Order*. There, the issue was whether the Commission, under the All Channel Receiver Act’s grant of authority to

²⁰ R&O ¶ 16 (emphasis added).

²¹ Similarly, the Commission does not even explain why, if both analog and digital signals qualify, but dual carriage is not required, stations would not have the option of choosing which signal, analog or digital, would be entitled to must carry. Such a result would at least afford stations the possibility of opting for must carry of their digital signal and securing carriage of their analog signal through retransmission consent. In the event the Commission rejects petitioners’ request for dual carriage under the statute, we request that stations be afforded the choice of which signals are subject to must carry.

²² “It is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself.” *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987).

require that television receivers be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting, could require new television receivers to include reception of all digital channels, as it had for UHF channels under ACRA in 1962. The Commission concluded that

[w]hile Congress in 1962 did not anticipate the advent of digital television service, a plain language reading of this section does not limit our authority to analog television receivers, nor does it limit our authority to channels in the UHF band. Inasmuch as the frequencies allocated to television broadcasting now include those channels allotted for DTV service, Section 303(s) provides the Commission with authority to require that television receivers be capable of adequately receiving those channels.²³

The same sort of plain language reading must be applied here to the statutory must carry provisions, with the only possible result being application of the statutory must carry command to all digital broadcast signals during the transition.

The Commission is not free to reject the plain language of the statute – which compels carriage of all local broadcast signals, analog *and* digital – on the basis of an unsupported and tentative analysis of the constitutionality of the statute’s command. An administrative agency has no authority to consider the constitutionality of its unambiguous governing statute.²⁴ Thus, implementing the statute’s express command will moot any further constitutional inquiry in this proceeding, and will moot as well the asserted but unsupported constitutional basis for the tentative conclusion against dual must carry in the *Report and Order*.²⁵

²³ *Report and Order and Further Notice of Proposed Rule Making*, MM Docket No. 00-39 (rel. Jan. 19, 2001) ¶ 110.

²⁴ *United States v. Bozarov*, 974 F.2d 1037, 1040 (9th Cir. 1992) (“[a]n agency has no authority to declare its governing statute unconstitutional”).

²⁵ There is little if any evidence in the *Report and Order* of reasoned decisionmaking with regard to the basic decisions (statutory, policy or constitutional) on dual carriage. The *Report and Order* tentatively concludes that “based on the existing record evidence, a dual carriage requirement appears to burden cable operators’ First Amendment interests substantially more than is necessary to further the government’s substantial interests” (R&O ¶ 3), but does not mention any of that record evidence nor otherwise discuss the burden of carriage on cable nor the government’s interests. Should the Commission, nonetheless, refuse to reconsider its reading of (continued...)

III. THE COMMISSION SHOULD RECONSIDER AND/OR CLARIFY SPECIFIC DTV SIGNAL CARRIAGE REQUIREMENTS.

After declining to adopt DTV carriage requirements for the transition, the Commission went on to make a series of decisions relating to the content and manner of DTV signal carriage. As set forth below, petitioners seek reconsideration and clarification of a number of these decisions. As an initial matter, however, the Commission should clarify that its decisions concerning the terms of DTV cable carriage shall apply both to signals carried pursuant to mandatory carriage and those carried pursuant to negotiated carriage agreements, whether during the transition or after its conclusion. In other words, the Commission's decisions regarding material degradation, content-to-be carried, and partial signal carriage should establish the *minimum* carriage requirements for local DTV signals carried pursuant to negotiated agreements. Such minimum standards are necessary to facilitate consumer access to and acceptance of DTV, to spur investment in DTV facilities and content, and to otherwise serve the goals of the 1992 Cable Act and the Congressionally-mandated digital transition.

A. The Commission Should Require, As The Statute Intended, Carriage Of The Entirety Of The Free Video Signal.

The Commission's decision in the *Report and Order* that the statutory term "primary video" (under the "Content to be carried" section of the statute) means "one" video stream in a digital multicast context is, by its account, "based on the plain words of the Act,"²⁶ the need to give meaning to the word "primary," and its direct application of that term to the digital context.²⁷ The *Report and Order* refers to the dictionary definition of "primary" as "First or highest in rank, quality or importance" and the like²⁸ and finds that, in digital, where there is

the statutory carriage obligation (and thus continue a constitutional inquiry in its *Further Notice of Proposed Rule Making* on DTV carriage), petitioners will there comment on the constitutional questions.

²⁶ R&O ¶ 54.

²⁷ *Id.*

²⁸ *Id.*

more than one video stream, “primary” means one. Petitioners respectfully submit, however, that the Commission, in straining to discern the literal meaning of the term “primary video” for the digital situation, has missed the forest for the trees. It is the meaning of the term in context, not the meaning of isolated words, which points to the appropriate interpretation.²⁹

Moreover, the word “primary” does not connote singularity. The first definition of “primary” in the Random House Unabridged Dictionary is “first or highest in rank or importance; chief; principal: *his primary goals in life.*”³⁰ Similarly, the first two definitions of “primary” in Webster’s New Collegiate Dictionary use plural examples: “fundamental; radical; as, the *primary* causes of war” and “First in dignity or importance; chief; principal; as, *primary* planets.”³¹ Webster’s II New Riverside University Dictionary provides the “*core meaning*: most important influential, or significant” using “*primary* responsibilities” as an example.³² “Primary” thus is an adjective that may be used with singular or plural noun forms, as in the phrases “primary elements,” “primary colors,” “primary values,” and “primary grades.” The term “video” is neither singular nor plural, but generic. Accordingly, the Commission cannot rely on “the plain words of the Act” to rule that only a single stream of programming is entitled to carriage.³³ It must look to the context.³⁴

What is required here is an approach to statutory construction that acknowledges that the statutory must carry provisions, while applicable to digital, were written for the analog world,

²⁹ Norman J. Singer, *Statutes and Statutory Construction* § 46:05 (6th ed. 2000).

³⁰ Random House Compact Unabridged Dictionary 1537 (also citing “primary grades,” “primary instincts” and “primary perceptions”).

³¹ Webster’s New Collegiate Dictionary 670 (1961).

³² Webster’s II New Riverside University Dictionary 934 (1994).

³³ R&O ¶ 54.

³⁴ It is puzzling that the Commission “recognize[s] that the terms ‘primary video’ as used in sections 614(b)(3) and 615(g)(1) are susceptible to different interpretations” (R&O ¶ 53) but then purports to construe the term based on “the plain words of the Act” (R&O ¶ 54).

and thus, as the statute itself directs (and the Commission in places acknowledges),³⁵ certain provisions must be adapted to fit the digital context.³⁶ The statutory terms here, in context and as described in the legislative history, are revealing of the statutory intention in a way not discussed in the *Report and Order*. They also yield a far different, and more supportable, result.

To begin with, the literal words of this provision simply cannot apply directly in the digital situation. The statutory provision, under the title “Content to be carried,” says “a cable operator shall carry . . . the primary video, accompanying audio, and line 21 closed caption transmission . . . and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers.”³⁷ Clearly, this provision was written with analog signals in mind, for in digital there is no line 21, no VBI, no subcarriers.³⁸ But the starting point for statutory interpretation here is not searching for a literal definition of each term that then might be applied to digital, but rather an application to the new digital context of *what was intended by the term* for the analog situation.³⁹ This the *Report and Order* did not do and this is what must be done upon reconsideration.

What was intended to be (and is) carried of the analog signal is “the entirety”⁴⁰ of the video, the audio, the closed captioning information, and ancillary program-related material.⁴¹

³⁵ See discussion of R&O’s adaptation of the statute: Channel Positioning Requirement, *infra* at III.E.

³⁶ Section 614(b)(4)(B) directs the Commission to “establish any changes in the signal carriage requirements necessary to ensure cable carriage of such [digital] broadcast signals of local commercial television stations which have been changed to conform with such modified standards.” 47 U.S.C. § 534(b)(4)(B).

³⁷ 47 U.S.C. § 534(b)(3)(A).

³⁸ It is inconsistent to interpret literally the term “primary” but not the rest of the terms in the same provision.

³⁹ Plain and unambiguous language must be given effect but not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose. Norman J. Singer, *Statutes and Statutory Construction* § 48A:08 (6th ed. 2000).

⁴⁰ Meaning and application must be given to the phrase “in its entirety,” just as meaning must be made of the word “primary.” Petitioners submit that “all of the viewable video signal” is the only interpretation that gives meaning to the phrase “in its entirety.”

The language of the statutory provision (by its terms and in accordance with the legislative history⁴²) breaks down the broadcast signal into “the primary audio and video signal,”⁴³ the closed captioning information, and the information in the VBI and on subcarriers, some of which is program-related and some of which is not program-related. Thus, in context, it becomes clear that what was meant by “primary” is the “basic” broadcast service viewed by the public without special equipment or subscription fee, versus ancillary or “secondary” material carried, in analog, in the VBI and on subcarriers. “Primary” thus equates, as in the dictionary definitions, with “first in importance,” “basic,” “fundamental,” as opposed to secondary or ancillary. Thus, “primary” does not relate to “one” or “single,” as the *Report and Order* concludes, but rather to “first in importance” or “fundamental.” Of everything in the signal, it is the video and audio that are primary.

This parsing of the language (and the signal), into the primary, viewable, basic free video (plus audio) versus the secondary program-related or tangential material is what the legislative history shows was intended, not, as the *Report and Order* suggests, that some “video” is “primary” and some is not.⁴⁴ It is not without significance that the House Report section-by-section analysis describes this statutory language as requiring carriage of “in its entirety the primary audio and video signal” but does not require carriage of “other enhancements of the

⁴¹ The term “ancillary,” as used in the analog context, is to be distinguished from the defined term “ancillary and supplementary services,” used in the digital context.

⁴² H.R. Rep. No. 102-628, 101st Cong., 2nd Sess. 1992, at 92-93.

⁴³ *Id.*

⁴⁴ R&O ¶ 54. Moreover, the *Report and Order*'s view that the statutory phrase “primary video” “suggests that there is some video that is primary and some that is not” makes no sense in the analog context, where there is only one video stream and thus no reason to distinguish a single video stream from several. *Id.* As the *Report and Order* indicates, “we must give effect to the word ‘primary,’” which certainly must be done in the first place for the analog signal. *Id.*

primary video and audio signal,” in clear reference to the dichotomy between traditional viewable free video programming versus secondary non-video material.⁴⁵

The same dichotomy that was intended for analog should be applied to digital. That is, the entirety of the free⁴⁶ video and audio (the “primary” broadcast service), the closed captioning information, and the program-related material contained in the digital bit stream should be carried as of right.⁴⁷ To do otherwise would render meaningless the statutory phrase “in its entirety,” would violate the statutory intention to ensure carriage of all the video/audio programming (as opposed to ancillary material), and would contravene the statutory purpose of getting to cable subscribers the free video broadcast service received by over-the-air viewers.⁴⁸

⁴⁵ H.R. Rep. No. 102-628, at 92, 93.

⁴⁶ As all that was available in the “primary video” of the analog world was free programming, it is reasonable to read that into what must be carried for digital.

⁴⁷ The R&O finds that certain services specified in the Commission’s rules are “ancillary or supplementary” in the context of digital cable and thus are not entitled to mandatory carriage (¶ 59). The Commission’s inclusion of “interactive materials” as ancillary and supplementary without regard to whether they are free or subscription or program-related should be reconsidered. As it did with regard to broadcast Internet offerings (¶ 60), the Commission should allow inquiry as to whether free interactive materials are program-related and thus eligible for must carry status. Forbearance from categorical treatment here is particularly important given the Commission’s current inquiry in its proceeding on Nondiscrimination in the Distribution of Interactive Television Services Over Cable, CS Docket No. 01-7, where cable operators’ stripping of interactive and Internet triggers is an issue. *See* NAB Comments in that docket at fn. 36 (March 19, 2001).

⁴⁸ *See* H.R. Rep. No. 102-628, at 47 (“A centerpiece of the Committee efforts to restore a competitive balance to the video marketplace are the provisions requiring cable operators to offer their subscribers a complement of local commercial television signals.”), at 50 (“The Committee firmly believes that reimplementing local signal carriage rules is essential to the preservation and further development of the benefits which the television industry has brought to the public.”), at 57 (“The use by one competitor of its ‘gateway’ facilities to block access to the other competitors offerings is not an appropriate competitive strategy and will, if unchecked, harm the public interest.”), at 64 (“The incremental weakening of local broadcasters that results from being dropped across a portion of their market, or by discriminatory carriage conditions, will result in those stations losing their ability to compete in a competitive programming market.”).

Finally, the *Report and Order* points to the technological developments at the time the must carry provisions were enacted to support its interpretation of “primary video.” It states that

the incorporation of the primary video construct into the Act in 1992 was reasonably contemporaneous with the gradual change in common understanding of the new television service from ATV (advanced television) and HDTV (high definition television) – which focused on improving the technical quality of traditional analog NTSC television – to DTV (digital television) with the ability to broadcast high definition television, SDTV (standard definition television) with multicasting possibilities, as well as the broadcast of non-video services.⁴⁹

The *Report and Order* is in error in drawing this conclusion. In point of fact, at the time the must carry provisions were considered and the accompanying reports were drafted, there was virtually no expectation, discussion or investigation of multicasting or multiple broadcast streams or anything but single channel HDTV for the newly introduced digital systems.⁵⁰ The instant *Report and Order*'s citations in support of this suggestion⁵¹ are dated months *after* a bill with the terminology “primary video” was considered by the Senate (in late January, 1992)⁵² and the Senate and House Reports with this same terminology were filed (June 28, 1991 and June 29, 1992, respectively). The Grand Alliance DTV system, put together in 1993, was single channel HDTV only, and it was not until 1995 that a lower resolution (SDTV) format was even included in the developing system.⁵³ Thus, the Commission can find no support for its “primary video”

⁴⁹ R&O ¶ 56.

⁵⁰ Even in the “new developments” section of the Commission’s *Second Report and Order* in the DTV proceeding, released May 8, 1992, there was no mention of multiple streams, multicasting or the like. *Second Report and Order*, MM Docket No. 87-268, 7 FCC Rcd 3340 (rel. May 8, 1992). The first mention of such an idea appears in comments filed in July 1992, in response to the *Further Notice of Proposed Rule Making* that accompanied the *Second Report and Order*, which were referenced in the Commission’s *Third Report and Order*, released October 16, 1992. *Third Report and Order*, MM Docket No. 87-268, 7 FCC Rcd 6924 ¶ 58 (rel. October 16, 1992). There, it was referenced as an idea only.

⁵¹ R&O ¶ 56, citing articles late Sept.-Dec. 1992.

⁵² 138 Cong. Rec. S400, S689, S712 (1992).

⁵³ See ATSC Digital Television Standard Doc. A/53 at 1 (Sept. 16, 1995) (“The document was approved by the Members of ATSC on April 12, 1995. Changes to Annex A, to include standard (continued...)”).

conclusion in the developing technology at the time the statutory language was drafted and passed.

B. The Commission Should Reconsider Its Decision On Partial Signal Carriage, Which Ignores Strong Congressional Policy.

The Commission should reconsider its change in policy to allow partial carriage of a digital broadcast signal in retransmission consent arrangements – despite the fact that the statute and the Commission’s analog rules prohibit partial carriage of the signals of must carry eligible stations. The Commission does not advance a reason supported by record evidence to depart from its current rules or from the statutory directive that the entirety of the program schedule of any television station be carried.⁵⁴ The Commission’s proffered reason for the change is that partial carriage will encourage at least *some* carriage that in turn will advance the transition.⁵⁵ But allowing partial carriage will *discourage full carriage deals* that cable operators might strike to procure those specifically desired parts of the broadcast schedule. And for digital only stations, the Commission’s decision creates the very real possibility that for some stations only a partial schedule will be available to subscribers in *any* format. As a result, cable subscribers can look forward to even *less* local television service as stations convert to digital. Moreover, by creating a scheme where local stations must negotiate away portions of their schedule to secure cable carriage – essentially destroying the station’s locally oriented DTV service – the Commission will have created a powerful disincentive to invest in expensive DTV facilities and content.

definition video formats, were approved by the members of T3 on August 4, 1995 and by the Members of the ATSC on September 15, 1995”).

⁵⁴ 47 U.S.C. § 534(b)(3)(B).

⁵⁵ The Commission’s approach here, “acknowledging” that “the statute gives the Commission flexibility to devise new rules for digital carriage when necessary” (citing 47 U.S.C. § 534(b)(4)(B)) should have been utilized throughout the *Report and Order* in interpreting provisions that were drafted with analog terminology and thus must be adapted for the digital context to achieve clear statutory intentions. Here, however, the terminology, the analog interpretation, and the statutory intention fit the digital situation.

The analog rules against partial broadcast signal carriage were adopted in light of the *strong* Congressional policy against partial carriage, which in turn was based on the controlling (and even overwhelming) gatekeeper power of cable operators over individual broadcasters.⁵⁶ That power is even greater with the digital signal and cable operators should not be allowed to cherry-pick the more desirable parts of digital broadcasts. To do so would only *encourage* cable to use its gatekeeper power, whereas preventing misuse of the gatekeeper facility was the fundamental premise of must carry and other cable regulation.⁵⁷ Congress's explicit requirement against partial carriage should be heeded.

C. Carriage Priority Should First Be Afforded To One Signal Of Every Local Broadcaster.

The *Report and Order* gives complete discretion to cable operators as to which broadcast signals are carried within the one-third cap, should it be reached with carriage of both DTV and analog signals pursuant to either must carry or retransmission consent. The *Report and Order* reaches this conclusion because "the Act provides a cable operator with discretion to choose which signals it will carry if it has met its carriage quota."⁵⁸ This statutory provision, Section 614(b)(2), is an example of a statutory term drafted with the analog world in mind and, consequently, it must be adapted for the digital context.

If it is literally applied, as in the *Report and Order*, it could defeat the purpose of the must carry statute to preserve a vibrant local broadcast service to the public by allowing carriage of two signals of one broadcaster first and none of another, more vulnerable station, leading ultimately to a reduction in the diversity of stations carried. The *Report and Order* fails to address the reasoned and reasonable requests of commenters that one signal of every station be

⁵⁶ See discussion in *Memorandum Opinion and Order*, MM Docket No. 92-259, 9 FCC Rcd 6723 ¶ 101 (Nov. 4, 1994).

⁵⁷ 47 U.S.C. § 521 note following ("Congressional Findings and Policy: Cable Television Consumer Protection and Competition Act of 1992"). See also NAB Comments at 11-15.

⁵⁸ R&O ¶ 42.

carried first,⁵⁹ and only then should a second signal (of cable's choosing) be carried, up to the one-third cap. Unless reconsidered, this decision will enable cable to cherry-pick the stronger stations – a result that the must carry statute sought to avoid.⁶⁰

D. The Commission Must Revise Its Decision On Material Degradation To Comply With The Statute's Clear Command And To Avoid Permitting Precisely What The Statute Sought To Prevent.

The “no material degradation” command of the must carry statute⁶¹ must be adapted for the digital environment. In the analog world, “no material degradation” was read to refer to the pure quality of the signal, as it was delivered by the broadcaster to the cable headend and routed through the cable plant and on to the subscriber.⁶² In the digital context, there is more opportunity for manipulation and degradation to occur.⁶³ Because Congress in the 1992 Cable Act sought to prevent cable from materially degrading the broadcast signal,⁶⁴ the Commission must prevent cable operators from degrading the quality of broadcasters' digital signals.

Instead, the Commission's *Report and Order* establishes a standard that will be construed by cable operators to allow substantial material degradation of broadcasters' DTV signals, whose primary distinction is high quality. The *Report and Order's* “no material degradation” standard requires only that “a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer . . . carried on the cable system,

⁵⁹ The broadcaster should choose which of its signals should be carried for any election period and be able to alter its choice at subsequent elections as the transition progresses.

⁶⁰ H.R. Rep. No. 102-628, at 93 (1992).

⁶¹ 47 U.S.C. § 534(b)(4)(A).

⁶² 47 C.F.R. § 76.601-76.630.

⁶³ Ironically, simply passing through the broadcast signal untouched would impose the least burden – manipulating the signal and adding equipment to convert formats requires effort and resources.

⁶⁴ “Evidence has also been presented showing that cable operators drop signals or *carry them in a way as to discourage their viewing*, in order to increase the value of cable programming.” H.R. Rep. No. 102-628, at 52 (1992).

provided, however, that a broadcast signal delivered in HDTV must be carried in HDTV.”⁶⁵ Unless reconsidered, material degradation will occur as a result of both format changes and changes in bit rate, both of which can dramatically affect the perceived picture quality.⁶⁶

To begin with, the Commission’s decision on material degradation is based on a misconception of the way the digital signal and digital processing work.⁶⁷ First, it mistakenly discusses quality by reference to format change alone, failing to account for the dramatic quality degradations that can result from changes in bit rate. Second, it does not appreciate the dramatic differences in quality among the various formats in the ATSC and the SCTE (cable) standards. Nor does the Commission appreciate that there may be business reasons for some cable operators to offer digital programs at very low signal quality, to which all broadcast digital signals could be reduced under this decision.⁶⁸ Third, it does not acknowledge that *the way* formats are converted and *the way* bit rate is reduced can cause more degradation, and depending on how it

⁶⁵ R&O ¶ 73.

⁶⁶ Record of Test Results, submitted to the ACATS (Oct. 1995) at II-2-19, § 2.10 (bit rate impact) and at Appendix C (assessment of impact of format conversions). See also John Watkinson, *The Engineers Guide to Standards Conversion* (1994) and D. Lauzon, *et al. Performance Evaluation of MPEG-2 Video Coding for HDTV* 42 IEEE Transactions on Broadcasting 88-94 (June 1996).

⁶⁷ A small but indicative misunderstanding of the ATSC signal is the discussion at footnote 212 and accompanying text of the *Report and Order*. The *Report and Order* there states that the 19.4 Mbps bit stream contains overhead for error correction which is removed and unused for cable retransmission and that the resulting “less than 19.4 Mbps” does not affect picture quality. This is wrong. All 19.4 Mbps comprise the net payload of the ATSC Standard and can be used for content. The total bit rate in the ATSC Standard that contains the error correction is actually 31.28 Mbps. See ATSC Doc. A/54, “Guide to the Use of the ATSC DTV Standard,” at 96-97 (October 4, 1995).

⁶⁸ Some cable systems may decide, as a business matter, to present as many programs as possible, making a significant sacrifice in quality. TCI’s “Headend in the Sky” (“HITS”) operations, for example, use digital compression technology to compress as many as 12 digital channels into the 6 MHz space of one analog channel. Experiments are also being done with compression schemes that exceed 20-to-1. See SG Cowen Securities Corporation, “Cable Television Industry Report,” July 9, 1998, at 22.

is done, this degradation can be material. The *Report and Order* sets no guidelines for properly accomplishing these changes with minimum perceived degradation.

The Commission's decision thus sets out an unworkable and standardless structure for permitting changes to broadcast DTV signals. In digital, there is currently *no objective way* to evaluate material degradation, unlike in NTSC where Subpart K of Part 76 of the Commission's rules contains pages of technical standards for this purpose. For example, the bit rate assigned (by the broadcaster or changed by the cable operator) can dramatically affect perceived quality, but the bit rate required for a given quality level is a function of the motion and detail of the material, which can vary tremendously within a given program and from program type to program type. It would thus be extremely difficult, if not impossible, to know what bit rate changes could be made without "material degradation."

Moreover, allowing bit rate changes, as the *Report and Order* seems to do, would be unworkable and certain to result in material degradation. Program and format changes occur as a function of time of day, at commercial breaks, and within commercial pods and as a result of late-running programs. The cable operator must allocate the full 19.4 Mbps bit rate to the broadcast signal at all times, because this bit rate will be needed to support the proper rendition of a single HDTV video stream. If this is not done, when a higher resolution format arrives, the quality would certainly be degraded as the bits needed would not be available. Major pieces of the video or audio would be distorted or even dropped, most definitely creating material degradation. And there can be no effective monitoring of such material degradation.⁶⁹

⁶⁹ As there is no technology that is generally accepted that can provide objective measurements that equate to material degradation, a subjective assessment would be required. The unintended consequence of allowing modifications would be to increase significantly the enforcement burden on the Commission and the industry. Unless this is reconsidered, the Commission should expect complaints and submissions of recordings of material that broadcasters believe to be degraded. Review of video and subjective evaluation by the Commission would be required to deal with these complaints.

The Commission's decision that "a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer"⁷⁰ also remains standardless as a technical matter. The Commission sets out no benchmarks or tests for determining whether its requirement is met. Nonetheless, this decision would allow *significant* material degradation. For example, a high quality 704 pixel by 480 line progressive scan broadcast signal could be reduced, under the Commission's ruling, to the lowest digital cable format containing only 352 pixels by 480 lines with interlaced scan, which is quite low quality (which, for business reasons, might suit some cable operators for their digital programs). Similarly, all non-HDTV broadcast signals (including high quality 480P signals, whose higher-than-SDTV resolution has been recognized by the manufacturing industry as "EDTV")⁷¹ could be reduced to the inferior quality of many cable digital signals, such as the HITS digital cable service, which is of *substantially* lesser quality than any format in the ATSC DTV standard, and even substantially less quality than broadcast NTSC. How is allowing degradation of DTV to a standard "worse than NTSC" good for the public or the transition, and how can it be said to meet the statute's "no material degradation" mandate?

Similarly, the Commission's decision on material degradation for an HDTV-delivered signal (requiring *an* HDTV format) creates a standardless rule. It could be construed to allow cable systems to change a broadcaster's 1080I signal to a 720P signal (maintaining the "HDTV"

⁷⁰ R&O ¶ 73. The Commission's attempt to apply the second direction of the statute as to material degradation – to adopt standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage for broadcast signals will be no less than that for carriage of any other type of signal (47 U.S.C. § 534(b)(4)(A)) – does not, as shown herein, work in the digital context. It does not, moreover, represent the sum total of the statute's no material degradation mandate, but is, as put in the House Report (H.R. Rep. No. 102-628, at 93), "in addition" to the basic statutory command that local broadcast signals "shall be carried without material degradation." To interpret otherwise would render the statute's basic command superfluous, which would contradict basic canons of statutory construction. Norman J. Singer, *Statutes and Statutory Construction* § 46:06 (6th ed. 2000).

⁷¹ *CEA Expands Definitions of Digital Television Products*, Press Release (Consumer Electronics Association, Washington, D.C.) Aug. 31, 2000.

character), but sets out no standard of how to make this format change without materially degrading the signal in so doing. In point of fact, all format conversions cause degradation, and some methods cause much more than others. In any event, changing HDTV formats still will result in substantial, and perceptible, differences in quality.⁷²

To be true to the statute's command, the *only way* in digital to assure no material degradation is to *not change anything* in the broadcaster's payload data stream. Thus, petitioners request that the Commission reconsider and revise its *Report and Order* to establish a "pass all the content bits" standard as the best way to assure no material degradation in the digital world.⁷³

E. The Commission Should Revise And Add To Its Requirements Concerning PSIP To Achieve The Statutory Mandate For On-Channel Positioning Of Broadcast Signals Carried On Cable.

The Commission finds that there is no need to implement channel positioning requirements for digital television signals like those that exist for analog signals because the channel mapping protocols contained in the PSIP data stream adequately address a television station's channel position concerns.⁷⁴ This adaptation is precisely the type of "change" that Congress directed the Commission to make in applying its statutory provisions to DTV⁷⁵ – that is, a change needed to adapt the provisions for the digital environment that still achieves the purpose of the statutory provisions. Here, however, the *Report and Order* does not achieve what

⁷² The example case of 24 frame per second film transfers to HDTV, where interlace versus progressive scan arguments are moot, illustrates the difference in the amount of viewable information between a 1080 format and a 720 format. The reduction of 1920 pixels by 1080 lines (a 1080 format) per frame (a total of 2,073,600 pixels of information on the screen) to 1280 pixels by 720 lines (a 720 format) per frame (a total of 921,600 pixels), is a substantial reduction (55%) in the amount of information transmitted and seen on the screen, qualifying as material degradation, under any reasonable definition established.

⁷³ If the flawed interpretation of primary video is reaffirmed, then at the absolute minimum, all bits associated with that program must be passed, not an arbitrary subset or a substitute set alleged to be equivalent.

⁷⁴ R&O ¶ 83.

⁷⁵ See 47 U.S.C. § 534(b)(4)(B).

it (or the statute) intended by requiring only carriage of the PSIP information in the broadcaster's signal.

First, to achieve what it intended (virtual on-channel positioning), the Commission must require cable operators to use broadcasters' PSIP information in their set-top boxes ("STBs") and in their construction of electronic program guides ("EPGs"). That is, cable operators must be required to number broadcast channels in their EPG displays (in both STBs and Point of Deployment modules for cable-ready DTV sets) as they are numbered in PSIP, in order for the Commission's stated principle to be implemented. Otherwise, "virtual on-channel positioning" will not be guaranteed and the statute's requirement will not be met.⁷⁶

Second, statutory historical low-band channel position rights are not preserved by relying solely on PSIP as delivered to the cable system to achieve "virtual" equivalent channel positions, as PSIP utilizes actual on-air NTSC channel numbers, not the historical cable channel numbers. Contrary to the Commission's suggestion,⁷⁷ historical channel positioning rights are important in the digital era for the same reasons they are important in analog – to ensure that consumers can continue to identify and locate these broadcast channels.⁷⁸ Such historical channel positioning rights should be preserved by the Commission's adopting the following proposed rule change.⁷⁹

⁷⁶ There is, moreover, no longer any technical justification for not requiring this of cable operators, as digital STBs use virtual channels as well. SCTE and Open Cable standards provide for single-part number channels (as do currently deployed digital STBs), but both standards have an option for two-part channel numbers as are used in PSIP (*e.g.*, 7-1). MSOs currently are ordering and deploying single-part number channel STBs. By so doing, they are knowingly defeating use of PSIP's virtual on-channel position capability to achieve compliance with the statutory on-channel position requirement. The Commission must explicitly require cable operators to comply with its adaptation of the statutory requirement.

⁷⁷ R&O at fn. 235.

⁷⁸ The Commission's comment that "each television station now has a different digital channel assignment" (R&O at fn. 235) is as irrelevant for this purpose as would be a changed NTSC channel number. Further, it would be straightforward to edit the PSIP data at the headend to replace the on-air (major) channel number with the historical channel number for the few stations this would apply to.

⁷⁹ The rule adopted by the *Report and Order* fails to require that the ATSC standard A/65 be used for the elements of PSIP. The rule as written (Appendix D) could be met by a proprietary (continued...)

To implement the revisions petitioners here request as to PSIP, the rule in the *Report and Order* should be revised to read:

[add at end of new sect. 76.57(c)] “using the ATSC A/65 (PSIP) numbering scheme for broadcast channels, or using the analog must carry historical numbers referenced in subpart (a) in a PSIP-type two part numbering scheme, or using another channel number as is mutually agreed upon by the station and the cable operator.”

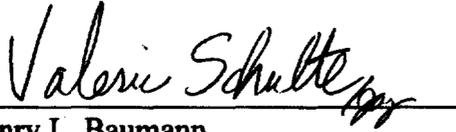
CONCLUSION

For the above-discussed reasons, petitioners respectfully request reconsideration and revision of the issues here raised. Without the modifications we urge, the majority of American consumers will miss much of the promise and marvels of the DTV technology that untold numbers have toiled so hard for so many years to develop and translate into reality.

out of band EPG, rather than by passing PSIP. This rule fails even to implement the decision taken in the *Report and Order*. See R&O ¶ 61.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

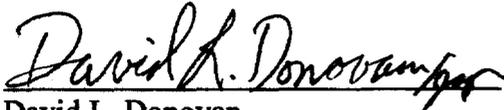


Henry L. Baumann
Jack N. Goodman
Valerie Schulte
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 429-5458

Lynn Claudy
Arthur Allison
NAB Science & Technology

Joan Sutton
NAB Legal Assistant

**ASSOCIATION OF LOCAL
TELEVISION STATIONS, INC.**



David L. Donovan
Vice President, Legal and Legislative Affairs
1320 19th Street, N.W., Suite 300
Washington, D.C. 20036
Telephone: (202) 887-1970

**ASSOCIATION FOR MAXIMUM
SERVICE TELEVISION, INC.**



Victor Tawil
Senior Vice President
1776 Massachusetts Avenue, N.W.
Suite 310
Washington, D.C. 20036
Telephone: (202) 861-0344



Jonathan D. Blake
Jennifer A. Johnson
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291
Its Attorneys

April 25, 2001