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

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	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 Retransmission of Broadcast Signals	)	CS Docket No. 00-2

OPPOSITION OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
TO PETITIONS FOR RECONSIDERATION

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OPPOSITION OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
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The National Cable & Telecommunications Association ("NCTA") hereby opposes the petitions for reconsideration submitted by the National Association of Broadcasters/Association of Local Television Stations, Inc./Association for Maximum Service Television, Inc. ("Broadcasters"), The Walt Disney Company ("Disney"), Paxson Communications Corporation ("Paxson"), Gemstar-TV Guide International, Inc. ("Gemstar"), Telemundo Communications Group, Inc. ("Telemundo"), and the Association of America's Public Television Stations/Public Broadcasting Service/Corporation for Public Broadcasting ("Public Broadcasters") in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The petitions for reconsideration focus, for the most part, on two important – and correct – determinations made by the Commission in the *First Report and Order*. First, the Commission refused to impose a dual carriage obligation on cable operators during the transition from analog to digital broadcasting. It found that the statute did not compel – and tentatively concluded that the First Amendment would not permit – such a requirement.

Second, the Commission determined that although a broadcast station that is transmitting *only* a digital signal is entitled to mandatory carriage, a cable operator's obligation is limited to carriage of the "primary video" – which means only a single video programming stream and any additional "program-related" material.

Several petitioners argue that the statute cannot be read in any way other than to require carriage of both the analog and digital signal of every broadcaster throughout the transition. They zero in on Section 614(a), which, in their view, generally requires every cable operator to carry every signal – analog and digital – of every local broadcast station. But Section 614(a) is not so sweeping in scope. It simply requires cable operators to carry the signals of local stations "as provided by this section."

It is Section 614(b) that identifies those signals that are entitled to mandatory carriage and those that are not. And, Section 614(b)(4)(B) specifically limits carriage obligations to those broadcast signals "which have been changed" to conform to a new broadcast standard. As NCTA and others argued in their rulemaking comments, this language can and should be read to mean that a broadcaster's digital signal is entitled to carriage when it no longer transmits its analog signal. Digital carriage is required, in other words, not when the broadcaster is in the midst of changing its signal from analog to digital but only after the signal "has been changed."

Even if the language of the statute were ambiguous and susceptible to either interpretation, the Commission would be compelled to avoid an interpretation that raised serious Constitutional problems – which is precisely what the Commission has done. The Commission tentatively concluded that "a dual carriage requirement appears to burden cable operators' First Amendment interests substantially more than is necessary to further the government's substantial interests" in enacting the statutory must-carry obligations. That conclusion is well-founded. And so long as the constitutionality of a dual must carry requirement is questionable, the Commission has no choice but to adopt a reasonable construction of the Act that imposes no such requirement.

Several petitioners also argue that the Commission was wrong to conclude that even when a digital signal becomes eligible for mandatory carriage, cable operators are only required to carry a single video programming stream and material that is related to that specific programming. In their view, "primary video" means *all* video that is included in a broadcaster's digital signal – a construction that renders the word "primary" meaningless and superfluous. Some petitioners suggest that, since all video contained in *analog* broadcast signals has been available free to over-the-air viewers, the primary video of a digital signal should be deemed to include only video programming that is available free of charge – including *multiple* streams of unrelated programming. In other words, while the Commission interpreted "primary" to mean "one," these petitioners contend that "primary" means "free." A dictionary is hardly necessary to determine which interpretation is closer to the plain meaning of the word.

But again, even if the Commission's interpretation were not far closer than the petitioners' to the plain meaning and the statutory purpose of the Act, it would still be a reasonable interpretation. Moreover, just as requiring dual carriage of analog and digital signals during the transition would raise serious First Amendment problems, requiring carriage of multiple video

streams of a digital broadcaster would be constitutionally dubious at best. If there was a reasonable alternative interpretation that avoided such problems, the Commission was compelled to adopt it. There was, and the Commission did.

The Broadcasters seek reconsideration of the Commission's decision to allow broadcasters and cable operators to negotiate for partial carriage of digital signals that are carried pursuant to retransmission consent rather than must-carry. Permitting partial carriage in such circumstances will encourage and facilitate agreements for carriage of broadcasters' digital programming streams during the transition. And it is wholly consistent with the existing rules, which only prohibit partial carriage of retransmission consent signals that – unlike digital signals during the transition – could have qualified for must-carry status.

The Commission's ruling that cable operators may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any other broadcast or non-broadcast digital programmer, and that a broadcast signal delivered in HDTV must be carried in HDTV, reasonably and effectively implements the statutory prohibition on material degradation. No purpose would be served, statutory or otherwise, in requiring cable operators to "pass all the content bits" in the broadcasters' signals, as the Broadcasters urge.

Finally, the channel positioning requirements of the Act should require only that set-top boxes or digital sets of cable customers display the channel number selected by the broadcaster in accordance with Section 614(b)(6), whether this is achieved using PSIP material in the digital signal or by some other means. There is no need to require display of two-part digital channel numbers used by broadcasters who transmit multiple streams of programming, because cable operators are only required to carry the primary video – *i.e.*, a single video programming stream – of multicast broadcast transmissions. If a cable operator and a broadcaster agree, pursuant to

retransmission consent, on carriage of multiple programming streams, the manner in which the channel numbers for such multiple streams are displayed should be a matter of negotiation.

I. THE COMMISSION CORRECTLY REFUSED TO REQUIRE DUAL CARRIAGE DURING THE TRANSITION.

The Broadcasters contend not only that the Commission should have interpreted the statute to require dual carriage of each broadcaster's analog *and* digital signal during the transition but also that "there is no other permissible interpretation of the plain statutory language."[1] The notion that the statute explicitly requires dual carriage and cannot possibly be construed otherwise is critical to their argument, in light of the Commission's tentative conclusion that compelling such carriage would be unconstitutional. Under the long-established doctrine of "constitutional doubt" established by the Supreme Court, "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[2]

As NCTA and others showed in their comments in this proceeding, the statute does *not* explicitly and unambiguously require dual carriage. To the contrary, the language of the statute indicates that the Commission's rules should *not* require carriage of a broadcaster's digital signal while that broadcaster is still transmitting an analog signal.

Citing Section 614(a), the Broadcasters maintain that "the explicit terms and plain language of the must carry statute direct that 'each cable operator shall carry, on the cable system

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[1] Broadcasters' Petition at 6.

[2] *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (*citing United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909)). *See also Rust v. Sullivan*, 500 U.S. 173, 191 (1991); *Edward J. DeBartolo Corp. v. Florida Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Almendarez-Torres v. U.S.*, 118 S. Ct. 1219, 1228 (1998).

of that operator, the *signals* of local commercial television stations.'"[3] First of all, to the extent that their emphasis on the plural word "signals" is meant to suggest an explicit, unambiguous directive to carry both the analog and digital signals – rather than only the analog signals – of all broadcasters, they miss the mark. The plural would be used in *either* case, because the statute refers to the signals of multiple *broadcasters*.

Second, the Broadcasters omit a key phrase in Section 614(a). What Section 614 says is that cable operators must carry "the signals of local commercial television stations and qualified low power stations *as provided by this section*."[4] That general carriage obligation is defined and limited by Section 614(b), which is entitled "SIGNALS REQUIRED" and establishes *which* signals must be carried. Section 614(b)(4)(B) – entitled ADVANCED TELEVISION – specifically addresses the possibility that the NTSC broadcast signal standards might be changed and establishes carriage obligations in such circumstances. That provision directs the Commission 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."[5]

This specific provision – not the general provisions of Section 614(a) and Section 614(b)(1) – is the Commission's guidepost in establishing digital must-carry obligations. It unambiguously limits such obligations to signals "which have been changed" to the new digital standard. All that can be at issue is the meaning of that phrase.

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[3] Broadcasters' Petition at 6 (emphasis in original).

[4] 47 U.S.C. § 534(a).

[5] *Id.*, § 534(b)(4)(B).

Under the Broadcasters' interpretation, all digital signals are entitled to must-carry status as soon as they begin broadcasting, even during the transition when the broadcaster's existing analog signal is still being transmitted exactly as before. In other words, the Broadcasters interpret signals "which have been changed" to the new digital standard to mean signals "which are being broadcast" in the new digital standard. NCTA and a number of other commenting parties in the Commission's rulemaking proceeding interpreted the language differently. In our view, an analog signal that continues to be transmitted in the same format has not, in any sense, been changed merely because a new, second signal is being transmitted by the same broadcaster in digital format. And the new digital signal cannot be said to have been changed *from* the analog signal while that analog signal is still being transmitted.

Indeed, NCTA argued that its interpretation was the *only* one that squared with the language of the statute and that the Commission would be obligated to adopt that interpretation even if dual carriage raised no constitutional problems. But, as we also showed, a dual carriage requirement *would* raise serious constitutional problems under both the First and the Fifth Amendments – so that, even if the Commission found the statutory language to be ambiguous, it would be required to construe it to avoid such a requirement.

The Commission did not agree with the Broadcasters' view that the statutory language compelled it to require dual carriage, and it appears also to have rejected NCTA's contention that the language unambiguously prohibits dual carriage. But it tentatively agreed with NCTA that a dual carriage requirement would be unconstitutional. In these circumstances, having found the statutory language to be less than conclusive on this matter, the Commission did precisely what it was obligated to do. In order to avoid serious constitutional problems, it interpreted the statute not to require dual carriage during the transition.

The Broadcasters and other petitioners do not, in seeking reconsideration, attempt to rebut the Commission's constitutional concerns. In their view, the statutory language so clearly compels dual carriage that the Commission has no authority to construe the statute any other way, *regardless* of any constitutional implications. But even if they were right that, as a general and invariable rule, "[a]n administrative agency has no authority to consider the constitutionality of its *unambiguous* governing statute,"[6] that rule would not apply in this case. Where, as here, the statute can be read – indeed, can *easily* be read – another way, the Commission has not only the authority but the duty to construe it in a way that avoids serious constitutional problems.

II. THE COMMISSION CORRECTLY REJECTED THE VIEW THAT "PRIMARY VIDEO" MEANS "MULTIPLE VIDEO."

The Commission's determination that "primary video," for purposes of Section 614, means a *single* video programming stream was based on two fundamentally sound principles of statutory construction. First, it decided that the term "primary" must have some meaning and cannot simply be superfluous. Second, it resorted to plain English and the dictionary in order to find the most reasonable meaning of the term, in light of the history and context of the statutory provision.

If the word "primary" is to have any meaning in the term "primary video," it must be the case, as the Commission logically concluded, that "there is some video that is primary and some that is not."[7] In determining that only a single video programming stream in a broadcaster's digital signal *is* the primary video, the Commission also effectively determined that additional video programming streams are *not* the primary video. The petitioners, on the other hand, never

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[6] Broadcasters Petition at 9 (emphasis added) (*citing United States v. Bozarov*, 974 F.2d 1037, 1040 (9th Cir. 1992). *But see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (noting that "[t]his rule is not mandatory").

identify *any* video that is not the primary video. In their view, there may be material in the signal that is not "primary" – but there is no video in the signal that is not "primary video."

Thus, according to the Broadcasters, "[o]f everything in the signal, it is the video and audio that are primary" – as distinguished from "secondary *non-video* material."[8] But if *all* the video is primary, then the term "primary video" is redundant, and the word "primary" is completely superfluous.

Some petitioners suggest that if "primary" must mean something, it should be construed to mean "free." Thus, the Broadcasters argue that "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."[9] But it is hard to imagine why, if Congress intended to require carriage of all "free" video programming, it would not have simply said precisely that – instead of using a term that in no other context means "free."

The Commission's approach is the most reasonable. It gives meaning to the word "primary," and the meaning it gives – *one* main video programming stream – is consistent with the common usage and meaning of the term. One video programming stream is designated (by the broadcaster) as the primary video, which must be carried by local cable systems. Other video is *not* primary and need not generally be carried.

In fact, the broadcasters themselves appear to have endorsed this approach when they joined NCTA in proposing new FCC must carry rules in 1986, after the former rules were held unconstitutional in *Quincy Cable T.V., Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985). The joint

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[7] *First Report and Order*, ¶ 54.

[8] Broadcasters Petition at 13.

[9] *Id.* at 14 n.46.

proposal, like the subsequently enacted provisions of Section 614(b), required that qualified stations be carried "in their entirety," and explained that

> the phrase "in their entirety" refers to the station's *primary video* and accompanying audio transmissions. Retransmission of material in the vertical blanking interval or other enhancements of the *primary audio and video signal* (including *multi-channel sound*, teletext, and material carried on subcarriers) will be left to the discretion of the cable operator.[10]

This provision and explanation mirror an initial proposal by the broadcast organizations, which provided that "systems are not required to carry signals contained in the vertical blanking interval (VBI), e.g., teletext, or other *primary signal* enhancements, e.g. *multi-channel sound*."[11]

Clearly, the broadcasters did not view "primary" as encompassing everything that is "free" – because multi-channel sound, which is available free of charge, was specifically defined as *not* part of the "primary" signal. And, equally clearly, the broadcasters did not view *multi-channel* services as part of the *primary* signal. If multi-channel sound was not meant to be included in the "primary audio," it follows that "primary video" was not meant to include multi-channel video. Back then, the broadcasters obviously understood that, consistent with common usage, there could only be one primary audio and one primary video.[12]

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[10] Submission of Joint Industry Agreement of the National Cable Television Association, the Community Antenna Television Association, the National Association of Broadcasters ("NAB"), the Television Operators Caucus ("TOC"), and the Association of Independent Television Stations, Inc. ("INTV"), MM Docket No. 85-349, Mar. 21, 1986 at 10 (emphasis added).

[11] Letter from Edward O. Fritts (NAB), Margita E. White (TOC) and Preston Padden (INTV) to James P. Mooney (NCTA), Feb. 26, 1986, Exhibit A to Submission of Joint Industry Agreement, *supra* (emphasis added).

[12] The Broadcasters also argue that Congress could not have meant, in requiring carriage of only the "primary video," to rule out carriage of multiple video programming streams because "[a]t 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." Broadcasters Petition at 15. But that simply is not the case. The concept of providing multiple streams of over-the-air service was under discussion for years – before passage of the 1992 Act, and long before the SDTV format was adopted in 1995. *See, e.g.*, *Second Report and Order/Further Notice of Proposed Rule Making*, 7 FCC Rcd 3340, 3362 (adopted April 9, 1992) (explaining that "there are a number of techniques, still in the developmental stage, for the compression of video signals"); *id.* at 3344 (referencing Comments of Blonder Broadcasting Corp. at 2, filed Dec. 4, 1991, which explained

In any event, this interpretation is also consistent with the policies of the must carry provisions of the Act and Congress's clear intention to limit carriage obligations in light of First Amendment concerns.[13] As the Supreme Court has noted, the must carry provisions of the Act were intended to further three governmental 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.[14]

During and after the transition, the must carry rules will continue to require cable operators to carry a single channel of broadcast programming from virtually every local broadcaster – the same single channel that has historically been available to over-the-air viewers. That continued carriage will preserve the benefits of free television that have been available to over-the-air viewers. The switch to digital transmission enables broadcasters to provide *additional* broadcast and non-broadcast services over their free spectrum. But carriage of these additional services is not necessary or useful to preserve the availability of free over-the-air broadcasting.

Moreover, it is obvious that carriage of multiple video programming streams from a single broadcaster's digital signal does absolutely nothing to enhance the availability of programming

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that "the digital HDTV systems being tested by the Advanced Television Test Center are each generally believed to be capable of carrying 4 simultaneous NTSC signals on a single 6 MHz channel"); *Memorandum Opinion and Order/Third Report and Order/Third Notice of Proposed Rulemaking*, 7 FCC Rcd 6924, 6968 (adopted Sept. 17, 1992) (referencing Comments of Fox, Inc. at 13 n.5, filed July 17, 1992, which urged the Commission not to rule out "[t]he use of digital compression techniques that may be developed in the future for ATV . . . . For example, if digital compression should one day permit multiple ATV images on a single 6-MHz channel, without significant quality degradation. . . .").

[13] Report, Committee on Energy and Commerce, House of Representatives, H.R. Rep. No. 92-628, 102d Cong., 2d Sess. 65-66 (1992) ("House Report").

[14] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

from a "multiplicity of sources." Even the Broadcasters acknowledge that carriage of multiple streams *of a single broadcaster* does nothing to promote such diversity.[15]

As for "promoting fair competition in the market for television programming," a majority of the Supreme Court *rejected* the notion that mandatory carriage of even a single analog channel was necessary to promote that interest. It is even more far-fetched to speculate that cable operators who chose not to carry multiple digital programming streams *in addition to* a broadcaster's primary programming stream would be doing so in order to favor their affiliated program networks or to protect their own local advertising revenues in an anticompetitive manner. Forcing cable operators to carry multiple streams of broadcasters' programming when no other program networks have such guaranteed carriage and when cable operators and customers might prefer that the capacity used for such carriage be dedicated to other video and non-video services would distort, not promote, marketplace competition among programmers and other cable service providers.

Since requiring carriage of multiple streams would multiply the burden on cable operators as well as the unfairness to cable program networks without serving any of the purposes of the must-carry provisions of the statute, it was reasonable for the Commission to assume that Congress intended no such result. Indeed, since imposing such additional burdens on the protected speech of cable operators and cable program networks in such circumstances would raise serious First Amendment problems, the Commission would have been compelled to avoid such a construction of the Act even if it found the term "primary video" to be at all ambiguous.

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[15] *See* Broadcasters Petition at 17 (arguing that if cable operators are allowed, pursuant to the one-third cap on channel capacity, to carry multiple streams of a single broadcaster without carrying at least one stream from each broadcaster, this would "defeat the purpose of the must carry statute to preserve a vibrant local broadcast service to the public . . . [by] leading ultimately to a reduction in the diversity of stations carried.").

In a final stretch, Disney argues that the Commission's definition of "primary video" for purposes of Section 614(b)(3)(A) of the Act is somehow inconsistent with Section 614(b)(3)(B), which provides that

> [t]he cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991) or any successor regulations thereto.[16]

But Congress made the purpose of Section 614(b)(3)(B) clear in the legislative history, and that purpose has nothing to do with carriage of multiple video programming streams of a single broadcaster. Thus, according to the House Report accompanying the 1992 Act,

> [s]ubsection (b)(3)(B) prohibits 'cherry picking' of programs from television stations by requiring cable systems to carry the entirety of the program schedule of television stations they carry. . . .[17]

In other words, the point of Section 614(b)(3)(B) is to "prevent[] cable operators from using portions of the signals of different broadcasters to create composite channels in an effort to increase audience for cable programming."[18] It requires cable operators to carry the entire program lineup that is assembled by a broadcaster on a particular channel 24/7. It has nothing to do with carriage of *multiple* channels or program lineups – and it can easily be squared with the Commission's "primary video" ruling. Section 614(b)(3)(B) simply requires that when a cable operator carries any particular video programming stream that is eligible for must carry, it must carry *that stream* in its entirety and may not provide a composite, cherry-picked programming stream.

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[16] 47 U.S.C. § 534(b)(3)(B). *See* Disney Petition at 9-11; Broadcasters Petition at 14.

[17] House Report at 93.

[18] *Id.* at 58

III. THERE IS NO STATUTORY BASIS OR PUBLIC POLICY REASON TO PROHIBIT PARTIAL CARRIAGE OF DIGITAL SIGNALS CARRIED PURSUANT TO RETRANSMISSION CONSENT DURING THE TRANSITION.

The Broadcasters also ask the Commission to reconsider its decision to allow partial carriage of broadcasters' digital programming streams during the transition if those streams are carried pursuant to retransmission consent rather than must carry. According to the Broadcasters, this is a departure from the current rules, which "prohibit partial carriage of the signals of must carry eligible stations." Broadcasters Petition at 16. To the contrary, the Commission's decision is for the most part entirely consistent with the rules and the Commission's previous interpretations of the statute.

Under those rules and interpretations, cable operators and broadcasters may not agree, pursuant to retransmission consent, on partial carriage of signals *that qualify for must-carry status*.[19] In other words, if the broadcaster could have opted for mandatory carriage of the signal, cable operators must carry the entirety of the program schedule of that signal whether the signal is carried pursuant to must-carry or retransmission consent. But if the signal is not eligible for must-carry, the cable operator and the broadcaster may negotiate for partial carriage pursuant to retransmission consent.

During the transition, while virtually all broadcasters are transmitting both analog and digital signals, digital broadcast signals will not be eligible for must-carry – although they may be carried pursuant to retransmission consent, even if the broadcaster has opted for mandatory carriage of its analog signal.[20] Accordingly, nothing in the rules or prior determinations of the

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[19] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6745 (1994).

[20] *See First Report and Order*, ¶ 27.

Commission would prevent retransmission consent agreements for partial carriage of those signals. Moreover, as the Commission recognized, permitting broadcasters and cable operators to negotiate for partial carriage would encourage carriage of more broadcasters' digital programming streams – a result that could facilitate and expedite the transition.

In sum, there is no statutory basis, as the Commission has previously ruled, for applying a partial-carriage prohibition that appears in the must-carry provisions of the Act to signals and programming streams that are carried pursuant to retransmission consent and do not even qualify for must-carry rights. And even if the Commission had discretion to extend the prohibition to such digital signals and programming streams, it would be hard to imagine a reason for imposing such an impediment to retransmission consent agreements during the transition.[21]

IV. THE COMMISSION'S DEFINITION OF "MATERIAL DEGRADATION" IS WHOLLY CONSISTENT WITH THE LEGISLATIVE LANGUAGE AND INTENT.

There is no single format and resolution that is used for broadcast digital transmissions. There are six high-definition formats, all with 16:9 aspect ratio, and 12 standard-definition formats.[22] Different broadcasters are choosing different transmission formats. And some are using different formats at different times on the same channel. Meanwhile, cable (and DBS) systems are using different approaches to transmit digital signals to their customers.

In the face of this experimentation and diversity of formats, the Commission has adopted a thoroughly reasonable approach to adapting the statutory prohibition on "material degradation" of

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[21] For these same reasons, the Commission has no legal or policy basis for ruling that *any* of its determinations regarding "the terms of DTV cable carriage" pursuant to Section 614, much less all such rulings, should, as the Broadcasters urge, "apply both to signals carried pursuant to mandatory carriage and those carried pursuant to negotiated carriage agreements." Broadcasters Petition at 10. Indeed, in NCTA's view, Section 614 applies only to must-carry signals and is applicable to broadcast stations that opt out of must-carry pursuant to Section 325.

[22] *See* ATSC Standard A/53A, www.atsc.org.

broadcast signals by cable operators. The Commission ruled 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 (e.g., non-broadcast cable programming, other broadcast digital program, etc.) carried on the cable system, provided however, that a broadcast signal delivered in HDTV must be carried in HDTV."[23]

This approach effectively protects broadcasters against intentional or unintentional discriminatory treatment by cable operators that would make any broadcaster's digital programming visibly less attractive to cable viewers than any other digital programming on the system. This is the purpose of Section 614(b)(4)(A), which prohibits material degradation of broadcast signals and directs the Commission to "adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal."[24]

The Broadcasters, however, want more. They insist that cable operators be required to "pass all the content bits" in their digital signals, even if that exceeds what is done in providing non-broadcast digital programming – and even if that requires cable operators to use entirely different manners of processing and transmitting broadcast and nonbroadcast digital programming. The notion that cable operators should be required to install equipment and adopt technologies to accommodate the digital formats chosen by each local broadcaster is another example of the Broadcasters' self-centered belief that cable systems exist largely for their benefit,

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[23] *First Report and Order*, ¶ 73.

[24] 47 U.S.C. § 634(b)(4)(A).

without regard to the rights and interests of cable operators, program networks or customers. The law strikes a different balance and requires no such thing.

In any event, in the one instance where picture quality is truly an issue – where a broadcaster chooses to transmit HDTV programming – the Commission's new rules *do* require cable operators to accommodate that choice, even if the cable operators are not transmitting any other digital programming in that format. But where broadcasters choose one of the many available standard-definition formats for transmitting digital programming, there is no reason why cable operators should not be permitted to retransmit that programming in a format compatible with, and not inferior to, the formats that they use to transmit non-broadcast digital programming.

Cable operators, in choosing the formats for transmitting such non-broadcast programming, have no incentive to provide an inferior, low-quality signal to their customers. This would hardly be an effective way to market digital tiers to customers. So long as broadcasters' digital signals receive at least the same treatment as non-broadcast digital programming, broadcasters will have a guaranteed right (which no other programmers have) to compete for viewership on the merits of their programming. That should certainly be sufficient – and, under the terms of Section 614(b)(4)(A), it is.

V. CABLE OPERATORS DO NOT NEED TO DISPLAY TWO-PART CHANNEL NUMBERING IN ORDER TO COMPLY WITH THE CHANNEL POSITIONING REQUIREMENTS OF THE ACT.

The Commission has ruled that, in light of its requirement that cable operators include PSIP information in the must-carry digital signals that they retransmit, there is no need for any further channel positioning requirements. The Broadcasters argue that carriage of PSIP information will not ensure that cable set-top boxes and digital television sets identify and tune digital broadcast stations by the channel number that is transmitted in that PSIP information –

including two-part numbering that may be used by broadcasters that choose to transmit multiple video programming streams on their digital signal. In addition, they argue that broadcasters should have a right to have their digital channels identified and tuned on set-top boxes and digital sets on the same channel number on which their analog channel had historically been carried on the cable system.

The Broadcasters are right that PSIP carriage is not an effective way to implement the must-carry channel positioning rights of the statute. What matters is that the set-top boxes or digital sets of cable customers display the channel number selected by the broadcaster in accordance with Section 614(b)(6). Cable operators generally can do this, but the PSIP material is neither necessary nor relevant to the process.

Nor is it necessary or appropriate to require cable operators to identify and display *two-part* channel numbering for must-carry stations. Since cable systems are only required to carry the primary video – *i.e.*, a single video programming stream – of multicast broadcast transmissions, it is sufficient to require that the broadcaster's principal channel number be displayed for that programming stream. Broadcasters who transmit multiple streams of programming can, of course, negotiate with cable operators for carriage of more than the primary video pursuant to retransmission consent – and they can negotiate channel positioning, identification and display, as well. But there is no reason to require cable operators who have deployed or acquired an inventory of set-top boxes that do not display two-part numbering to replace such existing equipment when there is no requirement to *carry* the multiple streams for which such numbering is designed.

CONCLUSION

For the foregoing reasons, the petitions for reconsideration discussed herein should be denied.

Respectfully submitted,

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May 25, 2001

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, hereby certify that I caused one copy of the foregoing Opposition to Petition for Reconsideration of NCTA to be served by mail on all parties on the attached service list, this 25th day of May, 2001.

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