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## **Executive Summary**

A&E Television Networks (“AETN”) opposes the petitions filed by certain broadcast interests seeking reconsideration of the Report and Order and Further Notice of Proposed Rulemaking’s (“R&O/FNPRM”) finding that the record in this proceeding does not support mandatory dual carriage of analog and digital signals during the digital television (“DTV”) transition in view of the significant First Amendment burdens imposed by such a requirement. The Commission must reject the broadcasters’ effort to modify the Act’s must carry language to support its demand for dual carriage, as well as their insistence, contrary to the well-reasoned decision in the R&O/FNPRM, that every digital broadcast television signal is entitled to carriage.

The broadcasters all but admit that the Act’s must carry provisions as written apply solely to analog broadcasting. Their arguments serve only to underscore that digital must carry generally – and a dual carriage rule specifically – would not advance the statutory interests heavily relied upon by the Supreme Court when it affirmed the constitutionality of analog must carry. The broadcasters’ effort to obtain maximum carriage for their digital signals also concedes the question of whether there is sufficient cable system capacity to support dual carriage without a significant loss of existing cable service. This only reinforces the critical need for thorough First Amendment analysis before imposing any digital must carry requirements, and it makes clear that the broadcasters’ petitions for reconsideration must be denied.

Conversely, AETN agrees with the petitioners seeking partial reconsideration of the Commission’s decision to allow new digital-only broadcasters to demand analog carriage of their primary digital video signals. Such a requirement has no basis in the Act.

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

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

**COMMENTS OF A&E TELEVISION NETWORKS**

A&E Television Networks (including A&E Network, The History Channel, The BIOGRAPHY® Channel and History International™) ("AETN"), hereby comments on the petitions for reconsideration filed in the captioned proceeding. 1/

AETN largely agrees with the Commission's decisions in the *R&O/FNPRM*, and in particular its recognition that serious First Amendment issues must control any consideration of mandatory dual carriage of analog and digital signals during the digital television ("DTV") transition. *R&O/FNPRM*, ¶ 12. AETN therefore opposes the petitions for reconsideration by certain broadcast interests asking the FCC to revisit or reverse its determination that, on the current record, imposing a dual carriage requirement would fail to withstand First Amendment scrutiny. 2/ See *R&O/FNPRM*, ¶¶ 113-16, 123-27. AETN also finds insupportable the broadcasters'

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1/ See *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2481 (rel. May 3, 2001), 66 Fed. Reg. 23929 (May 10, 2001) (providing public notice of petitions for reconsideration of, *inter alia*, *Carriage of Digital Television Broadcast Stations*, CS Docket No. 98-120, Report and Order and Further Notice of Proposed Rulemaking, FCC 01-22 (rel. January 23, 2001) ("*R&O/FNPRM*").

2/ See NAB/MSTV/ALTV Petition for Reconsideration and Clarification at 4-18 ("NAB"); Petition for Reconsideration of Paxson Communications Corporation at 2-14 ("Paxson"); Joint Petition for Reconsideration of the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting at 14-17 ("Public Broadcasting").

effort to modify the Act's must carry language to fit their preconceived end that every station is entitled to maximum carriage, and to reconceptualize the statutory purposes underlying the Act. Conversely, AETN agrees with the petitioners seeking partial reconsideration of the decision to allow new digital-only broadcasters to demand analog carriage of their primary digital video signals. <sup>3/</sup>

**I. THE BROADCAST PETITIONERS MISCONSTRUE BOTH THE LANGUAGE AND THE PURPOSE THE COMMUNICATIONS ACT'S MUST CARRY PROVISIONS**

The broadcast petitioners twist both the language of Sections 614 and 615 of the Act, as well as their underlying purposes to support their request that the FCC reconsider its previous decision in this proceeding. While the broadcasters take the position that "there is no other permissible interpretation of the plain [ ] language" of Sections 614 and 615 other than a digital must carry mandate, <sup>4/</sup> the Commission correctly recognized that "[i]t is precisely the ambiguity of the statute that has driven [the] policy debate" over carriage of digital stations. *R&O/FNPRM*, ¶ 113. <sup>5/</sup> As explained below, the purposes underlying the Act's must carry requirements do not apply to digital must carry. As such, the broadcasters' petitions for reconsideration must be denied.

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<sup>3/</sup> See Petition for Partial Reconsideration by National Cable and Telecommunications Association at 1-6 ("NCTA"); Time Warner Cable's Petition for Reconsideration at 1-3 ("Time Warner"); Petition for Partial Reconsideration by Adelphia Communications Corporation at 1-7 ("Adelphia").

<sup>4/</sup> NAB at 6; Public Broadcasting at 14.

<sup>5/</sup> See also *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd 15092, 15098 (1998) ("*DTV Must Carry NPRM*") ("Congress stated that it did not intend to confer must carry status on advanced television" but rather "the issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act.") (citing Telecommunications Act of 1996, Conference Report, 104th Cong. 2d Sess., Report 104-230 at 161) (internal quotations omitted).

The broadcasters' position appears to be that the Act's plain language compels digital must carry, *but only if the statutory language is changed to support their reading of the law*. For example, NAB calls for a construction of the statute "that acknowledges that the must carry provisions, while applicable to digital, were written for the analog world" and that "certain provisions must be adapted to fit the digital context." NAB at 11-12 (emphasis added). NAB further states, with respect to the carriage of primary video, that "the literal words of [Section 614] cannot apply directly to the digital situation." *Id.* at 12. Rather than finding, as did the *R&O/FNPRM*, that the mismatch between the words of the Act and a DTV carriage mandate calls for further inquiry, NAB simply "adapts" the Act as necessary to confer the maximum possible benefit on digital broadcasting. 6/ In short, the broadcasters unwittingly support the FCC's finding that the statute is ambiguous by seeking to *rewrite* the law rather than finding support for their position *in the law*.

NAB also asks the FCC to revise the Act in arguing that carriage priority must first be afforded to one signal of every local broadcaster. NAB at 17-18. Simply put, this is not in the law. As noted in AETN's initial comments in this proceeding, 7/ one of the problems posed by digital must carry is that it seriously undermines the key government interests recognized by the Supreme Court to support must carry, *i.e.*, assisting weak broadcast stations and promoting widespread dissemination of informa-

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6/ See also *id.* at 16 n.55 (asserting that the statutory provisions "were drafted with analog terminology and thus must be adapted for the digital context to achieve clear statutory intentions"); Petition for Reconsideration of the Walt Disney Company at 13-16 ("Disney") ("Congress may have intended to invest the text of Section 614 with sufficient flexibility to make it adaptable to the digital environment"); Public Broadcasting at 5.

7/ See Comments of A&E Television Networks on *DTV Must Carry NPRM*, 13 FCC Rcd 15092, filed October 13, 1998, at 22-27 ("AETN Initial Comments").

tion from a multiplicity of sources. *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 189 (1997) (“*Turner II*”) (citing *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 662 (1994) (“*Turner I*”)) (internal quotation omitted). If dual DTV carriage is mandated during the transition, some stations will be carried twice (or more times if the broadcasters’ interpretation of “primary video” is adopted), while others will not be carried at all. See NAB Petition at 17 (“If it is literally applied [Section 614(b)(2)] 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.”).

Rather than supporting its argument that the Act requires carriage for one signal of every local broadcaster, NAB only confirms the Commission’s decision to conduct a survey of channel capacity available for digital carriage. *R&O/FNPRM*, ¶ 123. NAB advocates the carriage requirement out of concern that “more vulnerable” stations would not be carried, thus ultimately leading to their demise and “a reduction in the diversity of stations.” NAB at 17. However, such “vulnerable” stations would not face this dilemma unless cable operators lack capacity to carry all stations and/or they have fulfilled their must carry commitments by carrying both the digital and analog signals of preferred “non-vulnerable” stations. <sup>8/</sup> This argument tacitly acknowledges that, unless that statute is rewritten by FCC rule, the weaker TV stations – those must carry was designed to help – will be supplanted by the larger, major-market broadcasters. This

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<sup>8/</sup> 47 U.S.C. § 534(b)(1)-(2) (establishing limits on number of channels cable operators must carry). See AETN Initial Comments at 44.

interpretation of the law is invalid because it reads Section 614(b)(2) out of the Act. 9/  
It also highlights the First Amendment problem of digital must carry. 10/

In addition to misconstruing the language of Sections 614 and 615, the broadcasters misconstrue the purposes of the Act's must carry provisions. We have already shown that the statutory purposes of the must carry requirements in the 1992 Cable Act do not apply to digital broadcasting. AETN Initial Comments at 21-27. As noted, the purposes of the must carry provisions – the ones the Supreme Court cited in narrowly upholding their constitutionality – were (1) preserving free over-the-air local broadcasting, (2) promoting widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition. *Turner II*, 520 U.S. at 189 (quoting *Turner I*, 512 U.S. at 662). Digital must carry advances none of these objectives. 11/

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9/ See 47 U.S.C. § 614(b)(2) (granting cable operators discretion to select, subject to certain exceptions, which stations to carry when the number of local commercial television stations exceeds the maximum number the cable operator is required to carry).

10/ It is curious that NAB suddenly grows concerned about “reductions in diversity” only when it comes at the expense of broadcast stations, but has no worries about such losses in the form of cable networks being dropped if cable operators are forced to carry duplicative digital and analog versions of each broadcasters’ signals. See AETN Initial Comments at 24-25. The broadcasters’ position illustrates the burden that necessarily would befall cable programmers under a digital must carry requirement. The Congressional Budget Office (“CBO”) report cited by NAB notes that digital must carry might be necessary to meet the transition deadline, but only because the “cable systems might find some nonbroadcast programming more valuable than some broadcast DTV programming,” and must carry comes “at the cost of precluding other, potentially more valuable programming.” *Completing the Transition to Digital Television*, Congressional Budget Office, at xi (Sept. 1999), *cited in* NAB at 2.

11/ AETN Initial Comments at 21-27 (noting, *inter alia*, that (i) digital must carry would lead to *diminishment* of divergent information sources as digital broadcast signals duplicating analog broadcasting supplant cable programming, (ii) digital must carry gives an unfair competitive advantage to broadcasters at the expense of cable programmers, and (iii) rather than helping less affluent viewers afford broadcast television, digital must carry will benefit only the richest viewers who can afford the expensive equipment necessary to receive digital signals).

Even NAB agrees that the Commission has deviated from must carry's original statutory justifications. See NAB Petition at 4. As NAB notes:

The Commission's departure from its statutory directives emerges in the first few paragraphs . . . where it identifies [the statutory purposes of Section 614 and 615 as]: (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 television; and (6) maintaining the strength and competitiveness of broadcast television. 12/

However, rather than asking the Commission to stick to the statutory purposes identified in *Turner I* and *Turner II* (which are the only possible constitutional bases for digital must carry, but are in fact not present for DTV), NAB advocates its own shift in statutory purpose. Specifically, NAB points to the 2006 deadline for the digital transition, noting the extent to which a "strong digital must carry requirement" might speed the transition. See *id.* at 2 (citing CBO Report, Chapter I); see also Public Broadcasting at 3 (citing same). However, the CBO Report on which the NAB heavily relies is a budget analysis that has nothing whatsoever to do with the statutory purposes of the Act's must carry provisions. 13/

NAB's references to the CBO Report and the need for must carry, moreover, are greatly distorted. CBO identified not just digital must carry, but a variety of factors that will determine the viability of DTV and the speed of the transition. These include the availability of tower space for the second antenna needed for new digital

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12/ *Id.* (quoting *R&O/FNPRM*, ¶ 4) (internal quotations omitted).

broadcasts; consumer adoption of DTV equipment, particularly among households that do not pay for television programming; and potential incentives for broadcasters to move from an analog to a digital format. The broadcasters' silence on these other factors – including, notably, the merit of the spectrum fees (such as \$200 million per year) that CBO found “would create an incentive, now absent, for broadcasters to work for the transition’s timely end,” 14/ – is telling. Rather than reinforcing a statutory basis for digital must carry, the CBO Report, and by extension NAB, merely demonstrate that the constitutionally-approved incentives that might support must carry requirements are simply not present in the context of DTV. Consequently, the Commission must reject the broadcast petitioners’ statutory and constitutional arguments.

## **II. THE BROADCASTERS’ PETITIONS DEMONSTRATE THE NEED FOR THOROUGH FIRST AMENDMENT ANALYSIS**

Contrary to their stated intentions, the broadcasters’ petitions demonstrate the need for a thorough First Amendment analysis in this proceeding. Any assertion that the Commission exceeded its authority by even raising constitutional questions, Paxson at 8-10, or that the agency may abdicate its duty to assess the constitutionality of its implementation of the Act, Public Broadcasting at 3 n.7, is clearly without merit. As the D.C. Circuit recently made clear, when imposing regulations that encroach on cable industry speech, “the FCC must show a record that validates the *regulations*, not just the abstract statutory authority.” *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (emphasis in original) (citing *Turner I*, 512 U.S. at 664).

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13/ Clearly then, Paxson’s suggestion that “[t]he same important governmental interests the Supreme Court identified as justifying the burden on cable operators have not changed,” is wholly unfounded. Paxson at 7.

This means that each time the FCC implements a provision of the Act that affects speech activities, it must ensure that its actions comport with the First Amendment – even if the provision being implemented and/or previous FCC efforts to implement it have survived constitutional scrutiny. 15/

The broadcasters' petitions for reconsideration underscore the need for thorough First Amendment analysis by the Commission in several respects. First, the broadcasters' arguments regarding the need to protect vulnerable stations in a world of limited cable system capacity, *see supra* at \_\_, illustrate the burden *any* kind of digital must carry requirement will impose on cable operators and programmers. 16/ In addition, as both AETN's Initial Comments and NAB's petition make clear, the Commission must find some important interest that is already embodied in the statute in order to support digital must carry. And even if it meets this threshold requirement, the FCC must then show how any regulation it adopts advance those interests without burdening more speech than is necessary. *See Time Warner v. FCC*, 240 F.3d at 1130 (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968); *Turner II*, 520 U.S. at 189).

The broadcasters' arguments about the meaning of the term "primary video" also demonstrate the need for the FCC to conduct further inquiry on constitutional issues. The broadcasters argue that Congress never contemplated the

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14/ CBO Report at xii.

15/ For example, in the *Time Warner* case cited above, the court vacated as unconstitutional the FCC's rules implementing the horizontal and vertical ownership limits in Section 613 of the Act, even though the court had previously denied a facial constitutional challenge to Section 613. *See Time Warner v. FCC*, 240 F.3d at 1130 (discussing *Time Warner Entertainment Co. v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000)).

16/ *See Turner I*, 512 U.S. at 637 (must carry rules "render it more difficult for cable programmers to compete for carriage on the limited channels remaining").

existence of multiple broadcast signals; yet they also assert that cable operators should be required to carry multiple DTV channels.<sup>17/</sup> However, if Congress never considered DTV multicasting, it obviously never assessed the constitutional burden on cable operators and programmers like AETN, nor did it approve the benefits of requiring carriage of duplicative broadcast programming. Thus, it may be doubtful that the FCC can make up for this legislative vacuum, especially given the significant extent to which the Supreme Court relied on congressional findings in upholding analog must carry, where other courts had struck it down in the past. *Compare Turner II* 520 U.S. at 190-193, 195-211. 219-222; *with Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (both striking down must carry rules in the absence of congressional findings).

At a minimum, further constitutional review by the FCC is required. The Commission has recognized as much, and we need not belabor the point here. See *R&O/FNPRM*, ¶¶ 113-16, 123-27; see also *DTV Must Carry NPRM*, 13 FCC Rcd at 15102, ¶ 16 (“we find it essential to build a record relating to the interests to be served by any digital broadcast signal carriage rules, the factual predicate on which they would be based, the harms to be prevented, and the burdens they would impose”).<sup>18/</sup> AETN will expand upon this constitutional discussion in response to the Commission’s solicitation of further comment in the *R&O/FNPRM*.

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<sup>17/</sup> NAB at 14-15; Paxson at 9-14; Disney at 13-16.

<sup>18/</sup> This Opposition is not intended to suggest that the channel survey the FCC conducts in conjunction with the FNPRM will resolve the constitutional issues posed by digital must carry or a dual carriage requirement. In fact, it is likely the survey results will only reinforce the significant burden a DTV dual carriage requirement would place on cable operators. AETN submits here only that conducting the survey *is the minimum* the FCC must do in conducting its constitutional analysis.

### III. THE COMMISSION SHOULD RECONSIDER THE REQUIREMENT THAT NEW DTV-ONLY STATIONS BE GRANTED ANALOG CARRIAGE OF THEIR PRIMARY DIGITAL SIGNAL

AETN supports the petitions for reconsideration seeking that the FCC reverse its decision to allow new DTV-only stations to presently demand that one of its digital signals be carried on cable systems for delivery to subscribers in an analog format. 19/ NCTA, Time Warner and Adelphia correctly point out that there is no statutory basis for requiring carriage of digital-only stations in analog format. 20/ Indeed, Section 614(b)(4)(B) clearly contemplates carriage of only “television stations which have been changed” from analog to digital. 47 U.S.C. § 534(b)(4)(B). New DTV-only stations, however, which were obviously not “changed” from anything, do not satisfy this statutory language. Moreover, the Commission has exceeded the bounds of the First Amendment by requiring cable operators – in furtherance of no discernible government interest – to dedicate channel capacity otherwise used by subscriber-valued cable programming, such as AETN’s slate of offerings, to carry new DTV-only stations that have been elevated to preferred status. 21/ The Commission should remove the requirement that television stations currently broadcasting in DTV-only format be carried in an analog format.

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19/ See NCTA at 1-6; Time Warner at 1-3; Adelphia at 1-7 (each seeking reconsideration of *R&O/FNPRM*, ¶ 74); see also Opposition of A&E Television Networks, BET, Inc., Courtroom Television Network, LLC, and Ovation, Inc., on *Petition for Declaratory Ruling that Digital Television Stations Have Must Carry Rights*, CSR 5562-Z, DA 00-1406 (CSB rel. July 3, 200), filed August 4, 2000.

20/ NCTA at 3-4; Time Warner Cable at 1-2; Adelphia at 1-3.

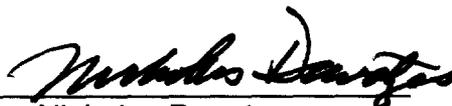
21/ See NCTA at 4; Time Warner Cable at 2; Adelphia at 3-7.

**CONCLUSION**

For the foregoing reasons, AETN respectfully requests that the Commission deny the petitions seeking reconsideration of its decision not to mandate dual carriage for the DTV conversion, and its limiting construction of "primary video signal" for purposes of DTV stations entitled to must carry rights.

Respectfully submitted,

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May 25, 2001

CERTIFICATE OF SERVICE

I, Margaret Reilly-Brooks, hereby certify that on this 25th day of May, 2001, copies of the foregoing Opposition to the Petition for Reconsideration, were served by first-class mail on the following:

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