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May 25, 2001

BY HAND

Magalie Roman Salas, Esquire
Secretary
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Washington, D.C. 20554

Re: **CS Docket 98-120 /**
Consolidated Opposition of Guenter Marksteiner
to Petitions for Reconsideration

Dear Ms. Salas:

On behalf of Guenter Marksteiner, please find an original and 4 copies of his Consolidated Opposition to Petitions for Reconsideration in the above-captioned proceeding.

If there are any questions regarding this matter, please contact me.

Very truly yours,



Paul J. Feldman
Counsel for Guenter Marksteiner

PJF:jpg

Enclosure

cc (w/encl.): Certificate of Service List
Mr. Guenter Marksteiner

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Before the
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Carriage of Digital Television) CS Docket 98-120
Broadcast Stations)

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

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May 25, 2001

TABLE OF CONTENTS

	Page
Summary	iii
I. Introduction	1
II. The Operators’ Statutory Arguments Provide No Basis for Reconsideration	4
III. The Operators’ Constitutional Arguments are Baseless	9
A. The Record is Sufficient to Justify Analog Carriage	10
B. Carriage of DTV-Only Stations in Converted Analog Format Will Further Important Governmental Interests	11
C. Carriage of DTV-Only Stations in Analog Format Will Not Unnecessarily Burden Cable Operators	12
D. Carriage of DTV-Only Stations in Analog Format Does Not Constitute an Improper “Preference”	13
E. Carriage of DTV-Only Stations in Analog Format Promotes Rational Policy Goals	15
IV. Conclusion	17

SUMMARY

Guenter Marksteiner, permittee of Station WHDT-DT (“WHDT”), Channel 59, Stuart, Florida, opposes the Petitions for Partial Reconsideration filed by Adelphia Communications Corporation (“Adelphia”) and the National Cable Television Association (“NCTA”) on April 25, 2001, and the Petition for Reconsideration filed by Time Warner Cable (“Time Warner”) in this proceeding. Neither the statutory nor the constitutional arguments in the Petition provide a basis for reconsideration of the analog carriage requirements set forth in the *DTV Must-Carry Order*. The Petitions do little more than repeat arguments already rejected by the Commission, and the reconsideration sought in the Petitions would be inconsistent with the requirements of the Communications Act and good public policy.

One core flaw in the arguments made by the cable operators is the assertion that carriage of DTV-only stations in analog format constitutes improper “preferential treatment” for such stations. The right to analog carriage for DTV stations constitutes no such preference *vis a vis* either analog stand-alone stations, or stations that transmit in both analog and digital formats. Indeed, it is not “preferential treatment” of DTV-only stations that truly concerns the cable operators; rather, it is the alleged burden of having to carry any new broadcast station. Recognizing that there is no colorable argument to deny carriage to a new analog station, the operators have settled for attacking carriage rights for new DTV-only stations. Such an approach is not only flawed, it is a substantial over-reaction, as there are now and will be very few stations nation-wide that are licensed as DTV-only, especially during the first few years of the transition during which DTV-only stations may demand carriage in analog format.

The operators' statutory arguments provide no basis for reconsideration. The Petitions ignore the core principles in Section 614, but rather use the word "signal" in Section 614(b)(4)(B) to assert that an analog signal of a DTV station is not a "signal". Yet, the operators provide no basis for their theory that the "signal" of a station cannot be in both analog and digital format, or converted back and forth between analog and digital. Indeed their argument ignores the reality of how many must-carry broadcast signals are delivered to cable operators, and the Commission precedent surrounding such delivery. That is, the signals of many traditional analog must-carry stations are delivered to cable headends by conversion to digital format, transmission by microwave or fiber optics, and then reconversion to analog format at the headend.

Furthermore, the operators provide no evidence that Congress intended the text of Section 614(b)(4)(B) to be interpreted as a limitation on the must-carry rights of DTV stations. Rather, a fair reading of Section 614 in its entirety would be that local commercial television stations are broadly defined and have broad carriage rights under Section 614, and that Section 614(b)(4)(B) was not designed to undercut those carriage rights for DTV stations, but to additionally and broadly ensure that once DTV stations are authorized by the Commission, that such stations enjoy the carriage rights set forth elsewhere in Section 614.

The Operators' constitutional arguments are also flawed. There is no basis for the assertion that grant of analog carriage rights to DTV-only stations burdens more speech than is necessary to protect important governmental interests. Because the analog version of the a DTV station will be equivalent in bandwidth and function to that of a traditional analog TV station, the "burden" of such carriage will be no different than

the “burden” on a cable system resulting from carriage of a traditional analog station, and that burden has already been upheld in the *Turner* case.

Adelphia asserts that the record in this proceeding does not justify the analog carriage requirement, and notes in comparison that the *Turner* decision was based on a record of “tens of thousands of pages”. However, while there may not be a “ten thousand page” record, over 140 sets of comments and reply comments were filed in this proceeding. Furthermore, the Commission can take note of the evidence in the companion *Stuart* proceeding regarding the nature of analog carriage of a DTV signal, as well as the need for analog carriage of DTV-only stations. In addition, it should be noted that the Commission can certainly rely on its extensive knowledge, based on over 30 years of regulating cable carriage, that the analog carriage requirement in the *DTV Must-Carry Order* is identical to that upheld by the *Turner* Court. The justification for the carriage requirement includes the very same justifications used by the *Turner* court.

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

In the Matter of)
)
Carriage of Digital Television) CS Docket 98-120
Broadcast Stations)

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

Guenter Marksteiner, permittee of Station WHDT-DT (“WHDT”), Channel 59, Stuart, Florida, by his attorneys, hereby opposes the Petitions for Partial Reconsideration filed by Adelphia Communications Corporation (“Adelphia”) and the National Cable Television Association (“NCTA”) on April 25, 2001, and the Petition for Reconsideration filed by Time Warner Cable (“Time Warner”) that same date, in the above-captioned proceeding (hereinafter, “Petitions”). As shown below, the Petitions do little more than repeat arguments already rejected by the Commission, and the reconsideration sought in the Petitions would be inconsistent with the requirements of the Communications Act and good public policy.

I. Introduction

After reviewing numerous extensive comments, and years of consideration, the Commission issued its First Report and Order In the Matter of Carriage of Digital Television Broadcast Signals (FCC 01-22, released January 23, 2001) (“*DTV Must-Carry Order*” or “*Order*”). This *Order* took a conservative approach to the application of

Section 614 of the Communications Act to DTV stations. The Commission held that all stations that meet the broad definition of “local commercial television station”, regardless of whether they broadcast in digital or analog format, are entitled to mandatory carriage consistent with the requirements of Section 614 of the Act and the Commission’s must-carry rules. The Commission easily could have ruled that stations are entitled to carriage of both a station’s analog and digital signals during the DTV transition, but in light of possible First Amendment concerns, sought additional information prior to making that decision. However, the Commission did not hesitate in holding that carriage of a single signal, even if that signal is transmitted by a DTV-only station, is consistent with the requirements of Section 614 of the Act,¹ and no more burdensome on a cable TV operator than carriage of a traditional analog station.²

The *Order* properly recognized that carriage of signals originated by DTV-only stations triggers other issues in Section 614 of the Act and in the must-carry rules, including the requirement that signals are to be carried without material degradation. In this context, the Commission ruled that DTV-only stations may demand carriage of their signal in a converted analog format, and that such carriage would not constitute material degradation. *Order* at para. 74. The Commission noted that such a policy would also support the transition to DTV and facilitate the return of analog spectrum.

¹ *DTV Must-Carry Order* at paras. 14-15.

² *Id.* at para. 12.

In what the *Order* calls a companion proceeding,³ the Commission also addressed the issue of whether DTV-only stations have a right to carriage in converted analog format: In the Matter of WHDT-DT, Channel 59, Stuart, Florida (CSR-5562-Z, FCC 01-23, released January 23, 2001)(“*Stuart Order*”). Therein, the Commission properly held that Station WHDT (a DTV-only station) is entitled to exercise mandatory carriage rights under Section 614 of the Communications Act. *Id.* at para. 12. In addition, the Commission concluded that to facilitate the availability of service to consumers during the transition from analog to DTV, and consistent with the requirements of Section 614(b)(4)(B) of the Communications Act, Station WHDT may elect between carriage in analog or digital format on cable systems. *Id.* at paras. 12 and 14.⁴ Lastly, the Commission ordered that cable carriage of Station WHDT in analog format must be done in a manner consistent with the analog carriage requirements in the Commission’s rules, while carriage of WHDT in digital format must be done in a manner consistent with the requirements set forth in the *DTV Must-Carry Order*.

Clearly, the *DTV Must-Carry Order* and the *Stuart Order* were complementary documents, issued on the same day, and referencing each other. While the *DTV Must-Carry Order* addressed the issue of carriage of DTV-only stations in analog format in the context of material degradation, the *Stuart Order* addressed the issue more broadly.

³ See, *DTV Must-Carry Order* at note 41.

⁴ The Commission also noted in paras. 12 and 14 that such an approach is consistent with the policies set forth in the Memorandum Opinion and Order in Docket 99-168, (FCC 00-224, released June 30, 2000) (hereinafter “*700 MHz Order*”).

Nevertheless, the *Stuart Order* referenced the *DTV Must-Carry Order* for other details of carriage of Station WHDT. *Id.* at para. 15.

As shown below, the Petitions for Reconsideration of the *DTV Must-Carry Order* largely repeat arguments made in Comments in the *Stuart* proceeding and rejected by the Commission in the *Stuart Order*. One core flaw in the arguments made by the cable operators is the assertion that carriage of DTV-only stations in analog format constitutes improper “preferential treatment” for such stations.⁵ As shown below, the right to analog carriage for DTV stations constitutes no such preference *vis a vis* either analog stand-alone stations, or stations that transmit in both analog and digital formats. Indeed, it is not “preferential treatment” of DTV-only stations that truly concerns the cable operators; rather, it is the alleged burden of having to carry any new broadcast station. Recognizing that there is no colorable argument to deny carriage to a new analog station, the operators have settled for attacking carriage rights for new DTV-only stations. Such an approach is not only flawed, it is a substantial over-reaction, as there are now and will be very few stations nation-wide that are licensed as DTV-only, especially during the first few years of the transition during which DTV-only stations may demand carriage in analog format.⁶

II. The Operators’ Statutory Arguments Provide No Basis for Reconsideration.

NCTA, Adelphia and Time Warner (hereinafter the “Operators”) assert that the Commission lacks the statutory authority to require cable operators to carry the signal

⁵ Petition of NCTA at page 2.

⁶ The *DTV Must-Carry Order* stated that the policy would be revisited after 2003. *Id.* at para. 74. The *Stuart Order* stated the same at para. 14.

of a DTV-only station in converted analog format. These arguments ignore the core requirements of Section 614(a) and (b) of the Act. Furthermore, such arguments were rejected in the *Stuart Order*.

As a context for review of this issue, it should be noted that Congress adopted very broad mandatory cable TV carriage requirements designed to ensure that viewers have access to local over-the-air broadcast television stations.⁷ The mandatory carriage provisions did not exclude application to DTV stations. Indeed, the only provision referring to the then-designated “advanced television” signals required the Commission to ensure their carriage. The 1992 Cable Act was premised on the principles of preserving the existence of local broadcasters and promoting competition in the provision of video programming. The Supreme Court upheld the constitutionality of the must-carry provisions of the Act, and the principles underlying them.⁸ In the present case, analog carriage of DTV-only stations is mandated by the must-carry provisions of the Act, and consistent with the principles underlying those provisions and the rationale used by the Supreme Court to uphold them.

Section 614(a) of the Communications Act requires cable TV systems to carry local commercial television stations as set forth in Section 614(b). Section 614(b)(1)(B) of the Communications Act reads:

⁷ Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, 106 Stat. 1460 (1992) (the “1992 Cable Act”).

⁸ *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”); *Turner Broadcasting System v. FCC*, 137 L. Ed. 369 (1997) (“*Turner II*”).

A cable operator of a cable system with more than 12 usable activated channels shall carry the *signals of local commercial television stations*, up to one-third of the aggregate number of usable activated channels of such system. [emphasis added.]

Section 614(h)(1)(A) of the Communications Act reads, in pertinent part:

[T]he term “local commercial television station” means *any full power television broadcast station*, other than a qualified noncommercial educational television station[emphasis added]

No party contests the fact that DTV-only stations such as Station WHDT fully meet the requirements set out in Section 614(a), 614(b), and 614(h)(1)(A) of the Communications Act. Such a station is clearly a “local commercial television station”.

The Petitions ignore the core principle in Section 614 discussed above, but rather focus on one particular word in a different provision: “signal”. Section 614(b)(4)(B) of the Communications Act requires the Commission to enact rules to ensure the carriage of the “signals of local commercial television stations which have been changed [to conform with DTV standards]”. NCTA thus argues (Petition at page 3) that the “signal of a digital-only station is obviously not in analog. And nothing in the statute compels - or provides any statutory authority for the Commission to compel - a cable operator to carry a feed of that digital broadcaster’s programming in a totally different format than that transmitted over the air.”⁹ Yet, the operators provide no basis

⁹ Similarly, the Adelpia Petition argues (at page 2) that the “converted analog format version of a station’s programming is not a broadcast signal at all since the digital signal would have to be converted to analog at the cable operator’s headend.”

for their theory that the “signal” of a station cannot be in both analog and digital format, or converted back and forth between analog and digital. Indeed their argument ignores the reality of how many must-carry broadcast signals are delivered to cable operators, and the Commission precedent surrounding such delivery. That is, the signals of many traditional must-carry stations are delivered to cable headends by conversion to digital format, transmission by microwave or fiber optics, and then reconversion to analog format at the headend. The Commission has long recognized that broadcasters may use such means of delivering a “signal” to cable headends as part of the process of exercising their must-carry rights.¹⁰ Under the operators’ argument, the use of digital format in the intermediate transmission in such cases would mean that there is “no analog signal” with must-carry rights. Yet, that is clearly not the case as a matter of law or fact. Accordingly, the intermediate conversion of a station’s signal back and forth between analog and digital is completely irrelevant to the issue of whether a station has must-carry rights in such cases, and is similarly irrelevant here.

Furthermore, the operators provide no evidence that Congress intended the text of Section 614(b)(4)(B) to be interpreted as a limitation on the must-carry rights of DTV stations. Rather, a fair reading of Section 614 in its entirety would be that local commercial television stations are broadly defined and have broad carriage rights under Section 614, and that Section 614(b)(4)(B) was not designed to undercut those carriage rights for DTV stations, but to additionally and broadly ensure that once DTV stations

¹⁰ See, e.g., *Must-Carry Clarification Order*, 8 FCC Rcd 4142, 4143 (1993); *In re Complaint Against Cablevision Systems Corporation*, 11 FCC Rcd 2362 (CSB, 1995); *In re Complaint of WWAC, Inc.*, 13 FCC Rcd 7219 (CSB, 1998).

are authorized by the Commission, that such stations enjoy the carriage rights set forth elsewhere in Section 614. This was the approach taken by the Commission in the *Stuart Order* (at para. 12), which rejected cable operator arguments based on Section 614(b)(4)(B).

In sum, the Operators' use of Section 614(b)(4)(B) to assert that the Commission lacks the authority to require carriage of DTV-only stations in analog format appears to turn that statutory section on its head. The Commission's authority under Section 614(b)(4)(B) is extremely broad: it explicitly authorizes the Commission to make any change in the must-carry rules necessary to ensure carriage of DTV stations. The limited analog carriage requirements in the *DTV Must-Carry Order* do not exceed that broad authority.

Equally unpersuasive is the argument made by the operators that Section 624(f) of the Communications Act prohibits the Commission from requiring carriage of DTV-only stations in converted analog format. Such arguments were apparently made by the Operators in comments in the proceeding leading to the *DTV Must-Carry Order*, and were rejected in paragraph 16 of that *Order*. While the NCTA Petition apparently adds nothing new to its rejected Section 624 argument, Time Warner at least addresses the Commission's treatment of the issue in the *DTV Must-Carry Order*. Time Warner notes (at page 2) that the Commission's reliance on Section 614(b)(4)(B)'s mere "mention" of digital signals does not give the Commission "unbridled discretion" to enact an analog carriage right for DTV stations. But Time Warner clearly misinterprets both the statute and the Commission's action. Section 614(b)(4)(B) doesn't just casually "mention" carriage of DTV stations: it explicitly requires the Commission to ensure the carriage of

DTV stations. In light of this broad Congressional mandate, the Commission's decision to require carriage of such stations in analog format for a few years is not an act of "unbridled discretion", but rather a limited application of very broad authority. In sum, both the requirement that DTV-only stations are entitled to carriage, and that they may elect to be carried in analog format for a short time,¹¹ are authorized in Section 614 of the Communications Act, and accordingly such authorization eliminates any restriction set forth in Section 624(f).

III. The Operators' Constitutional Arguments are Baseless.

The operators assert that the portion of the *DTV Must-Carry Order* allowing DTV-only stations to elect carriage in converted analog format does not pass constitutional muster because: 1) the existing record is insufficient to support the burden thereby imposed on cable operator speech; 2) carriage of such stations in analog format does not further important governmental interests; and 3) carriage of such stations in analog format burdens more cable operator speech than necessary to protect any governmental interests. These arguments provide no basis for reconsideration, and were rejected in the *Stuart Order* proceeding. Similarly flawed is NCTA's argument that

¹¹ In addition to granting broad authority to the Commission to enact rules for carriage of all local commercial television stations (DTV and analog) under Section 614(a) and 614(b), the provision in the Communications Act which specifically and additionally requires that the Commission ensure carriage of DTV stations (Section 614(b)(4)(B)), is a subsection of Section 614(b)(4), which is entitled "Signal Quality". The portion of the *DTV Must-Carry Order* which required carriage in converted analog format was that regarding material degradation of signals (paras. 70-76). Thus, in addition to having authority to require carriage of DTV-only stations in analog format under the broad authority of Section 614(a) and 614(b) generally, the Commission additionally had authority to do so pursuant to the signal quality provisions of Section 614(b)(4)(B).

carriage of DTV-only stations in analog format constitutes improper “preferential treatment” for such stations.

A. The Record is Sufficient To Justify Analog Carriage.

Adelphia asserts (Petition at page 5) that the record in this proceeding does not justify the analog carriage requirement, and notes in comparison that the *Turner* decision was based on a record of “tens of thousands of pages”. However, while there may not be a “ten thousand page” record, over 140 sets of comments and reply comments were filed in this proceeding. Furthermore, the Commission can take note of the evidence in the companion *Stuart* proceeding regarding the nature of analog carriage of a DTV signal, as well as the need for analog carriage of DTV-only stations. For example, in the Letter Request that led to the *Stuart Order*, under the scenario described therein, the analog version of the WHDT signal to be carried by the cable operator will be equivalent in bandwidth and function to the transmission of a traditional analog TV station. Letter Request at page 3. No cable operator contested this fact in comments in that proceeding. Similarly, because carriage of WHDT in converted analog format is functionally equivalent to the carriage of a traditional analog station, such carriage is no more burdensome than carriage of a traditional analog station, and again, no commenter provided any evidence in that proceeding that such carriage would be more burdensome than carriage of a traditional analog station.

Lastly, it should be noted that the Commission can certainly rely on its extensive knowledge, based on over 30 years of regulating cable carriage, that the analog carriage requirement in the *DTV Must-Carry Order* is identical to that upheld by the

Turner Court. As discussed below, the justification for the carriage requirement includes the very same justifications used by the *Turner* court.

B. Carriage of DTV-Only Stations in Converted Analog Format Will Further Important Governmental Interests.

The operators claim that provision of analog carriage to DTV-only stations for a limited time will not serve important governmental interests. They also claim that the Commission must articulate a different and additional interest for analog carriage of DTV-only stations, as opposed to carriage of analog stations. These assertions are not true, as analog carriage of DTV-only stations will serve the same interests as the carriage of traditional analog stations upheld by the *Turner* court.

In upholding the must-carry provisions of the 1992 Cable Act, the Supreme Court noted that the provisions advanced three interrelated important governmental interests:

(1) preserving the benefits of free, over-the-air local broadcasting television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.¹²

These principles apply as much to DTV-only stations as to analog stations, if not more so. First, cable carriage now is necessary if DTV-only stations are to survive to provide free over-the-air service to viewers who will be purchasing digital receivers over the next few years. Second, DTV-only stations such as WHDT will be providing unique news and informational programming to local viewers. Third, as a new video service (and potential competitor for advertising revenue), there is little incentive for cable operators

¹² *Turner I*, 512 U.S. at 662. See also, *Turner II*, 137 L. Ed. at 388. The Court referenced the findings set forth in Sections 2(a) 8-10 of the 1992 Cable Act. The Court also specifically upheld the reasonableness of the findings in Sections 2(a)2-5, 15, 16 and 19. *Turner II*, 137 L. Ed. at 388-89.

to commence carriage of new DTV-only stations. Indeed, the Supreme Court held that Congress could reasonably conclude that the threat of non-carriage due to competitive threat is even greater for DTV-only stations such as WHDT, which are independent and which broadcast movies. See *Turner II*, 137 L. Ed. at 394-95.¹³

C. Carriage of DTV-Only Stations in Analog Format Will Not Unnecessarily Burden Cable Operators.

NCTA's Petition (at page 4) suggests that grant of analog carriage rights to DTV-only stations would impermissibly burden cable operators. This argument is mystifying since the analog NTSC version of a DTV-only station will be equivalent in bandwidth and function to the transmission of a traditional analog TV station. Nevertheless, NCTA complains that such carriage would force cable operators to not carry or to drop carriage of other broadcast stations, or of non-broadcast cable programming services. There is no evidence that carriage of a few DTV-only stations over the next two years will significantly impact carriage of non-broadcast programming services: it is just as

¹³ Time Warner asserts in page 2 of its Petition that because the *DTV Must-Carry Order* recognizes that analog carriage of DTV-only stations would make stations more willing to return their analog spectrum, that the purpose of analog carriage is to generate auction revenue for the government, which is an insufficient basis for burdening cable operator First Amendment rights. This argument is deeply flawed. First, as noted throughout this and other pleadings in this proceeding, the primary purposes for analog carriage of DTV-only stations are identical to the purposes of must-carry for traditional analog stations, and those purposes have been upheld by the Supreme Court. Second, while the *DTV Must-Carry Order* recognizes that an additional purpose of analog carriage rights would be the return of analog spectrum by stations, that language is nothing more than a way of describing the DTV transition. There are obviously numerous important governmental interests in such a speedy transition, regardless of whether the government obtains revenues from the auction of returned spectrum. Time Warner's crass statement not only ignores the two principles set forth above, but provides no evidence that generating auction revenue is the Commission's purpose for promoting the digital transition, much less for requiring analog carriage of DTV-only stations.

likely that carriage of a DTV-only station will be accomplished not through substitution for an existing programming service, but rather through the use of rapidly increasing channel capacity of cable systems, or by placement on unused channels.¹⁴

Nevertheless, even where a cable system is “channel locked”, this “burden” of carrying a DTV-only station in analog format will be no different than the “burden” on a cable system resulting from carriage of a traditional analog station, and that burden has already been upheld in the *Turner* case. Try as they might, there is no way for the Operators to get around this fact.¹⁵

D. Carriage of DTV-Only Stations in Analog Format Does Not Constitute an Improper “Preference”.

NCTA’s Petition suggests (at page 2) that carriage of DTV-only stations in analog format constitutes some sort of “unjustifiable preferential treatment”. This vague assertion is unsubstantiated, and untrue.

¹⁴ In the *Stuart* proceeding, Marksteiner demonstrated that the Adelphia systems at issue had unused channels in their analog tiers. See Declaration of Guenter Marksteiner, attached to the August 18, 2000 Consolidated Reply of Marksteiner.

¹⁵ In a particularly creative attempt, NCTA suggests that carriage of a DTV-only station in analog format results in “doubling the burden on cable program networks by first forcing carriage of a station that virtually no one can see over the air, and by then forcing preferential analog carriage.” Petition at page 4. This assertion is misleading however, as there is no explanation given or precedent cited as to why carriage of a broadcast station is a burden on a non-broadcast cable service carried on the same cable system, or as to why carriage of a station in analog format is “preferential” when most non-broadcast cable services are also carried on analog tiers. Accordingly, rather than being a “double” burden, NCTA’s scenario constitutes a “non” burden on cable programming service providers. Furthermore, as to the “preferential treatment” argument, see pages 13-15 *infra*.

If by “preference”, NCTA means that broadcast stations (including DTV-only stations) are entitled to must-carry, and non-broadcast programming services are not, then the issue has already been decided by Congress and the Supreme Court --- broadcast stations have a statutory right to carriage, and non-broadcast cable programming services do not. Thus, “preference” for one sort of programming source may be inherent in the nature of must-carry generally, but that result was enacted by the Congress, and has been upheld by the Supreme Court as both constitutional and consistent with good public policy. There is nothing new or different about must-carry of DTV-only stations in this regard.¹⁶

Alternatively, the right to analog carriage for DTV-only stations also does not constitute a “preference” *vis a vis* either analog stand-alone stations, or stations that transmit in both analog and digital formats. In comparing analog format carriage rights of DTV-only stations with carriage rights of analog-only stations, 1) both are entitled to carriage, 2) both are entitled to carriage of one signal, and 3) the analog nature of the signal carried in each situation is identical. In comparing the carriage rights of DTV-only stations with the carriage rights of stations that broadcast in both analog and digital

¹⁶ NCTA may be concerned that DTV-only stations can end up in a cable system's analog tier by electing must-carry in analog format, while some non-broadcast cable services are relegated to the cable system's digital tier. However, there is nothing improper in that case: Section 614(b)(7) of the Act and the FCC's must-carry rules require carriage of all must-carry stations on the system's basic tier, which at this time is typically identical with the system's analog service. While non-broadcast cable programming services do not have a statutory right to carriage on the basic tier, the *Turner* court has upheld this distinction as constitutional.

formats, 1) both are entitled to carriage, 2) both are entitled to carriage of one signal, and 3) both are entitled to elect carriage of their one signal in either analog format or digital format. There is no apparent “preference” of any sort here, and certainly no improper or unjustified one.

In light of the lack of any apparent “preferences”, it is obvious that it is not “preferential treatment” of DTV-only stations that truly concerns the cable operators, but rather, the alleged burden of having to carry any new broadcast station. Recognizing that there is no colorable argument to deny carriage to a new analog station, the operators have settled for attacking carriage rights for new DTV-only stations.¹⁷ Such an approach is not only flawed, it is a substantial over-reaction, as there are now and will be very few stations nation-wide that are licensed as DTV-only, especially during the first few years of the transition during which DTV-only stations may demand carriage in analog format.¹⁸

E. Carriage of DTV-Only Stations in Analog Format Promotes Rational Policy Goals.

NCTA asserts that the Commission has failed to articulate a policy rationale that can justify the right of DTV-only stations to elect carriage in analog format. Petition at pages 4-6. This assertion is baseless.

¹⁷ See, e.g., Reply Comments of NCTA in CSR-5562-Z (*Stuart Order* proceeding) filed March 19, 2001 (explaining NCTA’s prior statement that continued analog carriage of an existing station that gives back its analog permit and broadcasts only in digital format would not be objectionable, while analog carriage of a new DTV-only station would be objectionable).

¹⁸ The *DTV Must-Carry Order* stated that the policy would be revisited after 2003. *Id.* at para. 74. The *Stuart Order* stated the same at para. 14.

NCTA acknowledges that in paragraph 74 of the *DTV Must-Carry Order*, the Commission states that analog carriage rights will promote the transition to DTV by providing stations that return their analog spectrum the security of knowing that they can be viewed by subscribers lacking digital equipment. No party appears to contest the importance (to both stations and viewers) of such an alternative. Yet NCTA argues that this rationale should not apply to new digital-only stations, since such stations have no analog spectrum to return. However, even if new DTV-only stations have no analog spectrum to return, this does not mean that the analog carriage alternative should not apply to new digital only stations: such carriage rights promote the digital transition by helping ensure the survival of a DTV station to the end of the transition, while DTV receivers penetrate the market. Such rights also promote the ability of viewers to see the programming of new DTV-only stations prior to the time when digital receivers fall to a more affordable level. These results are consistent with the core purposes of must-carry for all stations.

NCTA asserts (Petition at page 5) that requiring carriage of DTV-only stations in analog format is “untethered” from a policy of promoting the digital transition, since there are few digital TV sets in the market. However, it is not the purpose of must-carry to promote the purchase of DTV receivers, but rather to preserve the DTV-only stations until DTV receivers penetrate the market due to other forces.¹⁹ This approach is reflected in the language from paragraph 74 of the *DTV Must-Carry Order* quoted by

¹⁹ Nevertheless, the more that DTV-only stations survive and are seen by viewers, the more viewers will have an incentive to purchase DTV receivers.

NCTA: “[d]igital-to-analog conversion will not provide an impetus for cable subscribers to purchase digital television sets, but will allow new digital stations and stations that return their analog spectrum to continue to reach cable subscribers who have only analog receivers while commencing over-the-air service to attract and reach non-cable viewers who purchase digital television sets.”

In sum, the right of DTV stations to elect carriage in analog format will significantly encourage and protect the development of DTV stations during the DTV transition period. In so doing, the requirement not only promotes the DTV transition, it furthers the traditional policy goals of must-carry by preserving the existence of free over-the-air local broadcasting, promoting the multiplicity of programming sources, and promoting fair competition between cable TV operators and broadcasters.

IV. Conclusion

Neither the statutory nor the constitutional arguments in the Petitions provide a basis for reconsideration of the analog carriage requirements set forth in the *DTV Must-Carry Order*. Those requirements are a limited and rational approach, and are consistent with the Commission’s statutory authority and the decisions of the Supreme Court. Accordingly, the Petitions should be denied.

WHEREFORE, Guenter Marksteiner requests that the Commission deny the Petitions for Partial Reconsideration filed by Adelphia Communications Corporation and the National Cable Television Association on April 25, 2001, and the Petition for

Reconsideration filed by Time Warner Cable that same date, in the above-captioned proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul J. Feldman", with a long horizontal flourish extending to the right.

Frank R. Jazzo
Paul J. Feldman

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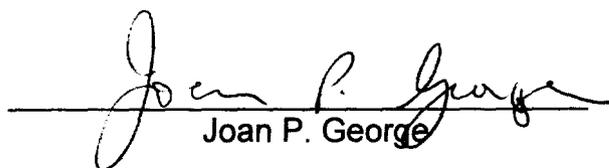
CERTIFICATE OF SERVICE

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that a true copy of the foregoing *Consolidated Opposition to Petitions for Reconsideration* was sent this 25th day of May, 2001, via United States First Class Mail, postage prepaid, to the following:

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