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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

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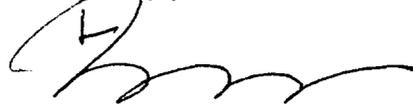
Re: *In the Matter of Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120

Dear Ms. Salas:

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

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

Very truly yours,



Henk Brands
Counsel for Time Warner Cable

Enc.

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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MAY 25 2001

In the Matter of)
)
Carriage of Digital Television)
Broadcast Signals)
)
Amendments to Part 76 of the)
Commission's Rules)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
CS Docket No. 98-120

**TIME WARNER CABLE'S OPPOSITION
TO PETITIONS FOR RECONSIDERATION**

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SUMMARY

As explained in this opposition, the Commission should deny petitions for reconsideration filed by broadcasters seeking unwarranted and unauthorized government protection for their digital signals.

The Commission should reject broadcasters' continued pleas to impose a dual-carriage regime during the transition. *First*, Section 614 does not *require* dual carriage of a broadcaster's digital and analog signals, as broadcasters argue, but rather plainly *forbids* it. Even if that section did not unambiguously forbid dual carriage, at best it would only *permit* the Commission to impose a dual-carriage regime. *Second*, a dual-carriage regime would violate the First Amendment. Given competition from other MVPDs like DBS, it is highly doubtful that any must-carry requirement — digital or analog — could now survive First Amendment scrutiny. At any rate, the rationale espoused in the *Turner* case — preservation of the viability of free, over-the-air television — plainly cannot be used to justify carriage of digital signals. Nor can this be justified on the theory that it will hasten the transition to all-digital broadcasting.

The Commission should reaffirm its conclusion that “primary video” cannot include multiple video streams. A contrary reading would render the word “primary” superfluous.

The Commission should reject Gemstar's request to reconsider its conclusion that electronic program guide data are not entitled to carriage. Gemstar offers no reason to think that the Commission's resolution was either ill-considered or incorrect.

The Commission was correct in holding that, with respect to digital signals, broadcasters should be free to give partial retransmission consent. The Commission should reject broadcasters' request for government-mandated tying.

The Commission also correctly held that, once the must-carry cap is met, Section 614(b)(2) grants cable operators sole discretion as to which additional signals to carry. There is no statutory basis for broadcasters' proposal that one signal of each local broadcaster must be carried before a second signal of any local broadcaster may be carried.

The Commission was further correct in concluding that "material degradation" must be defined in terms of picture quality perceptible to the viewer. The Commission should thus reject broadcasters' pleas to require carriage of their signal untouched. Cable operators sometimes need to change formats to make efficient use of cable spectrum, which usually will not result in any perceptible change in viewing quality.

Finally, the Commission should reaffirm its holding that carriage of PSIP channel-mapping protocols satisfies channel-positioning requirements. Because digital signals are new signals with new (and therefore unfamiliar) channel numbers, and because consumers will be able to locate a channel easily by name, transmission of channel numbers is unnecessary.

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INTRODUCTION

Time Warner Cable (“TWC”) submits this memorandum in opposition to certain petitions for reconsideration of the Commission’s First Report and Order in this proceeding.¹ In those petitions for reconsideration, broadcasters are once again clamoring for government hand-outs in connection with digital signals.

Ever since broadcasters in the 1980s persuaded the Government to launch an advanced TV initiative,² they have turned the tables and painted the transition as a terrible burden imposed upon them by a cruel and heartless Commission. On that theory, broadcasters claimed that spectrum estimated to be worth about \$70 billion should be given to them for free.³ On that theory, broadcasters claimed that they should not be required to use that spectrum for its originally intended HDTV purpose, but should instead be allowed to engage in standard-definition multicasting — thus ensuring that the more efficient digital transmission

¹See *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 01-22 (rel. Jan. 23, 2001) (“*Order*”). The petitions for reconsideration opposed are those of Arizona State University, *et al.* (“Broadcast Group”), the National Association of Broadcasters, *et al.* (“NAB”), Paxson Communications Corp. (“Paxson”), Telemundo Communications Group, Inc. (“Telemundo”), The Walt Disney Company (“Disney”), the Association of America’s Public Television Stations, *et al.* (“Public Broadcasters”), and Gemstar-TV Guide International, Inc. (“Gemstar”).

²See Joel Brinkley, *Defining Vision: How Broadcasters Lured the Government into Inciting a Revolution in Television* 7-12, 19-31 (1998) (detailing how broadcasters devised advanced television as a means of avoiding the loss of allotted but unused spectrum to “land mobile” users).

³See William E. Kennard, Chairman, FCC, *What Does \$70 Billion Buy You Anyway?*, Remarks Before the Museum of Television and Radio (Oct. 10, 2000), *available at* <<http://www.fcc.gov/Speeches/Kennard/2000/spwek023.html>> .

technology would result not in a return of valuable spectrum to the public fisc, but, rather, in a sixfold multiplication of their pre-existing broadcasting capability.⁴

On that same theory, broadcasters are now back with requests for free cable carriage in preference over programmers not blessed with free government-issued spectrum (like C-Span and the Discovery Channel). Without such additional protection, broadcasters say, they could not possibly be expected to spend money on digital broadcast towers and digital programming.⁵ But broadcasters are not in need of, and are not entitled to, further regulatory benefits. The statute plainly does not give digital signals carriage rights during the transition. Moreover, dual carriage would be both poor policy and contrary to cable operators' First Amendment rights. Accordingly, the broadcasters' claims should be rejected.

I. THE COMMISSION CORRECTLY DECLINED TO IMPOSE A DUAL-CARRIAGE REGIME.

Broadcasters argue that the statute compels the immediate imposition of a dual must-carry requirement. *See* NAB at 6-9; Broadcast Group at 2-4; Public Broadcasters at 14-17; Telemundo at 3-4. They further contend that it is irrelevant whether such a requirement would violate the First Amendment: according to these broadcasters, the Commission is powerless to draw into question the constitutionality of an Act of Congress. *See, e.g.*, NAB at 9; Public

⁴*See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809 (1997).

⁵*See, e.g.*, Disney at 4 (Commission must give broadcasters an “incentive . . . to invest in the development of new digital services”); *id.* at 16 (broadcasters must be “encourag[ed] . . . to exploit to the fullest the spectrum they have been assigned”); Paxson at 7 (“DTV construction costs are so onerous”); NAB at 16 (broadcasters should be given greater incentives “to invest in expensive DTV facilities and content”).

Broadcasters at 3-4 n.7. As more fully explained below, however, the statute does *not* compel a dual-carriage requirement. Moreover, such a requirement would unquestionably violate the First Amendment.⁶

A. Section 614 Does Not Require — Indeed, Does Not Permit — Dual Carriage.

1. Far from *compelling* a dual-carriage regime, the statute unambiguously *forbids* it.

Must-carry obligations can attach only to “broadcast signals of local commercial television stations which have been changed to conform with . . . modified [broadcast] standards.”

47 U.S.C. § 534(b)(4)(B). Digital signals broadcast during the transition are not “broadcast signals of local commercial television stations *which have been changed*.” The change contemplated in Section 614(b)(4)(B) does not occur until the transition is complete. *See* Comments of Time Warner Cable at 33 (FCC filed Oct. 13, 1998) (“TWC Comments”).

Broadcasters nevertheless assert that dual carriage is required because Section 614(a) refers to the “signals” of “local commercial television stations” without distinguishing between

⁶Because the statute does not compel a dual-carriage regime, the purported bar on querying the constitutionality of Acts of Congress is inapplicable. *See Order* ¶ 113 (“an administrative agency can consider potential constitutional infirmities in deciding between possible interpretations of a statute”). Obviously, a statute that is not unconstitutional in the abstract can be implemented in a way that is. *Compare Time Warner Entertainment Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000) (upholding statute requiring Commission to adopt subscriber and channel-occupancy limits), *cert. denied*, 121 S. Ct. 1167 (2001) *with Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (striking down subscriber and channel-occupancy limits actually adopted). In any event, the rule that agencies may not query “the constitutionality of congressional enactments . . . is not mandatory.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (internal quotation marks omitted); *see also WXTV License Partnership, G.P.*, Order on Reconsideration, 15 FCC Rcd 3308, ¶ 30 (2000).

analog and digital signals. *See, e.g.*, NAB at 6; Paxson at 3.⁷ Section 614(a), however, requires carriage only “as provided by” the balance of Section 614. 47 U.S.C. § 534(a). And the carriage of digital signals is specifically addressed in Section 614(b)(4)(B), under which the Commission may not require carriage until the transition is complete. That specific provision trumps the more general provision of Section 614(a). *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957). Thus, the question whether carriage of digital signals is required must be resolved by reference to Section 614(b)(4)(B) — not Section 614(a).

Even if there were ambiguity on the point, the Commission may impose must-carry requirements only “as expressly provided” in the statute. 47 U.S.C. § 544(f)(1). The requisite express mandate is lacking here. The *Order*’s suggestion that Section 614(b)(4)(B)’s reference to digital signals implies the necessary authority is mistaken. *See Order* ¶ 16; *see also* NAB at 8; Broadcast Group at 3. If that suggestion were well-taken, one could as easily argue that the Commission has unbridled discretion with respect to analog signals. The Commission itself has rejected that position. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 27 (1993).

2. Even if TWC were wrong in reading Section 614(b)(4)(B) as unambiguously *prohibiting* any dual-carriage regime, it would not follow — as broadcasters assume — that the

⁷The plural “signals” in Section 614(a) of course cannot help broadcasters: because the word “stations” in that provision is plural, the plural “signals” would be used one way or another.

statute would automatically *require* a dual-carriage regime. At best, the statute would then *permit* a dual-carriage regime — *i.e.*, afford the Commission discretion to impose such a regime without requiring it to do so.

Section 614(b)(4)(B) provides in full:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding 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.

47 U.S.C. § 534(b)(4)(B). Contrary to broadcasters' arguments (*see, e.g.*, Broadcast Group at 3), this provision does not actually say that the Commission must “ensure cable carriage” of *digital* signals. Instead, it says that the Commission must “ensure cable carriage” of “such broadcast signals” (which refers back to “television broadcast signals”) of “television stations which have been changed to conform” to the modified standards.⁸ Under this reading, the Commission must ensure carriage only of “signals” (*i.e.*, *some* signals) of modified stations — an obligation plainly discharged by requiring carriage of only analog signals.

In the end, broadcasters in effect concede that the Commission, at most, has discretion to impose a dual-carriage requirement. In an apparent attempt to make a dual-carriage regime more palatable, they admit (indeed, insist) that the Commission has authority to excuse carriage under all manner of circumstances.⁹ That admission is at odds with broadcasters'

⁸“Which” immediately follows “stations” — not “signals.” “An elementary principle of statutory construction is the ‘last antecedent’ rule, which holds that ordinarily a clause modifies only its nearest antecedent.” *Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996).

⁹*See, e.g.*, Broadcast Group at 4 (proposing “phase-in features, exemptions for smaller systems and sensitivity to special circumstances”); NAB at 3 (conceding that the Commission

basic argument that the statute compels dual carriage. If the statute truly compelled dual carriage, the Commission would presumably be powerless to excuse carriage under any circumstances.¹⁰

B. Dual Carriage Would Unquestionably Violate the First Amendment.

Even assuming that the Commission has discretion to impose a dual must-carry regime, it clearly must weigh constitutional considerations in exercising that discretion. *See supra*, p.3 n.6. Indeed, the law is clear that, where there are two permissible interpretations of which only one raises a constitutional question, the Commission must choose the other one.¹¹

may “accommodate the particular circumstances of the transition and various special situations”); Public Broadcasters at 16 (proposing “phasing in the requirements, adjusting them for smaller systems or those with lower capacity, or making adjustments for special circumstances”).

¹⁰Further, broadcasters ignore that, even if Section 614(b)(4)(B) would not prohibit a dual-carriage regime, it would not avail them. Carriage may be required only of a station’s “primary video.” 47 U.S.C. § 534(b)(3)(A). As TWC demonstrated in its comments, a broadcaster’s analog signal will be “primary” until the transition is complete. *See* TWC Comments at 49; Reply Comments of Time Warner Cable at 28 (FCC filed Dec. 22, 1998) (“TWC Reply Comments”). Because the *Order* did not embrace a dual must-carry regime, the Commission had no occasion to pass on TWC’s argument. *See Order* ¶ 52. But, if the Commission were to determine that the digital signals of stations other than digital-only stations are, in principle, entitled to carriage, it would have to address the argument. Given the Commission’s reading of “primary video,” it is hard to see how it could reject TWC’s reading. *See id.* ¶ 54 (“to the extent a television station is broadcasting more than a single video stream at a time, only one of such streams of each television station is considered ‘primary’”).

¹¹*See, e.g., Legal Servs. Corp. v. Velazquez*, 121 S. Ct. 1043, 1050 (2001) (“It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.”); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1131 (D.C. Cir. 2001) (“where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result”) (internal quotation marks and brackets omitted).

Imposing a dual must-carry requirement would not merely raise a constitutional question — it would be flatly unconstitutional. *See Order* ¶ 3 (concluding “that . . . a dual carriage requirement appears to burden cable operators’ First Amendment interests substantially more than is necessary”); *see also id.* ¶ 112.

In their petitions for reconsideration, broadcasters suggest that must-carry entitlements for their digital signals (including multicast signals) would nonetheless pass muster under the First Amendment, apparently on the theory that the Supreme Court’s *analog* must-carry decisions settle the issue for *digital* must-carry. *See, e.g.,* Paxson at 6-8; Telemundo at 6-9. Contrary to these claims, however, the *Turner* decisions do not stand for the proposition that must-carry obligations may be imposed whenever doing so would in some abstract sense further the interests of broadcasters and regardless of the current factual setting. The rationale on which the Supreme Court relied to uphold the analog must-carry requirement was much more specific than that: the theory was that carriage was necessary to preserve “access to free television programming for the 40 percent of Americans without cable.” *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 646 (1994) (“*Turner I*”).

In particular, the theory was that cable operators had an incentive to drop broadcasters to make room for cable-programming services because cable operators could sell advertising on cable-programming services but not on broadcast programming. *See id.* at 633, 646. The notion was that, because they supposedly had no competition, cable operators further had the ability to drop broadcasters without subscriber loss. *See id.* at 633. And, the notion was that television viewers usually discontinue reception of over-the-air stations after subscribing to cable; that dropped stations would therefore see their audience (and their advertising revenue)

shrink; and that, in the end, consumers unable or unwilling to subscribe to cable might therefore be left with fewer or less well-financed free, over-the-air television signals to watch. *See id.* at 632-34, 646-47.

It is questionable whether this *Turner* rationale could, under present conditions, justify *any* must-carry obligations — whether digital or analog. Since the *Turner* decisions, competition from other MVPDs, particularly DBS, has grown explosively. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, CS Docket No. 00-132, FCC 01-1, 2001 WL 12938, ¶¶ 13-14, 60-82 (rel. Jan. 8, 2001). DBS's share of the MVPD subscriber universe has grown from zero to more than 15 percent in just a few years, and DBS signs up the vast majority of new MVPD customers. *See id.* ¶ 14 & App. C, Table C-1; *see also Amendment of Section 73.658(g) of the Commission's Rules — the Dual Network Rule*, Report and Order, MM Docket No. 00-108, FCC 01-133, ¶ 13 (rel. May 15, 2001) (“DBS has grown from a predominantly rural service to a viable alternative to cable in all parts of the country.”). Given the current competitive landscape, it is simply implausible that cable operators would act on any supposedly anticompetitive incentive: if they declined to carry broadcast programming that viewers demand to see, loss of subscribers would make that action unrewarding. *See Time Warner*, 240 F.3d at 1133-34.

However that may be, the *Turner* rationale certainly cannot be invoked to justify carriage of *digital* signals. *See generally* TWC Comments at 19-24; TWC Reply Comments at 15-22. The notion that cable carriage of digital signals is somehow necessary to preserve over-

the-air analog signals is simply illogical.¹² *First*, it is entirely unclear why analog signals would in any way deteriorate if digital signals were unavailable to the cable audience. After all, television stations will continue to receive revenue resulting from cable carriage of their analog signals. There is no evidence that they would receive more revenue — let alone substantially more revenue — if their digital signals were carried on cable as well. *Second*, cable carriage is simply not necessary to expose the cable audience to digital signals: given built-in electronic input-selection switches, cable subscribers could just as easily watch digital signals off-air. *See* TWC Comments at 7-8.

Meanwhile, any dual-carriage regime would inflict great harm on cable operators, cable programmers, and cable subscribers. Carriage of digital signals necessarily comes at the expense of additional video programming or other services that cable operators would carry if left to make their own carriage choices. Contrary to broadcasters' arguments, *see* Disney at 6; Public Broadcasters at 16-17; Telemundo at 9; Paxson at 5-6, 8, the burden imposed would be significantly greater than the burden imposed by analog must-carry: whereas most analog signals were already being carried, *see Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 217 (1997) ("*Turner II*"), many digital signals currently are not. Moreover, the vast majority of cable subscribers will not benefit from carriage of digital signals at all: without a digital TV set (which few consumers have bought to date) or a digital converter box, most cable subscribers could not view digital signals.

¹²If the rationale is that must-carry is necessary to preserve over-the-air access to *digital* signals, it is altogether absurd. There is no evidence that there is even a single person who owns an expensive digital TV set but somehow cannot afford to — or, at least, does not — subscribe to an MVPD.

Nor could compelled carriage of digital signals be justified under the alternate rationale now suggested by some broadcasters — that carriage will encourage consumers to buy digital TV sets and thereby hasten the transition. *See, e.g.*, Paxson at 7; Telemundo at 8; Broadcast Group at 2; Public Broadcasters at 3, 17. This “prime the pump” rationale suffers from at least two defects in addition to the defects it shares with the *Turner* rationale. *First*, bringing advanced television to mostly upscale consumers simply is not a sufficiently “important” governmental interest to justify suppression of speech protected by the First Amendment. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 34, 50 (D.C. Cir. 1977) (per curiam); TWC Comments at 25. *Second*, broadcasters themselves say that, without must-carry, only little-watched stations will go without carriage. *See* Paxson at 7; Telemundo at 3; Public Broadcasters at 13-14. But carriage of little-watched stations would do nothing to encourage consumers to purchase digital TV sets, and would therefore not be narrowly tailored to hastening the transition. *See* TWC Comments at 5-6.

In addition to relying on this “prime the pump” rationale, some broadcasters simplistically suggest that the Commission should impose a must-carry obligation lest “the seventy percent of television viewers that subscribe to cable effectively will be deprived of the innovative digital services that they otherwise would receive from local broadcasters.” Broadcast Group at 2. But if the rationale for a dual-carriage regime would be to “improve” upon the mix of speech available on cable, it would necessarily trigger strict First Amendment scrutiny. *See Turner I*, 512 U.S. at 652 (stating that strict scrutiny would have been due if Congress had enacted the must-carry measure in an “effort to exercise content control over what subscribers view on cable television”); *Hurley v. Irish-American Gay, Lesbian &*

Bisexual Group of Boston, 515 U.S. 557, 577 (1995) (“[t]he Government’s interest in *Turner Broadcasting* was not the alteration of speech”). Thus, such a rationale is simply impermissible.

II. THE COMMISSION CORRECTLY DETERMINED THAT ONLY ONE VIDEO STREAM CAN BE A PRIMARY VIDEO TRANSMISSION.

A cable operator is required to carry only “the primary video . . . transmission of each of the local commercial television stations carried.” 47 U.S.C. § 534(b)(3)(A). In the *Order*, the Commission correctly determined that the “plain words of the Act [require] that, to the extent a television station is broadcasting more than a single video stream at a time, only one of such streams of each television station is considered ‘primary.’” *Order* ¶ 54. Broadcasters, seeking must-carry rights for all multicast streams, challenge that conclusion by claiming that “primary” really means “all” and that “primary video” constitutes the entirety of their free, over-the-air video signal. *See, e.g.*, *Broadcast Group* at 5-6; *NAB* at 10-16; *Public Broadcasters* at 4-14; *Paxson* at 10-16; *Telemundo* at 4-6; *Disney* at 2-17.

That view is contrary to the plain language of the statute. As the Commission correctly held, “[t]he term primary video . . . suggests that there is some video that is primary and some that is not.” *Order* ¶ 54. “Primary” means “[f]irst or highest in rank, quality, or importance.” *Id.* (internal quotation marks omitted). Thus, where there is “more than a single video stream at a time, only one of such streams” can be considered “primary.” *Id.* Any other reading would render the word “primary” superfluous, in violation of the settled canon of construction that all words in statutory text must be given meaning. *See id.*

In support of their contrary claim, broadcasters rely on six arguments. *First*, broadcasters contend that “the word ‘primary’ does not connote singularity,” NAB at 11, which they say is borne out by such expressions as “‘primary elements,’ ‘primary colors,’ ‘primary values,’ and ‘primary grades,’” *id.*; *see also* Paxson at 12; Public Broadcasters at 6. This is a transparent sleight of hand. Each of the examples cited involves a plural noun. Of course “primary colors” refers to more than one color, but that is because the word “colors” is plural — not because “the word ‘primary’ does not connote singularity.” In the phrase “the primary video, accompanying audio, and line 21 closed caption transmission,” “primary” qualifies a singular noun: “video . . . transmission.”¹³ Thus, the statutory language is plain and unambiguous: there can be only one video transmission that is first in rank.

Second, broadcasters argue that, even if the plain language cuts against them, the Commission should have divined “*what was intended by the term* for the analog situation,” which then “must be adapted to fit the digital context.” NAB at 12.¹⁴ According to broadcasters, one can divine in Section 614(b)(3)(A) an intent that what must be carried is “the ‘basic’ broadcast service viewed by the public without special equipment or subscription fee,”

¹³Broadcasters suggest that “primary” instead qualifies only “video,” which, they say, is “neither singular nor plural, but generic.” NAB at 11; *see also* Public Broadcasters at 6 (“collective”). In fact, “primary” qualifies “video . . . transmission.” Besides, broadcasters do not explain why what they call a “generic” or “collective” noun is more like a plural than like a singular noun.

¹⁴This is illustrative of a curious “one-way ratchet” theory of statutory interpretation that broadcasters employ more generally in their petitions. Whenever they like the application of a statutory provision to digital signals, they say that the statutory language is clear and permits no other result. *See, e.g.*, Broadcast Group at 2-3. Whenever they do not like the result, however, they claim that the Commission may — indeed, must — disregard the statutory language to “adapt” it to the digital context. *See, e.g., id.* at 3, 6; NAB at 16 n.55.

as distinguished from “ancillary or ‘secondary’ material carried, in analog, in the VBI and on subcarriers.” NAB at 13; *see also* Broadcast Group at 5; Public Broadcasters at 7-8. It is hard to argue with these contentions because the broadcasters are making things up out of whole cloth. The text of Section 614 does not use the terms ancillary and secondary. It nowhere says anything about any free/for-a-fee distinction. Instead, it draws a primary video/other video distinction. And that is the end of that.¹⁵

Third, some broadcasters argue that the Commission was wrong in relying on evidence that the enactment of the “primary video” provision was “reasonably contemporaneous” with the evolution from HDTV to DTV, and that Congress therefore knew about multicasting. *See Order* ¶ 56 & nn.158-59.¹⁶ In part, they do so by urging that the sources on which the Commission relied may have predated the statute but postdated the first appearance of the term “primary video” in the legislative history. *See* NAB at 15. That argument is absurd on its face: the only thing that could matter is what was thought at the time of enactment. In other part, broadcasters simply ignore that the legislative history on which the Commission relied goes all the way back to 1990. *See Order* ¶ 56 n.159. Besides, it does not matter whether Congress considered digital multicasting specifically.¹⁷ Plainly, Congress could imagine

¹⁵NAB also points to the “in its entirety” language in Section 614(b)(3)(A), *see* NAB at 12-14, but that plainly cannot further its cause. What must be carried “in its entirety” is “the primary video” — not “the video,” as NAB would have it, *see id.* at 12.

¹⁶Other broadcasters are content to concede the point. *See Paxson* at 13 n.31 (“Congress certainly was aware of the potential for multicasting when it passed the 1992 Cable Act”).

¹⁷*See Brogan v. United States*, 522 U.S. 398, 403 (1998) (“[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress

broadcast signals consisting of “primary” and other transmissions. Congress specifically considered just that in connection with *audio* signals,¹⁸ and it could plainly have thought that the same analysis should apply to video signals.

Fourth, broadcasters rely — for the first time in this rulemaking, so far as we can tell — on Section 614(b)(3)(B), which requires carriage of “the entirety of the program schedule of any television station carried on the cable system.” 47 U.S.C. § 534(b)(3)(B); *see* NAB at 16-17; Telemundo at 3-4; Disney at 9-11; Paxson at 10-12. But that subsection says only that, with respect to a signal that must be carried, a cable operator may not delete individual programs.¹⁹ If Section 614(b)(3)(B) meant what broadcasters say it means, Section 614(b)(3)(A) would be a nullity. Although it is contested just what programming Section 614(b)(3)(A) exempts from carriage, all agree that Section 614(b)(3)(A) exempts at least *some* programming. For example, even in broadcasters’ own cramped reading of Section 614(b)(3)(A), that provision exempts “pay” programming. *See, e.g.*, NAB at 13-14. If the

was trying to remedy — even assuming that it is possible to identify that evil from something other than the text of the statute itself.”).

¹⁸The House Report spoke of “primary audio and video,” H.R. Rep. No. 102-628, at 92 (1992), and acknowledged that separate audio transmissions of “alternative languages which employ the Separate Audio Program (SAP) channel” did not constitute primary audio, *id.* at 93.

¹⁹The exceptions to the provision illustrate the point. As the Conference Report explained, “Subsection (b)(3)(B) requires that cable systems carry the entirety of the program schedule of any television station carried on the cable system, except where FCC rules governing network non-duplication, syndicated exclusivity, sports programming, or similar regulations require the deletion of *specific programs* by a cable system and permit the substitution of other programs.” H.R. Conf. Rep. No. 102-862, at 66-67 (1992) (emphasis added)).

proposed reading of Section 614(b)(3)(B) were correct, that limitation would be undone, rendering Section 614(b)(3)(A) superfluous.

Fifth, broadcasters argue that the Commission's interpretation of "primary video" is "unworkable." *Disney* at 11. This is so, they contend, because, even if multicast streams generally do not have to be carried, streams that are "program-related" do have to be carried. According to broadcasters, there will thus be constant disputes as to whether particular multicast signals are program-related (and thus required to be carried) or unrelated (in which case they need not be carried). But, at least until broadcasters formulate firm plans as to how to use their digital spectrum, there is no reason to think that this will be a serious problem: it seems unlikely that broadcasters will continuously treat their viewers to shifting and unannounced combinations of programming streams. Besides, one would think that the difference between program-related and other material will usually be fairly clear. In any event, if the Commission's solution is likely to result in any dispute at all, the conclusion to be drawn is not that all separate programming streams must be carried, but, rather, that separate programming streams need not be carried even if they are program-related.²⁰

Finally, broadcasters argue that the purpose of must-carry was to protect broadcasters, that more carriage therefore necessarily better promotes the statutory purpose, and that enforcement of the "primary video" limitation therefore hampers the statutory purpose. *See Disney* at 15; *Broadcast Group* at 5-6. That kind of reasoning is utterly unpersuasive. As the Supreme Court has observed: "[N]o legislation pursues its purposes at all costs. Deciding

²⁰*See* Time Warner Cable's Petition for Reconsideration at 3 (FCC filed Apr. 25, 2001).

what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). To say that more must-carry is always better (even if contrary to the statute’s limitations) ignores that basic teaching.

III. THE COMMISSION CORRECTLY DETERMINED THAT ELECTRONIC PROGRAM GUIDES ARE NOT ENTITLED TO CARRIAGE.

In its 1998 comments, Gemstar asked the Commission to decide that all electronic program guide (“EPG”) data qualify as “program-related” material for purposes of Section 614(b)(3). In the *Order*, the Commission rejected Gemstar’s plea, holding that “program guide data that are not specifically linked to the video content of the digital signal being shown cannot be considered program-related, and, therefore, are not subject to a carriage requirement.” *Order* ¶ 64. Once again refusing to take no for an answer,²¹ Gemstar now asks the Commission to say that it could not have meant what it said. That is so, Gemstar contends,

²¹Gemstar shamelessly trumpets that “[t]he question [whether EPG data are program-related] has not been resolved in the analog context.” Gemstar at 3. Gemstar notes that it raised the issue in a petition for special relief but says that it “withdrew its Petition” — purportedly “because the cable practice of stripping the content from the broadcast signal had ceased.” *Id.* at 3 n.8. Even overlooking that Gemstar has merely filed a petition to withdraw (on which the Commission has yet to act), Gemstar’s version of events is at odds with the facts. TWC recommenced transmitting Gemstar’s EPG data long before Gemstar’s withdrawal. Gemstar nonetheless argued for almost a year that relief continued to be necessary. *See Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission’s Must-Carry Rules*, Docket No. CSR 5528-Z, Response at 2-3 (FCC filed Apr. 12, 2001).

because whether EPG data are entitled to carriage should turn on whether such data can qualify as “program-related” for purposes of Section 614(b)(3), and because the Commission has not yet decided more generally under what circumstances digital transmissions are program-related. *See* Gemstar at 2 & n.2, 6-7 & n.13 (citing *Order* ¶¶ 57, 122).

Gemstar’s request should be rejected. *First*, the issue whether EPG data are “program-related” was properly before the Commission: Gemstar itself had raised the issue in opening and reply comments, and numerous commenters (including TWC) joined issue. *See* TWC Reply Comments at 34-35. Thus, the Commission was fully informed as to the merits of the issue, and its ruling is not, as Gemstar says, “murky” or “obscure,” Gemstar at 3, 9 — rather, it is categorical and decisive.²² Although Gemstar argues that the Commission could not have intended to hold that EPG data are not program-related and therefore not entitled to carriage, it cannot proffer any alternative explanation that is even remotely logical.²³

Second, Gemstar is wrong in arguing that the Commission could not logically decide that EPG data are not program-related before adopting a generally applicable program-related-ness standard in connection with digital signals. In the *Order*, the

²²Gemstar also argues (at 3) that the statement is “factually inaccurate,” apparently on the theory that EPG data can be carried not only within the PSIP but also within the main digital channel. Gemstar does not explain how that distinction, even if correct, could possibly make a difference.

²³Gemstar argues that paragraph 64 of the *Order* might be understood to say only that an “EPG that does *not* contain any data descriptive of the program(s) with which it is being transmitted is not subject to mandatory cable carriage.” Gemstar at 3 n.5; *see also id.* at 9 & n.17. In other words, Gemstar reads the statement as applying only to EPGs that, say, are transmitted as part of the local ABC signal but that do not contain any information about ABC’s programming. The Commission could not possibly have meant that. No one in this proceeding pointed to any such strangely incomplete EPGs, and it is doubtful that they exist.

Commission applied the same general standard it has long used: to be program-related, material must be “related to the broadcaster’s primary digital video programming.” *Order* ¶ 61; *see also id.* ¶ 64 (“specifically linked to the video content of the digital signal being shown”). To the extent that it asked for further comment, the Commission only proposed to fine-tune that standard in connection with digital material that could arguably meet that test. *See id.* ¶ 122 (seeking comment on status of material providing “multiple camera angles” of “a sporting event,” “sports statistics to complement a sports broadcast,” and “detailed financial information to complement a financial news broadcast”). There is nothing illogical about asking whether a tomato is a vegetable while at the same time determining that a banana is not.

Gemstar also argues that, if the Commission did mean what it said, it should change its mind. *See Gemstar* at 9. In this connection, Gemstar again rolls out its shopworn “peppercorn” theory, under which an EPG containing information on hundreds of channels can qualify as “program-related” in its entirety on the strength of a peppercorn of information about the channel in whose signal it is carried. *See id.* at 3 (“the fact that the EPG contains *additional* program and related information (about programming on other stations, for example) does not change the essential character . . . of EPGs as ‘program-related’ services”).

TWC has on numerous occasions explained that this theory is meritless.²⁴ Rather than repeating itself, TWC respectfully refers the Commission to its prior pleadings.²⁵

IV. THE COMMISSION CORRECTLY PERMITTED PARTIAL RETRANSMISSION CONSENT.

The Commission concluded that a broadcaster may give retransmission consent for partial carriage of a digital television signal. *See Order* ¶ 31. Broadcasters seek to require cable operators to carry a broadcaster's entire signal (including multicast streams) pursuant to retransmission-consent agreements. They do not seriously claim that the Commission's decision violates the statute.²⁶ Nor can they credibly contend that the Commission's decision is at odds with the Commission's analog rules: those rules protect only must-carry-eligible

²⁴*See, e.g., Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission's Must-Carry Rules*, Docket No. CSR 5528-Z, Ex Parte Letter to Magalie Roman Salas, Secretary, FCC, at 2-4 (FCC filed Mar. 16, 2001); *Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission's Must-Carry Rules*, Docket No. CSR 5528-Z, Reply Comments of Time Warner Cable at 6 (FCC filed Apr. 24, 2000); *Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission's Must-Carry Rules*, Docket No. CSR 5528-Z, Opposition of Time Warner Cable at 13-16 (FCC filed Apr. 13, 2000).

²⁵Quite apart from the fact that EPGs cannot qualify as "program-related," there is an even more fundamental reason why EPGs contained in digital signals are not entitled to carriage. The statute is clear that program-related material must be carried only if it is contained in "the vertical blanking interval." 47 U.S.C. § 534(b)(3). As the Commission has acknowledged, "there is no VBI in a digital signal." *Order* ¶ 60. Thus, contrary to Gemstar's argument, *see Gemstar* at 4 & n.9, non-primary video, even if program-related, is not entitled to carriage, *see supra*, p.15 & n.20.

²⁶After all, the Commission previously (in connection with analog signals) adopted a prohibition on partial carriage only as a matter of discretion — not because it thought the prohibition was statutorily compelled. *See Order* ¶ 31.

retransmission-consent signals,²⁷ and digital signals are not must-carry eligible. Instead, broadcasters claim that permitting partial carriage is bad policy in that it will discourage full carriage deals, thereby impeding the transition. *See* NAB at 16-17; Broadcast Group at 9-10; Public Broadcasters at 20.

The right broadcasters are seeking is government-assisted *tying*: they urge the adoption of a rule requiring cable operators to buy unattractive programming as a condition to the purchase of attractive programming. But if broadcasters want to engage in such tying, they can do so even without the benefit of a rule making it mandatory: all they need to do is decline to assent to a partial-carriage agreement. *See Order* ¶ 31 (seeing no harm in partial carriage “as long as the cable operator has the broadcaster’s permission to select which programming will be carried”). Broadcasters’ apparent calculation that they can extract more value from cable operators if they can hide behind a government-decreed prohibition to consent to partial carriage hardly justifies making mandatory a practice that is elsewhere prohibited. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984).²⁸

²⁷*See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, ¶¶ 105-107 (1994); *Order* ¶ 31 n.83.

²⁸Indeed, the Commission has explained that a broadcaster’s tying of unattractive programming to attractive programming may constitute an “effort to stifle competition” and therefore may “not meet the good faith negotiation requirement” of Section 325(b)(3)(C). *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, ¶ 58 (2000).

V. THE COMMISSION CORRECTLY DETERMINED THAT CABLE OPERATORS HAVE DISCRETION TO SELECT WHICH DIGITAL SIGNALS TO CARRY ONCE THE MUST-CARRY CAP IS FILLED.

Section 614(b)(1)(b) requires that a cable operator with more than 12 usable activated channels devote up to one-third of its capacity to the signals of local commercial television stations. 47 U.S.C. § 534(b)(1)(B). Once a cable operator has filled that quota, it has “discretion in selecting which such stations shall be carried on its cable system.” *Id.* § 534(b)(2). In the *Order*, the Commission held that, assuming that the must-carry rules would ever apply to digital signals, Section 614(b)(2) would apply in the same way as it does in the analog context: “the Act provides a cable operator with discretion to choose which signals it will carry if it has met its carriage quota.” *Order* ¶ 42.

Once again relying on the “one-way ratchet” theory of statutory interpretation, *see supra*, p.12 n.14, NAB claims that Section 614(b)(2) was “drafted with the analog world in mind.” NAB at 17-18. According to NAB, the Commission should therefore disregard the plain language of Section 614(b)(2) and require carriage of one signal of every broadcaster before a second (presumably digital) signal of that same broadcaster could be carried. NAB’s claim should be rejected. As the Commission correctly noted, the plain language of Section 614(b)(2) states that, once the must-carry quota is met, discretion over carriage is vested in the cable operator, not the Commission or broadcasters. That grant of discretion does not become ambiguous simply because it is applied to digital signals.

VI. THE COMMISSION CORRECTLY DETERMINED THAT THE “MATERIAL DEGRADATION” PROVISION DOES NOT REQUIRE UNALTERED PASS-THROUGH.

The Act requires that broadcast signals subject to must-carry requirements “shall be carried without material degradation,” and says that the Commission “shall adopt carriage standards to ensure that, to the extent 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.” 47 U.S.C. § 534(b)(4)(A); *see also id.* § 535(g)(2).²⁹ The Commission determined that, to the extent digital signals are entitled to carriage, “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.” *Order* ¶ 73.

Broadcasters claim that the Commission should hold instead that all over-the-air signals must be retransmitted by cable operators without any alteration. *See Broadcast Group* at 7 (“the entire qualified digital bitstream of each station in the format in which the broadcaster originally transmitted it”); *see also Public Broadcasters* at 18-19; *NAB* at 18-22. That request should be rejected. The statutory text and purpose call only for carriage that is equal from the subscriber’s point of view. *See* 47 U.S.C. § 534(b)(4)(A); *Cable Television Consumer*

²⁹*See also* H.R. Conf. Rep. No. 102-862, at 67 (“The FCC is directed to adopt any carriage standards which are needed to ensure that, so far as is technically feasible, cable systems afford off-the-air broadcast signals the *same* quality of signal processing and carriage that they employ for any other type of programming carried on the cable system.”) (emphasis added); S. Rep. No. 102-92, at 85 (1991) (same).

Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), (15), (16), 106 Stat. 1460, 1462 (1992). As the Commission correctly observed, “material degradation is about the picture quality the consumer receives and is capable of perceiving and not about the number of bits transmitted by the broadcaster if the difference is not really perceptible to the viewer.” *Order* ¶ 72; *see also id.* (“The number of bits appropriate for mandatory carriage will vary based on the programming and service choices of each broadcaster.”).

Insisting that broadcast signals must be “pass[ed] through . . . untouched” (NAB at 18 n.63) is particularly inappropriate where digital signals are concerned. As the Commission has recognized, cable operators need to be able to change formats to make efficient use of cable spectrum, and they can do so in ways that will not result in any quality changes that are noticeable to the naked eye. *See Order* ¶ 72. Thus, the broadcasters’ demand is simply unreasonable: it highlights just how indifferent broadcasters are to the burdens that their proposals would impose on cable operators, cable programming services, and cable subscribers.

NAB also appears to urge the Commission to adopt minutely detailed technical standards. *See* NAB at 19-21. Even if that were ever appropriate, it is premature to do so at this time. In the analog context, material-degradation complaints have been extremely rare, and they have generally been found to lack merit.³⁰ Moreover, material degradation can readily be ascertained by comparing broadcast with cable programming. Thus, any elaboration

³⁰*See, e.g., Complaint of Butler University Against Time Warner Cable*, Memorandum Opinion and Order, 12 FCC Rcd 19678 (1997) (rejecting complaint); *Order to Show Cause Directed Against Teleprompter Cable Co.*, Memorandum Opinion and Order, 46 FCC2d 845 (1974) (same).

on the statutory standard can safely be reserved for adjudication in connection with complaint procedures.

VII. THE COMMISSION CORRECTLY DETERMINED THAT CARRIAGE OF PSIP CHANNEL-MAPPING PROTOCOLS SATISFIES ANY CHANNEL-POSITIONING REQUIREMENTS.

In the *Order*, the Commission held that, “[g]iven the new digital table of allotments, . . . there is no need to implement channel positioning requirements for digital television signals of the same type currently applicable to analog signals.” *Order* ¶ 83. Rather, the Commission determined, “the channel mapping protocols contained in the PSIP [program and system information protocol] identification stream . . . assure[] that cable subscribers are able to locate a desired digital broadcast signal.” *Id.*

NAB claims that the Commission should “be required to number broadcast channels in their EPG displays . . . as they are numbered in PSIP.” NAB at 23. That is nonsense. As the Commission correctly held, channel numbering is not warranted for digital broadcast signals both because they are new signals with new (and therefore unfamiliar) channel numbers and because viewers will be able to locate the channel easily by name. *See Order* ¶ 83; *see also id.* ¶ 49. For the same reasons, NAB’s additional suggestion (at 23) that a digital station should, in some cases, be numbered identically to the broadcaster’s historical analog channel should be rejected.

Other broadcasters contend that *all* PSIP information is entitled to carriage. *See Broadcast Group* at 8-9; *see also Public Broadcasters* at 19. But that argument presumes that such information is “program-related to the primary digital video signal.” *Order* ¶ 83. As the Broadcast Group recognizes, that subject will be addressed in comments to the Commission’s

Further Notice of Proposed Rulemaking. *See id.* ¶ 122. The Broadcast Group does not explain why there is any need to address it here.

CONCLUSION

For these reasons, the opposed petitions for reconsideration should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of May 2001, copies of Time Warner Cable's Opposition to Petitions for Reconsideration were served on the following by first-class mail, postage prepaid.



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