

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

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals	)	CS Docket No. 98-120
	)	
Amendments to Part 76 Of the Commission's Rules	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999:	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals	)	CS Docket No. 00-2
	)	

**NAB/MSTV/ALTV  
REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

The National Association of Broadcasters (“NAB”), the Association for Maximum Service Television, Inc. (“MSTV”) and the Association of Local Television Stations, Inc. (“ALTV”)<sup>1</sup> hereby file a reply to certain Oppositions to Petitions for Reconsideration in the above-captioned proceeding on cable carriage of digital television broadcast signals. Specifically, NAB/MSTV/ALTV reply to the Oppositions filed by National Cable & Telecommunications Association (“NCTA”), Time Warner Cable (“TWC”) and A&E Television Networks (“A&E”) (collectively, “cable” or “cable commenters”).<sup>2</sup>

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

<sup>2</sup> *Opposition of National Cable and Telecommunications Association to Petitions for Reconsideration*, CS Docket No. 98-120, CS Docket No. 00-96, CS Docket No. 00-2, filed May 25, 2001; *Time Warner Cable's Opposition to Petitions for Reconsideration*, CS Docket No. 98-

## I. Introduction

NAB/MSTV/ALTV asked the Commission to reconsider the *First Report and Order*<sup>3</sup> in this proceeding concerning cable carriage of local digital television broadcast signals. We urged the Commission to reconsider its decisions in several respects, in order to be true to the statutory directives and intent of the 1992 Cable Act,<sup>4</sup> not to impair the DTV transition and not to hobble permanently broadcast DTV service.

To the extent cable charges that “broadcasters are once again clamoring for government hand-outs”<sup>5</sup> and “protection,”<sup>6</sup> they misconstrue the issue raised by NAB/MSTV/ALTV. That question is not what Congress – faced hypothetically for the first time with the issue of DTV carriage – might find relevant. Instead, the issue we raised is what the plain language of the Cable Act requires. Invective concerning broadcasters’ motives has no relevance and should have no place in this proceeding.<sup>7</sup>

Moreover, the basic rationale behind must carry has not changed, despite cable’s attempt to point to competition from satellites.<sup>8</sup> The lock Congress found cable to have on a majority of homes (then 59.3% of all American television homes) has now increased to 68% of households. Indeed, Congress also applied must carry to satellite carriers, reaching the conclusion that any multi-channel video program distributor would have the ability and incentive to disadvantage local broadcasters to the detriment of the vigorous system of local broadcasting Congress ordained.<sup>9</sup>

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120, filed May 25, 2001; *Comments of A&E Television Networks*, CS Docket No 98-120, filed May 25, 2001.

<sup>3</sup> *First Report and Order and Further Notice of Proposed Rule Making*, CS Docket No. 98-120, CS Docket No. 00-96, CS Docket No. 00-2 (rel. Jan. 23, 2001) (“*Report and Order*” or “*R&O*”).

<sup>4</sup> Cable Television Consumer Protection & Competition Act of 1992, Pub. L. No. 102-385 (“1992 Cable Act” or “Cable Act”).

<sup>5</sup> TWC at 1.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> In any event, the Supreme Court upheld must carry, finding that “cable systems have more systemic reasons for seeking to disadvantage broadcast stations: simply stated, cable has little interest in assisting, through carriage, a competing medium of communication.” *Turner Broadcasting System v. FCC*, 520 U.S. 180, 201 (1997).

<sup>8</sup> *E.g.*, TWC at 8.

<sup>9</sup> 47 U.S.C. § 338; see *SHVIA Implementation*, CS Docket No. 00-96 (rel. Nov. 30, 2000). Notably, satellite carriers there raised constitutional arguments similar to cable’s here, and the Commission appropriately concluded that it must defer to Congress’ conclusion that the must carry provision “is lawful,” and that its task “is to implement the statutory directives.” *Id.* ¶ 13.

Thus, Congress, in Section 614(b)(1)(B) of the Act, deemed it necessary that cable systems “shall carry the signals of local commercial television stations, up to one-third” of their capacity. Congress thus also set the upper limit of an appropriate carriage burden on cable. That upper limit of burden on a cable system has rarely been reached. Given the explosive growth in cable capacity, it would be hard to imagine it being reached with the temporary addition of digital must carry. Nonetheless, one would believe, by reading the cable comments here, that cable was being unfairly imposed on for no valid purpose. One must pause and wonder about cable’s *real* motive for arguing so hard against any role in seeing free, over-the-air broadcasting preserved via the digital transition.

## **II. Cable Has Not Countered Congress’ Clear Statutory Command.**

The NAB/MSTV/ALTV Petition demonstrated that the explicit terms and plain language of the must carry statute direct cable carriage for all local commercial broadcast signals, without excluding digital signals. We showed how the *Report and Order* explicitly acknowledged this but concluded without explanation that the statute does not compel temporary dual carriage. Cable commenters have done little to shore up this failing of the *R&O*.

No party disputes our key contention – that the carriage language of section 614(a) includes both analog and digital signals. Instead, both NCTA and TWC argue that Congress limited the statutory command in section 614(b)(4)(B).<sup>10</sup> TWC repeats the argument that section 614(b)(4)(B) *bars* digital carriage during the transition, a strained reading indeed of a provision that by its terms directs the Commission “to *ensure* cable carriage” of advanced television

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<sup>10</sup> As NAB previously argued, the placement of § 614(b)(4)(B) in a section of the Act entitled “Signal Quality” belies the notion that Congress, having created broad must carry obligations in an earlier section, intended in a section dealing with technical issues to grant the Commission broad discretion to redefine that mandate. *See* Comments of NAB, CS Docket No. 98-120 (filed Oct. 13, 1998)(Statement of Jenner & Block at 5).

signals (emphasis added).<sup>11</sup> The Commission, however, specifically rejected that interpretation, and TWC offers no explanation of how the Commission might have erred. *R&O* ¶ 15.<sup>12</sup>

NCTA instead argues that the mere fact that it and other cable parties submitted interpretations of the statute which differ from ours demonstrates that the Act is ambiguous and thus should not be construed as requiring digital carriage since that view would – in NCTA’s judgment – raise First Amendment issues. NCTA at 7. The Commission notably did not accept NCTA’s view of section 614(b)(4)(B), and it failed to explain why section 614(a), which it acknowledged does not distinguish between analog and digital signals, does not mandate carriage of DTV signals.

A&E (at 3) contends that our recognition that certain statutory terms must be adapted for the digital context belies the contention that the statute unambiguously directs DTV carriage. Its argument also cannot be comported with the statute, for Congress – at the same time as it directed carriage for the signals of local commercial television stations without regard to whether they are analog or digital – told the Commission it must “establish any changes in the signal carriage requirements” needed to ensure carriage of advanced television signals. Section 614(b)(4)(B). Our reliance on this explicit direction is in no way inconsistent with the view that Congress did not give the FCC discretion to permit cable systems to deny carriage to digital signals altogether.

Most of the cable responses to the NAB/MSTV/ALTV Petition, therefore, simply assume that our central argument is wrong without demonstrating that it is. Only if they are correct, and the statute does leave the FCC with discretion concerning DTV carriage, would constitutional considerations be relevant. That is why the Commission asked parties to provide additional

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<sup>11</sup> Moreover, accepting cable’s view that the statutory term “changed” only allows for DTV carriage after the conclusion of the transition would mean that Congress told the Commission to begin a rulemaking proceeding when it adopted the DTV standard, but did not intend those rules to go into effect for 15 years (the then anticipated length of the transition). Congress should not be deemed to have dictated such an absurd result. *See* NAB Reply Comments, CS Docket No. 98-120 (filed Dec. 22, 1998) at 58-59.

<sup>12</sup> TWC’s reliance on § 624(f)(1) fails because it also has already been rejected by the Commission. *R&O* ¶ 16. TWC’s arguments (at 7-11) that Congress’ reasons for adopting must carry no long apply cannot be considered. The FCC is not authorized to reconsider Congress’ judgment on the basis of post-enactment material. “If the intent of Congress is clear, that is the end of the matter.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

evidence addressing those issues in the *Further Notice*. *R&O* ¶¶ 112-131.<sup>13</sup> Even though the *R&O* tentatively concluded – without any explanation – that a dual carriage requirement would not meet the *Turner* standard, the Commission clearly left that conclusion open for consideration in response to the *Further Notice*, and it cannot – as all cable parties ask it to do – base its construction of the statute on a decision not yet finally reached.

We end where we began: the Cable Act by its plain terms requires carriage of the signals of local commercial television stations. The Commission acknowledged that Congress did not exclude digital signals from that mandate, but it failed to explain how the statute could be read to give the FCC discretion to determine whether must carry applied during the transition. Nothing in cable’s responses fills that gap.

### **III. “Primary Video” Does Not Mean One Program Stream.**

Cable commenters strain to defend the Commission’s interpretation of “primary video” to mean one video stream, but they fail to explain what “primary” could have meant for analog carriage, for which the words were written, given their (and the Commission’s) interpretation that it means there is some video that is primary and some that is not. And they are simply wrong to say that “[a]ny other reading would render the word ‘primary’ superfluous.”<sup>14</sup>

NAB/MSTV/ALTV showed that a more useful reading of the “primary video” language (to begin with, for the analog context), and one supported by the legislative history,<sup>15</sup> was that what was to be carried was the basic (primary) video and audio service, as opposed to secondary, ancillary material, some of which was to be carried, and some not. Thus defined, “primary” takes on its most common usage: basic, fundamental. We submit that to read “primary video” as cable suggests is to render the word “primary” superfluous, for what could their interpretation possibly mean in the analog context for which the words were written?

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<sup>13</sup> Oddly, TWC (at 5-6) suggests that broadcasters have conceded the statutory argument by suggesting ways in which any undue burdens on cable could be ameliorated. Here again TWC ignores Congress’ directive that the FCC modify the signal carriage rules for advanced television. While that discretion certainly does not allow the Commission to permit cable operators to deny carriage to DTV signals, it does give the Commission the ability to tailor the rules, particularly in light of § 614(b)(1)(A) which sought to reduce the burden on smaller cable systems.

<sup>14</sup> TWC at 11; *see* NCTA at 9.

<sup>15</sup> *See* NAB/MSTV/ALTV Petition for Reconsideration at 13-14. Cable of course does not, as it cannot, respond to the support for our interpretation found in the legislative history.

TWC misspeaks when it claims that we conceded that the plain statutory language did not support our construction. TWC at 12. To the contrary, we argued that the plain language must be discerned in context: not word by word, as cable does, rendering superfluous the basic application of the statutory words to analog.<sup>16</sup>

TWC also tries to mislead the Commission in attempting to refute our argument that the Commission erred in relying on “reasonably contemporaneous” technological developments to support its interpretation of “primary video.” The facts are that “multicasting” was barely conceived of at the time the must carry provisions were enacted, was not generally under discussion and could not possibly have informed the use of the term “primary video.”<sup>17</sup> The bareness of TWC argument is shown by its reciting the *R&O*’s reliance on legislative history from 1990 which speaks of the potential of advanced technology to open new markets “for components of advanced television systems (such as semiconductors, fiber optics, and flat screen displays), and to enhance the integration of the television and computer industries”<sup>18</sup> as indicating Congress could have expected multicasting. Nothing in the quoted language even remotely relates to multicasting. That TWC’s reliance (at 13-14) on legislative history is similarly unavailing is shown by its concession that Congress “*could plainly have thought*” of

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<sup>16</sup> NCTA is simply wrong as well in suggesting that common usage and meaning of “primary” is one, NCTA at 9, or one could not use “primary” with plural nouns, as we have shown is indeed common, *e.g.*, primary colors, primary values, even primary reliance. See NAB/MSTV/ALTV Petition at 10-11. It is wrong as well to suggest that broadcasters, in advancing, along with cable, compromise proposals to the FCC in 1986 concerning *analog* must carry rules thereby acknowledged that there could be multiple audio or video streams, when what was under discussion was multi-channel sound, *i.e.* stereo, which was contained in the VBI and hardly constituted multiple audio programs. NCTA’s italicization of “multi-channel” throughout its discussion of this is at best misleading. NCTA at 9-10. Further, NCTA fails to explain why a 1986 *proposal* to the FCC should be viewed as proof of Congressional intent in 1992.

<sup>17</sup> See NAB/MSTV/ALTV Petition at 15. NCTA’s discussion of this issue, at n. 12, in pointing to two references buried in thousands of pages of comments as an indication of the general state of knowledge about the potential for multicasting is simply grasping at straws. The fact remains that multicasting was newly acknowledged as a concept within the scientific community at the time and was not even mentioned in an FCC document as even a possibility until the *Third Report and Order* in September, 1992. Congress then was completing final passage of the Cable Act that had long been under consideration and had long before included the term “primary video.”

<sup>18</sup> *R&O* at ¶56, quoting H. Rep. 101-1026, 101st Cong., 2<sup>nd</sup> Sess. (1990) 133-134.

TWC's interpretation (emphasis added). *Could have* is a far cry from *did*.<sup>19</sup> The absence of an articulable application of the Commission's reading of "primary video" even to analog signals, therefore, should lead it to reconsider its decision.<sup>20</sup>

#### **IV. The Commission Should Reverse Its Decision On Partial Signal and Priority Carriage.**

Cable commenters, in arguing for the ability to strike partial carriage deals with DTV stations, point out that the Commission's rules against partial carriage apply only to must carry eligible broadcast stations, which under the *R&O* do not include local DTV signals. Thus, they say DTV stations should not fall under the statutory direction of section 614(b)(3)(B) that cable operators shall carry "the entirety of the program schedule of any television station carried on the cable system." NCTA at 14-15; TWC at 19-20. NAB/MSTV/ALTV disagree.

One, the Commission, on reconsideration of the analog must carry rules, reversed its initial decision that the statute and the legislative history did *not* permit negotiation for partial carriage and narrowed application of section 614(b)(3)(B) to must carry eligible local stations because of specific compelling circumstances which do not exist here.<sup>21</sup> Those special circumstances had to do with negotiations for partial carriage of *distant, non-local* stations which could fill a hole left in cable carriage for reasons such as carried stations providing only adjacent state news (thus a need to fill in with distant but in-state news coverage) or must-carried network affiliates' not clearing network programming.<sup>22</sup> Not only do those special circumstances not exist here, the rationale pointed to by the Commission for applying carriage in the entirety to must carry eligible stations *does* apply with regard to DTV signals: Congress was concerned that the controlling market power of cable systems not overwhelm the ability of local broadcast stations to obtain carriage, and that the terms of carriage not be unreasonable.<sup>23</sup> Here, unless the Commission reverses its decision on the right of DTV stations to must carry, fledgling DTV

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<sup>19</sup> The Committee *did* say that it did not intend "to impede the use of technological improvements that better would facilitate the delivery of broadcast television programming to subscribers." H. Rep. No. 628, 102d Cong., 2d Sess. 93 (1992). Cable's reading of "primary video" would have precisely the result Congress sought to avoid.

<sup>20</sup> TWC (at 14) is in error in claiming that NAB/MSTV/ALTV relied on §614(b)(3)(B) in connection with our arguments on primary video. In fact, that argument related only to the issue of partial carriage.

<sup>21</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, ¶¶ 96-107 (1994).

<sup>22</sup> *Id.* at ¶99 and fn. 278.

<sup>23</sup> *Id.* at ¶101.

stations will be at the mercy of the cable gatekeeper for *any* access to 70% of its local audience. Cable could, under the protection of this provision, cherry pick prime DTV programming and forego full carriage agreements they otherwise might enter which would help drive the digital transition.

Two, local DTV signals, as we continue to assert, *are eligible* for must carry status under the terms of the 1992 Act and thus should be carried only in their entirety. The Commission should not bootstrap from one tenuous decision to another, to the detriment of the DTV transition and in derogation of Congressional intent.

Similarly, TWC (at 21) argues for the unbridled right to defeat the purposes and goals of the 1992 Act by urging strict adherence to statutory terms written for the analog world concerning cable's discretion to choose which local signals it will carry up to the one-third cap. While the enormous growth in cable capacity effectively removes any realistic concern over reaching the one-third cap, the theoretical possibility exists that cable might exclude some local broadcasters entirely while carrying both digital and analog signals of other (probably less competitive) broadcasters. For that unlikely situation, and in furtherance of the goal of must carry to preserve the entirety of the free over the air broadcast system, the Commission, under section 614(b)(4)(B)'s authority to adapt the rules for advanced television, should provide for priority carriage of one signal of each local broadcaster.

Cable simply cannot have it both ways. If they claim that DTV signals are not "eligible" for must carry, they should not be allowed to "count" them for purposes of the one-third must carry cap.

#### **V. Cable Would Have the FCC Endorse Material Degradation and Foil the Use of PSIP.**

Time Warner says that "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." TWC at 23. This statement is misleading in several ways. To equate format changes with efficient use of cable spectrum implies a reduction of bit rate during the conversion. But, as described in the NAB/MSTV/ALTV Petition (at 21), format changes alone may clearly result in material degradation (for example, 480P-to-480I conversion). And certainly, bit rate reductions may result in material degradation, whether the format is changed or not. Further, the statement that cable *can* change formats in ways that will not result in quality changes that are noticeable to the naked eye does not mean that they *will* do

so in only those ways. Therefore, the viability of a measurement standard for verifying the no material degradation rule is critical. As pointed out in our Petition (at n. 69), effective monitoring of material degradation is simply unworkable in any practical regulatory regime. The only reliable bright line test for no material degradation is not to tamper with the bit stream in the first place.

NCTA misstates the technical requirements of adopting a leave-the-bits-alone solution as proposed by NAB/MSTV/ALTV for implementing the no material degradation rule. NCTA suggests that this might require cable operators to incur extra expense “to install equipment and adopt technologies to accommodate the digital formats chosen by each local broadcaster.” NCTA at 16. This line of reasoning is wrong and in fact backwards. Special equipment (a format converter) is required to change a format of the broadcast signal to obtain a bit rate reduction or a format change. Nothing would be less costly for the cable operator than the NAB/MSTV/ALTV proposal to pass through the broadcast data stream in its entirety.

TWC also argues that the NAB/MSTV/ALTV proposal on PSIP should be rejected, arguing that program identification does not need to be numerically related to the analog channel number and that program name identification provided by the cable system’s EPG will be sufficient. TWC at 24. We disagree, and note that stations that have gone to considerable efforts over many years to brand their stations with their channel number. To relinquish that branding identity when the signal is delivered over cable is highly disadvantageous, from a marketing point of view, and potentially could be used in an anti-competitive way by the cable gatekeeper.

NCTA bases their anti-PSIP comments on the supposition that cable systems are only required to carry a broadcaster’s single video programming stream, and therefore do not need a two-part channel number (NCTA at 18), a decision on which we are seeking reconsideration from the Commission. The NCTA argument is thus rendered moot if the “primary video” decision is changed. Further, even if the FCC does not revise the “primary video” ruling, NCTA fails to show how a consumer would be able to select the DTV channel in preference to the NTSC channel from a broadcaster if they are both entitled to the same channel number under section 614(b)(6).

**Conclusion**

For the foregoing reasons and those set forth in the NAB/MSTV/ALTV *Petition for Reconsideration*, the Commission should reconsider the *Report & Order*.

Respectfully submitted,

**NATIONAL ASSOCIATION OF  
BROADCASTERS**

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

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

Lynn Claudy  
*NAB Science & Technology*

Joan Dollarhite  
*NAB Legal Assistant*

---

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

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

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

June 4, 2001

## **CERTIFICATE OF SERVICE**

I, Patricia Jones, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Reply to Oppositions of the National Association of Broadcasters was sent this 4th day of June, 2001, by first class mail, postage prepaid to the following:

Time Warner Cable  
c/o Henk Brands  
Kellogg, Huber, Hansen, Todd & Evans, PLLC  
1615 M Street NW  
Suite 400  
Washington, DC 20036

Daniel L. Brenner  
Michael S. Schooler  
Diane B. Burstein  
National Cable & Telecommunications Association  
1724 Massachusetts Ave NW  
Washington, DC 20036

Nickolas Davatzes  
President & CEO  
A&E Television Networks  
235 East 45th Street  
New York, NY 10017

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Patricia Jones