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June 4, 2001

VIA HAND DELIVERY

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JUN 4 2001

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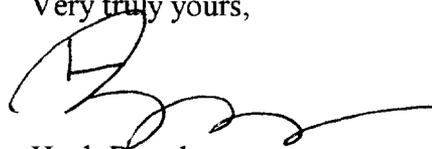
Re: *In the Matter of Carriage of Digital Television Broadcast Signals;  
Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120*

Dear Ms. Salas:

Please find enclosed for filing in the above-referenced proceeding the original and 11 copies of Time Warner Cable's Reply to Oppositions to Its Petition 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*

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
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JUN 4 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Carriage of Digital Television ) CS Docket No. 98-120  
Broadcast Signals )  
)  
Amendments to Part 76 of the )  
Commission's Rules )

**TIME WARNER CABLE'S REPLY TO OPPOSITIONS TO ITS  
PETITION FOR RECONSIDERATION**

Time Warner Cable ("TWC") respectfully submits this reply to oppositions to TWC's petition for reconsideration of two aspects of the Commission's First Report and Order in this proceeding.<sup>1</sup> In its petition, TWC demonstrated that the Commission erred by determining (1) that, upon a must-carry-eligible digital-only station's request, a cable operator must carry the station's signal in converted-to-analog format, and (2) that all "program-related" material in a digital signal must be carried. Broadcasters have filed oppositions to TWC's petition, but their arguments are meritless.

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<sup>1</sup>See *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*"). This reply addresses the oppositions of the Association for Maximum Service Television, Inc., the National Association of Broadcasters, and the Association of Local Television Stations, Inc. (collectively "NAB"), Gemstar-TV Guide International, Inc. ("Gemstar"), Guenter Marksteiner on behalf of WHDT-DT ("WHDT"), and Paxson Communications Corporation ("Paxson").

**I. DIGITAL STATIONS ARE NOT ENTITLED TO ANALOG CARRIAGE.**

The Commission determined that, upon request, cable operators must carry the signals of digital-only stations in analog format. *See Order* ¶ 74. TWC and others demonstrated that this requirement has no statutory basis and violates the First Amendment as well as the Administrative Procedure Act. *See TWC Pet.* at 1-3; *NCTA Pet.* at 3-6; *Adelphia Pet.* at 1-7.

**A. The Act Does Not Authorize the Commission to Require Analog Must-Carry with Respect to Digital-Only Stations.**

Broadcasters purport to find statutory authority for imposing analog must-carry of a digital-only station in Section 614(b)(4)(B), claiming that, “[o]nce it is established that a digital-only station is entitled to mandatory carriage, the Commission may adapt that requirement to ensure cable carriage of the station in accordance with the objectives of the Communications Act.” *NAB Opp.* at 3 (footnote omitted); *see also Paxson Opp.* at 2; *WHDT Opp.* at 4-9. But there is no such leeway in the statute. Section 614(b)(4)(B) applies only to “broadcast signals.” 47 U.S.C. § 534(b)(4)(B). At most, then, Section 614 would support must-carry status for a signal that is actually broadcast over-the-air. In the case of a digital-only station, that is a digital signal — not an analog signal. Thus, Section 614(b)(4)(B) does not authorize the requirement imposed.<sup>2</sup>

WHDT says that, to deliver a good-quality signal to a cable operator, some broadcasters convert their analog signal to a digital signal, transmit it over microwave or fiber-

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<sup>2</sup>Cable operators may, of course, *voluntarily* carry a digital broadcaster’s signal in analog format — or, for that matter, in any format, so long as no material degradation results. *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 20845, ¶ 65 (2000).

optic facilities, and then convert it back to an analog signal. On this, WHDT predicates the conclusion that conversion of a signal is irrelevant to carriage rights. *See* WHDT Opp. at 6-7. That conclusion does not follow. What a broadcaster does on its own to deliver its signal to the cable operator has no effect on what signal is entitled to carriage. Section 614(b)(4)(B) requires carriage of only a station's "broadcast signal" — not a signal that has been converted to a format different from the signal broadcast over the air. Indeed, in WHDT's example, the analog signal carried *is* the "broadcast signal": the signal delivered to the cable operator is identical to the signal broadcast over the air. That is not true when the over-the-air signal is digital and the signal carried on cable is analog.

Finally, WHDT claims that "local commercial television stations are broadly defined and have broad carriage rights," and that Section 614(b)(4)(B) should not be read as a limitation on those rights. *Id.* at 7; *see also id.* at 5-6 (referring to Section 614(a)). That theory does not work, either. Section 614(a) requires carriage only "as provided by" the balance of Section 614. Section 614(b)(4)(B) specifically addresses carriage of digital signals, and therefore trumps the more general provision of Section 614(a). *See* TWC Opp. at 4. Section 614(b)(4)(B) does not authorize the imposition of any conversion requirement. And, if there were any doubt on the matter, Section 624(f)(1) would put the matter to rest by forbidding must-carry requirements not "expressly provided" in the statute. 47 U.S.C. § 544(f)(1); *see also* TWC Pet. at 1-2.

**B. Requiring Analog Carriage of Digital-Only Stations Violates the First Amendment.**

Quite apart from Section 624(f)(1), there is a second reason why, even if there were any doubt whether the statute prohibits the Commission from imposing an analog-carriage requirement with respect to digital-only stations, the Commission should resolve that doubt by rejecting the broadcasters' argument: imposing the requirement would violate the First Amendment. *See* TWC Pet. at 2-3; TWC Opp. at 6 n.11.

Broadcasters attempt to defend the conversion requirement on the theory that analog must-carry has already been sustained by the Supreme Court and that analog carriage of a digital signal imposes no more onerous burden. *See* NAB Opp. at 4; WHDT Opp. at 12-13. The burden point is plainly a red herring. Even if the burden were merely equal, the fact remains that carriage of digital signals in analog format imposes a burden on protected speech. No such burden, no matter how small, is permissible unless it furthers an important governmental interest. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*").<sup>3</sup>

Broadcasters suggest that there *is* such an interest, saying that the requirement can be justified on the strength of the same rationale as that relied on in the *Turner* decisions. *See* NAB Opp. at 4; *see also* WHDT Opp. at 11-12. The *Turner* rationale was that cable operators had an incentive to drop broadcasters to make room for cable-programming services; that

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<sup>3</sup>Besides, the burden imposed by digital must-carry (whether or not the digital broadcast signal is converted to analog) is significantly greater than that imposed by analog must-carry: whereas most analog signals were already carried voluntarily, *see Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 217 (1997) ("*Turner II*"), new digital signals are not.

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 be left with fewer (or less well-financed) free, over-the-air television signals to watch. *See Turner I*, 512 U.S. at 632-34, 646-47. We have already explained elsewhere why this chain of reasoning cannot support any requirement to carry digital broadcast signals at all, *see TWC Opp.* at 8-9, and we will not repeat ourselves here.

We add only that, even assuming that the *Turner* rationale could support a digital must-carry requirement, it certainly could not support a requirement to carry digital signals in analog format. The Supreme Court did *not* uphold must-carry requirements as a way to preserve broadcast stations simply by giving them a cable-paid subsidy.<sup>4</sup> Instead, the Supreme Court endorsed must-carry as a means to ensure that the cable industry would not use its alleged ability to divert broadcast stations' audience to make them worse off than they would be without cable.<sup>5</sup> On that reasoning, one might at the very most attempt to justify a

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<sup>4</sup>*See Turner II*, 520 U.S. at 246 (O'Connor, dissenting) ("the must-carry provisions have never been justified as a means of *enhancing* broadcast television"); *see also id.* at 222 (majority opinion) ("[A] system of subsidies would serve a very different purpose than must-carry. Must-carry is intended not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households.").

<sup>5</sup>*See Turner II*, 520 U.S. at 226 (Breyer, J., concurring in part) (finding the statute justified by the "noneconomic purpose [of] prevent[ing] too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public"); *id.* at 228 (without the statute, "the quality of over-the-air programming on [broadcast television] stations would almost inevitably suffer"); *WLNY-TV v. FCC*, 163 F.3d 137, 139 (2d Cir. 1998) (must-carry counteracts "reduced viewership of noncable stations" resulting from cable viewers' supposed tendency not to "maintain an antenna to receive over-the-air signals").

requirement that a digital-only signal be carried in digital format, on the theory that digital-only stations should be protected from audience diversion. But it is entirely unclear how that rationale could justify ordering analog conversion, which exposes broadcasters to a vastly greater audience than they would have reached without carriage.

Without support from the *Turner* rationale, the conversion requirement collapses of its own weight. Broadcasters cannot rely on a second rationale that they have from time to time proposed — that carriage is necessary to encourage consumers to buy digital TV sets. As the Commission correctly noted in the *Order*, “digital-to-analog conversion will not provide an impetus for cable subscribers to purchase digital television sets.” *Order* ¶ 74; *see also* WHDT Opp. at 16 (“it is not the purpose of must-carry to promote the purchase of DTV receivers”). Nor do broadcasters seriously rely on a third rationale, which arguably is reflected in the *Order* — that converted carriage is necessary to persuade broadcasters to return their analog spectrum, thereby generating auction revenue. *See Order* ¶ 74; TWC Pet. at 2. In fact, broadcasters expressly distance themselves from that rationale, refusing to attribute to the Commission a motive that they consider “crass.” *See* WHDT Opp. at 12 n.13.

Broadcasters do propose a fourth rationale: that, because many cable subscribers do not subscribe to digital cable, lack of an analog-conversion requirement “would deprive such viewers of the programming of local broadcasters.” Paxson Opp. at 2; *see also* WHDT Opp. at 16 (conversion requirement “promote[s] the ability of [cable] viewers to see the programming of new DTV-only stations”). But if the rationale for an analog-conversion regime is to improve the mix of speech available to cable subscribers, it necessarily triggers 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. PROGRAM-RELATED DIGITAL MATERIAL IS NOT SUBJECT TO MUST-CARRY.**

As TWC demonstrated in its petition, program-related digital material that is not part of the primary video transmission is not entitled to carriage: the only program-related material required to be carried is that “in the vertical blanking interval,” which exists only in analog signals. 47 U.S.C. § 534(b)(3)(A); *Order* ¶ 60; TWC Pet. at 3. Broadcasters, relying on a supposedly “explicit mandate in Section 614(b)(4)(B) to adapt the cable carriage rules to the digital environment,” claim that the plain language of Section 614(b)(3)(A) should be cast aside on the theory that its express reference to the VBI is a “meaningless technological distinction.” NAB Opp. at 5-6; *see also* Gemstar Opp. at 1-2.

The Commission, however, is not free to disregard clear statutory limitations on must-carry obligations — as the Commission itself has acknowledged by refusing to ignore Section 614(b)(3)(A) insofar as the “primary video” limitation is concerned. *See Order* ¶ 57. That provision plainly limits the carriage obligation to “the primary video” and “program-related material carried in the vertical blanking interval.” 47 U.S.C. § 534(b)(3)(A). Because digital signals have no VBI, the carriage obligation does not extend beyond the “primary video.” And Section 614(b)(4)(B) affords no authority to disregard this unambiguous language. That

section does not imply authority to override explicit statutory limitations — particularly given applicable First Amendment concerns and Section 624(f)(1). *Id.* § 544(f)(1).<sup>6</sup>

Finally, Paxson is wrong in claiming that such authority can somehow be found in Section 614(b)(3)(B), which requires that the “entirety of the program schedule” of a must-carry-eligible station be carried. *Id.* § 534(b)(3)(B). According to Paxson, this provision is violated if a cable operator fails to carry “program-related” material. *See Paxson Opp.* at 3. But, as more fully explained in TWC’s opposition, Section 614(b)(3)(B) is not concerned with program-related material: it provides only that a cable operator may not delete individual programs from a primary video transmission. *See TWC Opp.* at 14. Moreover, if Section 614(b)(3)(B) required carriage of all program-related material, Section 614(b)(3)(A)’s requirement that certain program-related material be carried would be entirely superfluous, in violation of the settled canon of construction that all words in statutory text must be given meaning. *See Order* ¶ 54.

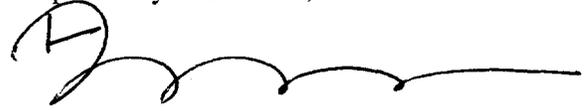
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<sup>6</sup>Even if the Commission had authority to “adapt” Section 614(b)(3)(A) to the digital context, the Commission could not reasonably require carriage of possibly program-related multicast streams. In contrast to such digital streams, which may consume five times as much bandwidth as the primary video transmission in a digital signal, the analog VBI consumes only a tiny fraction of the bandwidth of the primary video transmission in an analog signal. Allowing a VBI acorn to sprout into a multicasting oak goes well beyond adaptation.

**CONCLUSION**

For these reasons, TWC's petition for reconsideration should be granted.

Respectfully submitted,



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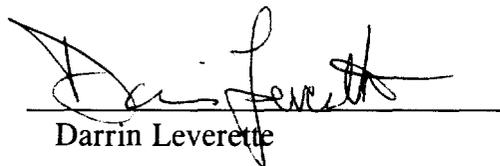
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June 4, 2001

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I hereby certify that, on this 4th day of June 2001, copies of Time Warner Cable's Reply to Oppositions to Its Petition for Reconsideration were served on the following by first-class mail, postage prepaid.



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