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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
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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

COMMENTS OF THE FOX AFFILIATES
IN SUPPORT OF THE NAB/MSTV/ALTV AND DISNEY
PETITIONS FOR RECONSIDERATION

The FBC Television Affiliates Association (the "Fox Affiliates"), representing the Fox network affiliates not owned by the Fox network itself, by its undersigned counsel, hereby files these Comments in support of the Petition for Reconsideration filed jointly by the National Association of Broadcasters ("NAB"), the Association for Maximum Service Television, Inc. ("MSTV") and the Association of Local Television Stations, Inc. ("ALTV") (hereinafter the "NAB Petition") as well as the Petition for Reconsideration filed by the Walt Disney Company ("Disney Petition"). These Petitions sought consideration of various decisions made by the

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Commission in the *First Report & Order* in the above-referenced proceeding.[1] The Fox Affiliates' comments below highlight various issues raised by those Petitions that warrant special attention from the Commission.

The Commission Should Require Full DTV Must-Carry During the Transition: The Commission should reverse its initial decision in this proceeding and order dual carriage during the DTV transition, including full DTV must-carry on those cable systems that have been upgraded to 750 MHz or more.[2] The NAB Petition convincingly demonstrates that the Commission has the authority to require full DTV must-carry under the 1992 Cable Act. DTV must-carry during the transition would also be fully consistent with the Telecommunications Act of 1996. In the 1996 Act, Congress ordered the FCC to issue second channels to every eligible broadcaster to ensure that the free, over-the-air broadcast industry remained competitive with the subscription based multi-channel video programming distributors ("MVPDs"). Ordering full DTV must-carry during the transition will break the stranglehold these MVPDs currently have on the over-the-air digital transition, where only those companies with significant economic leverage have any chance of securing carriage of their digital signal.

As recognized in the NAB Petition, there are also several important public policy reasons supporting such a requirement. First and foremost, Congress has intervened in the marketplace and established an aggressive target date of December 31, 2006 to complete the transition to DTV. This Congressionally-mandated target date is the polar opposite of a market driven result. Thus, the Commission's regulatory inclination to rely on market driven solutions must give way.

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[1] *See Carriage of Digital Television Broadcast Stations, First Report & Order*, FCC 01-22, CS Docket No. 98-120, released January 23, 2001.

Specifically, the target date established by Congress requires ambitious, aggressive actions by this Commission to ensure that the four industries vital to the transition to DTV – (i) over-the-air broadcasters, (ii) cable and satellite providers (so-called MVPDs), (iii) receiver manufacturers and (iv) content creators – each play their role in effectuating this Congressional mandate. To date, the only industry required to act by the Commission to meet this deadline is the broadcast industry. The sorry state of the DTV transition is the result – a transition that was appropriately characterized by then-Commissioner Powell as a "potential train wreck."[3]

Notwithstanding years of hand-wringing over DTV cable compatibility and DTV receiver standards, the Commission has yet to require any meaningful contributions to the DTV transition from any industry segment other than broadcasters. The Commission should act quickly and forcefully to break this inertia. Although admittedly beyond the scope of this proceeding, the Commission should require that every television set sold contain a chipset capable of demodulating an 8 VSB DTV signal. The Commission should also specify the minimum standards for DTV receivers — cable compatibility. In this proceeding, given that nearly 70 percent of the television homes in this country receive their video programming via cable MVPDs, the Commission must require these cable systems to carry the entire DTV signal of broadcasters if there is to be any chance of meeting this Congressionally-mandated DTV deadline.

This conclusion is hardly controversial. The Congressional Budget Office itself reached this same conclusion almost two years ago. Specifically, the CBO found that "a strong must-carry requirement for cable systems to carry DTV signals . . . will be necessary to achieve

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[2] By "full DTV must-carry," the Fox Affiliates refer to all portions of the 19.4 mbps digital transport stream that contain program-related material.

the mandated market penetration level by 2006 and end the transition."[4] The CBO also referred to DTV must-carry as the "most significant single determinant" in the pace of the DTV transition. It is hardly surprising that the DTV transition is currently stalled given the lack of a DTV must-carry requirement to date.

Contrary to the Commission's initial conclusion in the *First Report & Order*, the DTV must-carry rule supported by the Fox Affiliates will survive constitutional scrutiny because it is narrowly tailored to avoid excessive interference with the operations of cable systems. First, the dual carriage requirement would only apply to upgraded cable systems with significantly increased channel capacity. Second, as the Commission noted in the *First Report & Order*, today's digital compression technology will allow cable companies to carry DTV programming streams over less bandwidth than the 6 MHz channel currently devoted to the carriage of the analog signals.[5] Finally, the dual carriage requirement would only apply during the DTV transition period – a period that will be significantly shorter if the FCC reverses its initial decision and orders full DTV must-carry on all upgraded cable systems.

To the extent the Commission nonetheless concludes that it lacks the statutory authority to order dual carriage during the transition, including full DTV must-carry on upgraded cable systems, the Commission should immediately request that authority from Congress. DTV must-carry is essential to the ultimate success of the transition DTV. As the expert agency charged with regulatory and oversight of the communications industry, the Commission has an obligation to report any impediments to effectuate the expressed will of Congress in ensuring a smooth and timely DTV transition.

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3 *See Broadcasting and Cable* "Powell raises red flag over DTV switch," September 14, 1998, at 14.

4 "Completing the Transition to Digital Television" Congressional Budget Office, Chapter I (Sept. 1999).

5 *See First Report & Order*, ¶ 41, n. 115.

The Commission Should Clarify That All Program-Related Material in the DTV Signal Is Entitled to Must-Carry: The Commission should also reverse its initial decision and require that all the program related information in the broadcaster's DTV transport stream be carried by upgraded cable systems, regardless of whether the programming streams are interrelated feeds of the same program or independent, unrelated multiplexed programming streams. As noted by Disney in its Petition, the Commission should act in this proceeding "to ensure that cable television consumers enjoy unencumbered access to the full range of enhanced programming and services that will be available in the digital environment."[6] The Fox Affiliates wholeheartedly endorse Disney's assertion that the Commission's reading of the Cable Act to require cable carriage for only one independent programming stream in a multiplexed DTV signal "represents a quantum leap backward for consumers."[7]

The Commission's interpretation of the 1992 Cable Act and the command that a cable operator carry the "primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial broadcast signals carried" is flawed. As noted by Disney, the Commission's attempt to read the word "primary" used by Congress in 1992 in light of today's understanding of the possibilities of DTV is misguided.

The Fox Affiliates submit that the better reading of the word "primary" in the 1992 Cable Act, as suggested by Disney, is that it was used by Congress to describe the most important part of the broadcast signal to consumers – namely, the programming – as opposed to other portions of the broadcast signal of less importance to the consumer contained in the Vertical Blanking Interval. The Commission's attempt to limit the DTV programming streams that consumers are entitled to receive by fast forwarding the statutory language to a different

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[6] Disney Petition at 6.

[7] *Id.*

time and place stands the purpose of the 1992 Cable Act on its head. As Disney noted, "[i]t is unimaginable that, had it happened at that time, there would have been any serious question about whether cable operators could refuse to pass through color pictures. Yet the advancement of digital multicasting is of the same revolutionary character with even greater long-term impact."[8] Because the word primary was not used as the Commission initially interpreted it, the Fox Affiliates urge the Commission to reconsider its initial decision and require cable operators to carry all program related material in the DTV transport stream, regardless of whether the programming is interrelated or independent.

The Disney and NAB Petitions identify several important policy reasons justifying this change. From the perspective of the Fox Affiliates, the Commission should require full must-carry for multiplexed programming carried in the DTV transport stream because it will give DTV broadcasters extra incentive to build out their DTV channels. In medium to smaller sized markets, the business case for funding the construction of a DTV station is tenuous at best. The second station will require a significant capital investment (typically in the range of $500,000 - $1.5 million), significant increases in operating expenses (an estimated increase of $50,000 - $200,000 in power bills alone) while providing no readily available market of viewers for that station or advertisers to support it. An FCC decision ordering full DTV must-carry that includes multiplexed programming streams will help change that business model and give broadcasters some hope of a return on the enormous financial investment the construction and operation of the second station will require.

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[8] Disney Petition at 5.

Conclusion: The DTV transition stands at an important crossroads. For too long, the Commission has focused only on broadcasters in establishing requirements designed to facilitate the transition to DTV. To jump start the DTV transition, the Fox Affiliates urge the Commission to take the actions outlined in the Petitions for Reconsideration filed collectively by NAB, MSTV and ALTV as well as by Disney. Specifically, the Fox Affiliates urge the Commission to act now and order dual must-carry during the DTV transition, including full must-carry of all program-related material carried in the DTV transport stream regardless of whether that program material is interrelated or consists of independent, multiplexed programming.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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