

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

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 Retransmission of Broadcast Signals)	CS Docket No. 00-2
)	

**COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
ON THE FURTHER NOTICE OF PROPOSED RULEMAKING**

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The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its comments in response to the Federal Communications Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹ NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving more than 90 percent of the nation’s cable television

¹ Carriage of Digital Television Stations, 58 Fed. Reg. 16524 (Mar. 26, 2001) (“First Report and Order” and “Further Notice.”)

customers, and owners and operators of more than 200 cable program networks. NCTA also represents equipment suppliers and providers of other services to the cable industry.

INTRODUCTION AND SUMMARY

The Commission has entertained several rounds of pleadings comprising over a thousand pages of comments, and dozens of meetings with interested parties, on whether Congress in the 1992 Cable Act provided it with statutory authority to require cable operators to carry both the analog and digital signal of every television station, and whether imposing such a requirement would violate the Constitution.² It has been one of the agency's most thoroughly examined statutory questions in its 67-year history.

To date, the Commission has not adopted a double carriage requirement. Its January 2001 Report and Order reached the tentative conclusion that “based on the current record, a dual carriage requirement may burden cable operators’ First Amendment interests more than is necessary to further the important government interests they would promote.”³

In this Further Notice, the Commission proposed a variety of questions designed to update the voluminous record in order to assess whether requiring carriage of a broadcast station’s analog and digital signals during the transition period would pass constitutional muster despite the tentative conclusion. But the constitutional inquiry needs to be refined – and simplified. The agency need not declare that the First or Fifth Amendment would be violated by a dual carriage

² See e.g., Comments of the National Cable Television Association, filed Oct. 13, 1998; Reply Comments of the National Cable Television Association, filed Dec. 22, 1998, NCTA Petition for Partial Reconsideration, filed April 25, 2001; NCTA Opposition to Petitions for Reconsideration, filed May 25, 2001.

³ Further Notice at ¶112.

obligation. It need only determine that interpreting the statute to require dual carriage presents a “serious likelihood that the statute would be held unconstitutional.”⁴ It does.

The constitutionality of the analog must carry requirement – which Congress clearly required in the 1992 Cable Act – was a close call at the Supreme Court. It follows that imposing an even more burdensome must carry regime, one that Congress has nowhere expressly authorized, would face an even greater likelihood of being struck down. The FCC under these circumstances must read the statute to prohibit imposition of digital must carry prior to the return of the analog spectrum – a reading that is fully consistent with the language of the statute. It should finalize its tentative conclusion and not require carriage of digital television signals during the transition period.

Moreover, the Commission should narrowly define what material is “program-related” in the digital environment. It should also permit operators to carry digital signals on a digital tier during the transition period, where all customers will already be receiving analog broadcast signals on the basic tier.

I. THE COMMISSION LACKS STATUTORY AUTHORITY TO IMPOSE DUAL MUST CARRY

The Further Notice approaches the issue of whether a dual must carry requirement could be lawfully imposed as if it were primarily a matter of building a record to evaluate the relative harms that would be caused by any such obligation. But that puts the cart before the horse. Before ever getting to the constitutional question, however, the Commission as a threshold matter must have the statutory authority to impose a digital must carry regime during the transition.

⁴ Almendarez-Torres v. US, 118 S. Ct. 1219 (1998).

As NCTA and others showed at great length in their comments in this proceeding, the statute does not explicitly and unambiguously require dual carriage. To the contrary, the language of the statute indicates that the Commission cannot require carriage of a broadcaster's digital signal while that broadcaster is still transmitting an analog signal.

Section 624(f) of the Communications Act provides that “[a]ny Federal agency, State or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.”⁵ Thus, the FCC cannot impose dual must carry obligations unless Title VI expressly authorizes it. Accordingly, the Commission can find no implied or residual authority to adopt must carry requirements other than those set forth in Sections 614 and 615 of the Act.

Nothing in Title VI expressly authorizes or compels the Commission to require cable operators to carry broadcasters' digital signals along with their analog signals during the transition. Instead, Congress limited the FCC's authority in Section 614(b)(4)(B). That provision – entitled ADVANCED TELEVISION – specifically addresses the possibility that the NTSC broadcast signal standards might be changed and establishes carriage obligations in such circumstances. It directs the Commission 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.”⁶

⁵ 47 U.S.C. §544(f)(1)(emphasis added).

⁶ 47 U.S.C. §534(b)(4)(B)(emphasis added).

An analog signal that continues to be transmitted in the same format has not, in any sense, been changed merely because a new, second signal is being transmitted by the same broadcaster in a digital format. And the new digital signal cannot be said to have been changed from the analog signal while that analog signal is still being transmitted. The change-over can only be said to occur after the analog signal has been surrendered and a broadcaster is only transmitting in digital.

The Commission did not agree with NCTA's argument that the statute unambiguously foreclosed a dual carriage requirement. And it also rejected the broadcasters' argument that the statutory language compelled such a requirement.⁷ But contrary to the assumption in the Further Notice, the tentative "draw" between the two sides does not, in fact, put the question in play. Even arguing arguendo that the language is ambiguous, that does not leave the Commission with discretion to impose or not impose dual carriage. The Commission must still construe the statute in a manner consistent with established canons of statutory construction, including Section 614(b)(4)(B). It must look to the purposes of the statute. And, under the long-established Supreme Court doctrine of "constitutional doubt," a statute "[m]ust be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but grave doubts upon that score."⁸

There is no denying that, at the very least, the constitutionality of a dual must carry requirement would be on highly shaky grounds. Indeed, the Commission has tentatively concluded that such a requirement would fail to survive First Amendment scrutiny.⁹ Thus, to the

⁷ First Report and Order at ¶2.

⁸ United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

⁹ First Report and Order at ¶3.

extent that there is ambiguity about Congress' intent, the FCC must construe the statute in a manner that does not raise these constitutional problems.¹⁰

In other words, even if the provision requiring carriage of signals “which have been changed” does not unambiguously resolve the issue, the Commission is compelled to construe the language as foreclosing dual carriage because that construction is most consistent with the statutory purposes and avoids serious constitutional problems. As we now show, while the burden that dual carriage would impose on cable operators and program networks is exacerbated by the lack of excess available capacity to carry analog and digital broadcast signals, the constitutional burdens and problems would not disappear even if a particular cable operator had unlimited capacity to carry additional channels. A dual carriage requirement does not further any of the purposes of the must carry provisions of the statute. And it would substantially interfere with cable operators' and programmers' constitutional rights.

II. A DUAL MUST CARRY RULE WOULD BE INCONSISTENT WITH THE SUPREME COURT'S TURNER DECISIONS

As our initial comments and reply comments in this proceeding demonstrate, must carry proponents face insurmountable barriers to making a showing that a dual must carry obligation would serve any of the purposes of the must carry provisions of the statute, much less that it would do so in a narrowly tailored manner.

¹⁰ Solid Waste Agency v. Army Corps of Engineers, 121 S. Ct. 675, 683 (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. ... This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”)

A. Dual Must Carry Does Not Serve Any of the Governmental Interests Identified by Congress and the Supreme Court

Any dual must carry obligation must be shown to further an important governmental interest. But merely reciting the governmental interests addressed by the Turner court does not establish that digital must carry would serve those interests. As our initial Comments in this proceeding show, there are several critical distinctions between any possible digital must carry rules – especially dual carriage rules – and the analog must carry rules before the Supreme Court in Turner.

In contrast to the record regarding analog must carry, there are no congressional findings and scant materials in the legislative history with respect to digital must carry. Thus, as an initial matter, there is no showing that digital must carry is necessary to protect against any alleged harms to any important governmental interest. And, in fact, dual must carry would serve none of the governmental interests identified in Turner as justifications for adopting must carry requirements.

The Supreme Court identified three governmental interests asserted by Congress as reasons for adopting must carry rules: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.¹¹ But a majority of the court – the four dissenters and Justice Breyer – expressly did not agree that analog must carry could be justified by the third interest. Justice Breyer based his concurring fifth vote solely on the important governmental interest in “[p]roviding over-the-

¹¹ Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662 (1994); Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 189-190 (1997).

air viewers who lack cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate.”¹²

Every local analog broadcaster is carried today on virtually every cable system in its market. The Supreme Court found that such carriage served the governmental interest in preserving the benefits of free, over-the-air local broadcast television. There is no reason to believe that requiring additional carriage of a digital signal of the same broadcaster during the transition is necessary to protect the viability of that broadcaster, or that the absence of such a requirement will in any way diminish the availability or quality of broadcast signals available to non-cable subscribers.

Moreover, giving the same broadcast speakers access to additional space on a cable system that already carries their analog television signal hardly advances the other interest that Congress identified: ensuring access to a multiplicity of sources. Such a preference instead would crowd out voices of cable programmers that otherwise might provide diverse, non-duplicating programming in favor of those broadcasters that already have a government-bestowed preferred berth on cable systems.

B. Dual Must Carry Rules Cannot Be Based on an Interest in Accelerated Return of the Analog Spectrum

Since the governmental interests approved by Turner would not be served by dual must carry, it is no wonder that broadcasters in their previous comments in this proceeding have strained to concoct a wholly different alleged governmental interest as justification. Broadcasters now claim that it is necessary in order to hasten the end of the digital transition. But Congress

¹² Id. at 226.

expressed no such interest – and the Supreme Court never embraced any such interest – in adopting and upholding the must carry requirements at issue.

That is no surprise. An interest in hastening the day when analog signals disappear would be in direct conflict with Congress’ interest in protecting over-the-air viewers against the loss of broadcast service. Because when that day comes, over-the-air only viewers will lose access to all over-the-air television service unless they buy or lease a converter or purchase an expensive new digital television set. Accelerating the time by which these measures must be taken to get any over-the-air television at all can hardly be said to advance the government’s interest in protecting those same viewers against the loss of television service, the very government interest that analog must carry was intended to promote.

The Further Notice nonetheless asks several questions about the pace of the transition and the proper statutory interpretation of the 85% threshold for the analog spectrum return incorporated in the Balanced Budget Act of 1997.¹³ We have explained in our earlier comments why the legislative purpose of the contingent 2006 deadline was not to accelerate the analog spectrum give-back, but was, in fact, just the opposite. But as we now show, even assuming, arguendo, that the FCC could rely on an interest in hastening the digital transition as a justification for dual must carry, imposing such a requirement would not get the analog spectrum back.

¹³ Further Notice at ¶¶117-118. The Further Notice asks whether “the analog television license will be returned when 85% or more of the television households in a market either subscribe to an MVPD that carries all of the digital broadcast stations in the market or have a DTV receiver or digital downconverter to receive the digital signal over the air.” It appears that a television household will count toward the 85% threshold if either condition is satisfied. Therefore, the statute could be interpreted to require the spectrum to be returned even if cable customers could not view the digital programming carried on their cable system since they did not have a digital-to-analog converter and did not have a digital television set.

C. Cable Carriage of Digital Must Carry Stations Would Not Hasten the Transition's End

Cable operators serve 85% or more of the households in virtually no markets.¹⁴ So even if cable systems were to carry a digital signal from every broadcaster in the market, the transition would not end in the remaining cable markets – nor would the finish line be any closer in sight. The real end of the transition will hinge on the behavior of those households that do not subscribe to cable or any other multichannel provider. These are the households presumably least able to afford cable or least interested in television generally, hardly the prime candidates to purchase expensive digital television sets or invest in digital-to-analog converter equipment.

In any event, there is no reason to believe that a dual carriage requirement would even provide much, if any, incentive for cable customers to purchase digital sets.

1. Broadcast Stations Are Not Offering Much HDTV and Little Original Digital Programming

As the Further Notice recognizes, broadcasters have offered precious little original digital programming.¹⁵ In some cases digital television transmitters may only be turned on for certain hours of the day. In most cases, what is broadcast when those stations are on hardly resembles that which the American people were promised when they “loaned” the broadcasters \$70 billion worth of free spectrum.

Broadcasters obtained their additional digital spectrum on the promise of offering HDTV. But other than CBS's prime time schedule, hardly any HDTV programming is being broadcast.

¹⁴ The Congressional Budget Office report showed that in only four of more than 200 cable markets in the United States do more than 85 percent of the television households subscribe to cable and these are not major metropolitan areas. Congressional Budget Office, “Completing the Transition to Digital Television,” Sept. 1999 at Chapter II.

¹⁵ Further Notice at ¶120.

Rather, beyond a limited number of high definition programs, the programming on many of these digital channels appears to consist of upconverted standard definition analog signals.

The FCC has “urge[d] broadcasters to increase the amount of digital and high-definition programming,” believing that high definition programming in particular will help speed the transition to DTV.¹⁶ With respect to high definition programming, cable programmers offer more of that programming than all the broadcast networks combined – and certainly more than those broadcasters that rely on must carry for carriage of their analog signals. In fact, HBO alone shows several times more high definition programming than the four broadcast networks. In addition, Showtime, Madison Square Garden Network, A&E and Discovery all are producing high definition programming.

2. Few Consumers Have Purchased Digital TV Sets

In the face of a paucity of compelling high-definition digital programming, it is not at all surprising that few consumers have decided to invest the many thousands of dollars it takes to purchase a new digital television set. Last year, more than 25 million television sets were sold in the United States, and less than 3 percent – a mere 625,000 – were digital HDTV sets.¹⁷ Of those 625,000 digital sets, only about 27,000 are estimated to even have digital tuners; the remainder are simply designed to watch DVDs.¹⁸ At the current rate, one broadcaster suggested that “it will take 12,000 years for Americans to replace their 300 million analog TV sets with digital ones,” and “4,000 years before there’s at least one TV set in 85 percent of U.S. homes.”¹⁹ Even if it will

¹⁶ Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 00-39 (rel. Jan. 19, 2001) at ¶11.

¹⁷ “As Sales of HDTV’s Increase, Producers Ease Promotion,” The New York Times, Jan.8, 2001.

¹⁸ “Sony’s Grebow Pushes Digital,” Electronic Media, Apr. 30, 2001.

¹⁹ “HDTV Outlook for the Next 12 Millennia,” Electronic Media, Feb. 12, 2001 at 6 (citing Mark Hyman, Sinclair Broadcast Group Vice President of Corporate Relations.)

not take millennia for the switch-over to occur, experts including Chairman Powell²⁰ and Senator McCain²¹ have all voiced their skepticism that the transition will end anytime close to 2006.

3. Carriage of Duplicate Must Carry Digital Programming is Not Likely to Spur Interest in Digital Sets

Assuming the 85% figure cannot be realistically reached by double must carry, it is still maintained by broadcasters that must carry will somehow “speed the transition” by greater purchases of TV sets and the like. But there is no evidence, and it confounds reason, to believe that mandatory carriage of the digital upconverted version of stations lightly viewed in an analog format would have the slightest impact on television purchasing incentives.

The fact is, cable and over-the-air viewers overwhelmingly watch stations that elect retransmission consent.²² For better or for worse, these stations have a powerful tool for gaining digital carriage on a cable system – their analog broadcast station that is available in every cable customer’s home. Not only does that station provide leverage to the broadcasters to negotiate for carriage of its digital services. It also is an obvious means by which the station can drive interest in its digital television offerings, leading to more customer awareness of, and potentially demands for carriage of, the digital stations.

²⁰ Transcript of conversation between FCC Chairman Michael K. Powell and Sam Donaldson, NAB 2001 Convention (Apr. 24, 2001) (“I am one of those who is pretty openly critical that the [2006] date, as originally envisioned, will in any way be realized.”); Broadcasting & Cable, “Delaying Digital TV” (Jan. 29, 2001). (“Powell considers it unreasonable to expect that the industry can remake itself with new technology and replace consumer sets by 2006, the date when the government aims to take back analog spectrum if 85% of U.S. homes have digital sets. ‘I look in history in vain to find examples of consumer transformation, be it CDs from records to the introduction of VCR, to find any examples that show this complete a transformation in the time frame expected.’”)

²¹ Transcript of Mar. 1, 2001, Hearing on “The Transition to Digital Television Broadcasting,” U.S. Senate, Committee on Commerce, Service and Transportation at 3. (“But this much is clear: By 2006, this country will have neither the transmission facilities, nor the digital content, nor the reception equipment needed to ensure that 85% of the population will be able to receive digital television as their exclusive source of television.”) (Statement of Senator McCain.)

²² Further Notice at ¶128.

The precise details of any retransmission consent agreements for digital signal carriage are generally highly confidential. But several agreements have been publicly announced, as the Further Notice references. For example, AOL Time Warner has entered into comprehensive agreements for carriage of the digital signals of the four major broadcast networks, several station group owners, and a group of public broadcasters. AT&T has digital retransmission consent agreements with Fox and NBC, and continues discussions with other broadcasters. Comcast has reached a digital retransmission consent agreement with Disney/ABC. Several cable operators reached agreement to carry CBS's multicast of the NCAA basketball tournament this past year.²³ There are likely additional agreements for the carriage of broadcast station's digital signals on cable systems that have not been publicly announced.²⁴

In short, if the digital transition is to occur, it will be driven by marketplace interest in digital product. It is far more likely that digital broadcast stations carried pursuant to retransmission consent – or cable programmers providing digital fare – would be valued by cable customers than digital must carry stations. Intervening in that marketplace by forcing carriage of digital must carry stations would not speed the transition, but would simply interfere with customer preferences.

²³ See Testimony of Michael Willner, President, Insight Communications, Before the Hearing of the House Telecommunications and the Internet Subcommittee of the House Energy and commerce Committee, Mar. 15, 2001 (describing agreement with LIN Broadcasting in Indianapolis, IN).

²⁴ The Further Notice asks whether cable operators “[h]ave refused to discuss digital retransmission consent with several network affiliated groups” and, if so, “why haven’t cable operators entered into negotiations with network affiliated broadcast groups?” Further Notice at ¶129. From discussions with operators, it appears that a variety of factors explain why more agreements have not been reached. In many retransmission consent negotiations for the analog station, broadcasters have rarely mentioned carriage of their digital signal, instead demanding carriage of other things, like additional commonly owned non-broadcast programming services. Many stations still have no plans yet for how to use their digital spectrum – and simply demand carriage without any understanding of whether duplicate carriage will bring any value to cable customers.

D. A Dual Carriage Obligation Would Significantly Harm Operators and Programmers While Failing to End the Transition

Forcing cable operators to carry both analog and digital signals for any time period, regardless of the duration, will impose significant burdens on the protected speech rights of cable operators and cable programmers. Further, it will disrupt and interfere with the viewing preferences of cable customers on a scale that significantly exceeds the substantial burdens of analog must carry.

The Commission cannot reasonably expect cable operators to put plans on ice for offering customers services that they may desire so that broadcasters can gain an additional advantage – even if “temporary”²⁵ – by occupying channel space. As described below, that capacity remains scarce.

1. Cable Channel Capacity Remains Limited

The cable industry has been investing in the future. Cable operators have poured billions of dollars back to rebuild their systems to bring their customers better service and new choices. These upgrades have come in response to a variety of factors. Operators are competing for customers against DBS and other multichannel providers. DBS, in part due to its greater channel capacity, has a significant head start over cable in offering a variety of new services, such as multiple pay-per-view offerings and certain interactive services. Operators are delivering on the promises that the industry made in the mid-1990’s – promises to offer customers broadband

²⁵ Since cable carriage is not the determinant of the transition’s end, a time-limited dual carriage requirement, about which the Further Notice seeks comment, is an alternative to a permanent dual carriage requirement in theory alone. In fact, imposing a three-year waiting period could be the equivalent to a death sentence for many struggling or nascent cable program networks, and could effectively block the emergence of new networks yet to be developed. Unlike digital broadcasters, they do not have an analog twin on the basic tier in every cable home in their market. And unlike digital broadcasters, they are unable to reach their intended audience over-the-air. Placing additional obstacles in the way of gaining distribution will put severe strain on programmer finances – putting into suspended animation these new services that are struggling to achieve the widespread distribution critical to gaining vital advertising revenues and subscriber fees.

access to the Internet; wire schools and libraries; provide more diverse program offerings; improve system reliability; and expand the range of non-video services that they provide, including telephony in competition to the local telephone monopolies.

Cable programmers have been gaining viewership at the same time, through increasing investments in original programming at both the national and local level. Indeed, cable program networks have invested \$10.5 billion in original programming since 1999.²⁶ The cable industry has been doing its part to bring digital technology to its customers. Many systems now offer digital cable program networks that can be seen on existing analog television sets through digital-to-analog set-top boxes. More than 12 million customers subscribe to these diverse offerings.²⁷

All of this has been accomplished through private industry investments. The cable industry was not granted any government handouts for bringing these new services to customers. Nor was it given any government-bestowed guarantee of success. Cable customers get to choose every month whether cable provides them with the services they want – because they otherwise have multiple options for obtaining the video entertainment and non-video services that cable provides – free over-the-air, or through DBS and other competitors.

Now that the cable industry is in the process of building and utilizing this capacity to provide new services, broadcasters ask the government to conscript even more capacity for their use. However, the forced carriage of additional broadcast signals will obviously consume more channel capacity than was the case at the time the Supreme Court evaluated the constitutionality

²⁶ “Cable Programming Blossoms,” www.mediaweek.com (May 30, 2001).

²⁷ Sixty new digital networks have been introduced. These include Biography Channel and History Channel International (from A&E); Science, Civilization and Kids (from Discovery); Noggin, Nick Too and Nickelodeon Games & Sports (from Nickelodeon); style. (from E!); six new Hispanic channels from Liberty Canales, new music channels from MTV and BET, and separate channels targeting Indian, Italian, Arabic, Filipino, French, South Asian and Chinese viewers from the International Channel. Additional premium offerings are also available from HBO, Showtime and Starz! Encore.

of the analog must carry requirements. And, in fact, as NCTA's earlier comments documented, the burden on cable operators from analog must carry is of a different degree than would be the case with digital carriage. Most analog television stations were already being carried voluntarily by cable systems. This would not be the case with digital signals, signals that for the most part duplicate those analog signals already being made available by cable systems to their customers. Worse, and decisionally significant from a burden standpoint, forced carriage will consume additional channels for standard definition versions of that programming that will look little different on a digital television set from that already provided today.

Even if channel capacity were unlimited – which it decidedly is not – mandatory carriage would come at the expense of other, more valuable uses of that bandwidth. It would stymie cable's efforts to introduce new non-video services as well to their customers. And it would relegate cable programmers to second class status yet again behind broadcasters that, in many cases, have yet to show any innovative uses for the spectrum that they managed to “borrow” from the government on a promise of innovative high definition pictures.

The Further Notice seeks updated information about cable channel capacity.²⁸ System rebuilds have continued since the FCC first launched this proceeding. As of year-end 2000, Warren Publishing data show that about 62 percent of cable subscribers were served by systems with 54 or more channels.²⁹ Other estimates show that cable operators by year-end 2001 will have approximately 77 percent of their plant upgraded to 550 MHz and above.³⁰

²⁸ Further NPRM at ¶125.

²⁹ NCTA, Cable TV Developments 2001 at 13 (Warren Communications News, Inc., The Television and Cable Factbook, Volume 69, 2001).

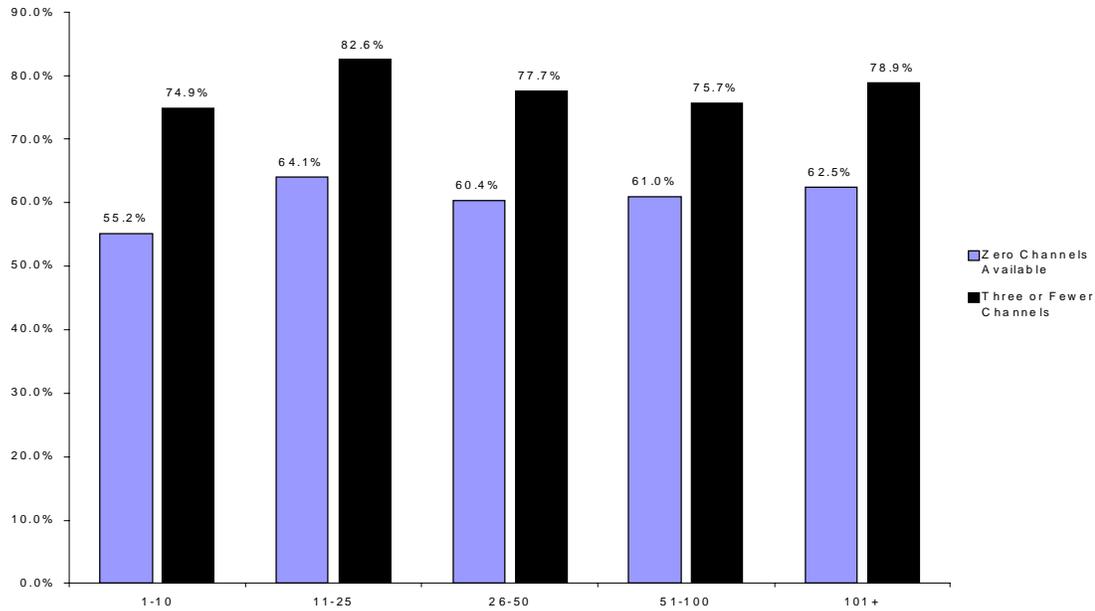
³⁰ NCTA, Cable & Telecommunications Industry Overview 2001 (Paul Kagan estimates.)

Some of those systems have been upgraded to 750 MHz capacity or higher.³¹ But as the Further Notice seems to recognize, the mere fact that a system has been upgraded to 750 MHz does not mean it has available capacity – or that additional carriage obligations would be justifiable.

Upgrades notwithstanding, available cable system channel capacity is still in short supply. According to Nielsen data, more than half of the cable customers in the United States subscribe to cable systems with no available channels. This is true in all the markets across the country, from the top ten television markets to above the top 100. Moreover, even where some capacity is available, it still is highly limited. Nearly 80 percent of cable customers subscribe to systems with three or fewer available channels.

³¹ Warren Publishing data show that 103 systems have 91 or more channels as of year-end 2000. NCTA, Cable TV Developments 2001 at 13. Kagan estimates for 2001 that 68 percent of cable homes will be passed by systems with 750 MHz capacity or more. NCTA, Cable & Telecommunications Industry Overview 2001.

**Analysis of Channels Available by DMA Rank (Weighted by Subscribers)
A.C. Nielsen**



Source: Nielsen Media Research, FOCUS database [formally Cable Online Data Exchange (CODE)], data as of May 31, 2001.

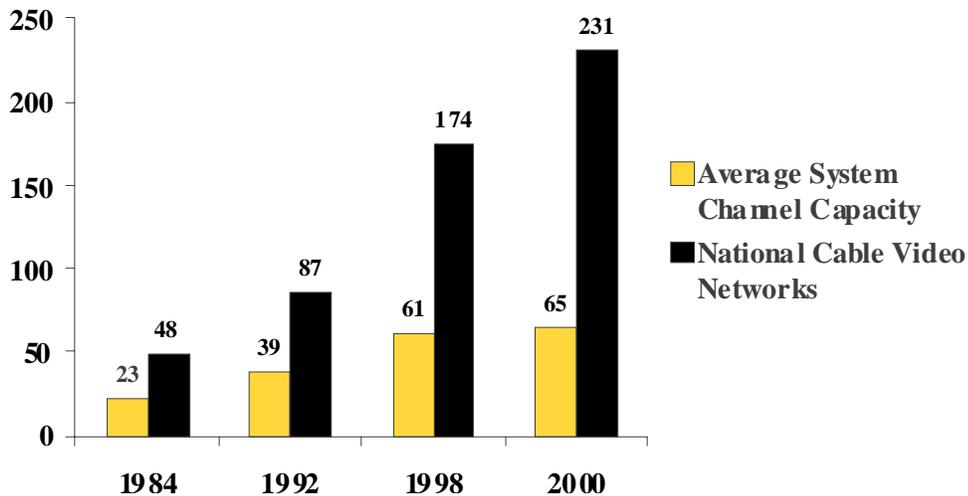
The fact that capacity remains tight is unsurprising. There are many competing demands for use of cable bandwidth. Cable operators have spent billions of dollars to increase capacity from under 550 MHz to above 550 MHz. The 550 MHz devoted to analog services will still be used to provide those analog services, since the vast majority of cable customers still have analog television sets and will continue to use them for the foreseeable future. But the 200 MHz in added capacity has been built to accommodate a wide range of innovative and desirable services, both video and non-video, well into the future.

A large portion of the newly constructed digital spectrum will be taken up with new video and non-video digital services – services like digital video, high definition programming, high speed Internet access (including multiple Internet service provider access), pay-per-view, video-

on-demand and near video-on-demand, telephony, digital audio, and interactive television applications. It will also be used for services under development, like IP telephony and other future uses which too will be competing for limited bandwidth. Thus, even a 750 MHz system may well be full up with existing services – and even if not, will have earmarked capacity for future uses depending on customer demand and market conditions.

Digital video uses alone continue to outpace increases in channel capacity. The number of national cable program networks has risen from 79 networks in 1990 to 231 networks in 2000 – nearly a threefold increase over ten years. While the average cable system has 65 channels of capacity, there are more than 280 national or regional cable program networks either launched today or expected to be launched soon.³² New networks – and even several more mature networks – are struggling to gain access to an audience that, unlike broadcasters, they can only reach through a multichannel video programming distributor like cable.

Increased Channel Capacity Continues to be Outpaced by Increased Number of National Cable Networks



Source: Channel Capacity: Paul Kagan Associate, Cable TV Programming, July 23, 1992, p.1 and August 31, 1997, p.1; NCTA Estimate Based On Warren Publishing Data 2001; Cable Networks: NCTA, Cable Television Developments 2001.

³² See Appendix for a listing of national and regional networks, as of year-end 2000.

2. Techniques for Recovering Capacity are Costly and Their Potential Utility is Speculative

The Further Notice suggests that there may be techniques to recapture additional capacity.³³ But the FCC should not base estimates of available capacity on the tenuous notion that more capacity might be squeezed out of existing plant. There are significant costs and risks associated with doing so.

For example, the FCC asks about operators' plans to use 256 QAM instead of the 64 QAM modulation used by most cable systems today. But moving to 256 QAM is not without its own costs and difficulties. For example, millions of set-top boxes already deployed in the field today use 64 QAM. A system would need to support these boxes and could not switch over to 256 QAM without stranding this investment. In addition, use of 256 QAM places greater demands on a cable system's performance. As a result, it may not be possible to offer 256 QAM unless an operator pushes fiber deeper into its system and uses less active devices in its system in order to minimize noise and distortion. Thus, switching to 256 QAM is not a foregone conclusion for any system, and the decision to do so will depend on an analysis of whether the benefits outweigh the costs of making the switch.

Another recovery technique that the Further Notice raises is premised on an operator taking some capacity currently used to provide analog channels and using that capacity to provide digital instead.³⁴ In theory, doing so will free up additional channels. But in practice, removing analog channels is not a viable strategy for most systems.

³³ Further Notice at ¶126.

³⁴ Id.

For the foreseeable future, most cable customers will continue to demand access to analog services for their existing television sets. Analog customers may well be angered if they lose services that they enjoy, or are only able to continue to view those services on television sets equipped with digital-to-analog converter boxes. At the same time, cable program networks that previously enjoyed carriage on an analog tier may lose access to a large base of their viewers due to shifts to a digital tier – and will be further disadvantaged vis-à-vis analog broadcasters, which will continue to occupy a preferred position on analog basic tiers that all customers of a cable system must buy before they even can view a cable program network.

* * *

In sum, a requirement to carry both analog and digital signals during the multi-year, open-ended transition to a fully digital environment would not serve any important governmental interest. Meanwhile, the burdens that such rules would impose on the First Amendment rights of operators and programmers would far exceed the significant burdens imposed by the existing analog rules. It is therefore hard to imagine how such rules could conceivably be deemed narrowly tailored to further an important government interest – now or in the future.

III. THE MUST CARRY RULES VIOLATE THE FIFTH AMENDMENT

But it is not just the First Amendment that poses a constitutional barrier to any Commission action here. The Fifth Amendment is implicated as well, as NCTA demonstrated in its earlier comments, including an analysis by Professor Laurence Tribe.³⁵ Must carry rules, insofar as they force cable operators to permanently cede the use of channel capacity to unaffiliated broadcasters, constitute a taking of property. Title VI of the Communications Act effectively forecloses any possibility of just compensation from broadcasters for such a taking.

And because Congress has not clearly authorized a requirement that cable operators carry broadcasters' analog and digital channels together, the Commission lacks authority to effectuate a taking that requires compensation by the government. Accordingly, any such requirement would run afoul of the Fifth Amendment, too. While the tentative decision did not make a finding on the Fifth Amendment, the Commission should rule on this constitutional issue as well.

A. Must Carry Rules Constitute a Taking of Property

The power to exclude others from one's property is a traditional property right. Indeed, “[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.”³⁶ Must carry rules do not simply regulate the manner in which cable operators use their systems. To the contrary, they give other entities – specifically, the operators' competitors – the right to use a portion of the operators' physical plants. This intrusion on the right of the operators to exclude others from the use of their property constitutes a compensable taking under the Fifth Amendment.

In Loretto v. Teleprompter Manhattan CATV Corp.,³⁷ the Supreme Court held that even a “minor but permanent physical occupation of an owner's property authorized by government constitutes a taking of property for which just compensation is due.” In that case, the taking was effectuated by a state law compelling apartment building owners to permit the attachment of cable operators' wires to the outside of their buildings. The attachment involved the occupation of a mere 1½ cubic feet on a building's roof.

³⁵ NCTA Comments at 32-37 (filed Oct. 13, 1998).

³⁶ Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). See also Nollan v. California Coastal Comm'n, 483 U.S. 825, 830-32 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

³⁷ 458 U.S. 419, 421 (1982)

In Bell Atlantic Corp. v. FCC,³⁸ the D.C. Circuit invalidated the Commission's physical co-location rules, which granted competitive access providers "the right to exclusive use of a portion of the [local exchange carriers'] central offices." According to the court, the Commission's decision "directly implicate[d] the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve.'"³⁹

Giving broadcasters exclusive use of cable channels on a continuing basis is no less a taking than granting cable operators the right to attach their wires to a small corner of a landlord's building or requiring local exchange carriers to permit co-location. It is tantamount to exercising eminent domain powers over – or effecting the nationalization of – a portion of the cable system. "When the Government has condemned business property with the intention of carrying on the business, as where public-utility property has been taken over for continued operation by a governmental authority[, and] the taker acquires going-concern value, it must pay for it."⁴⁰ The government cannot avoid this constitutional obligation by turning the condemned property over to private competitors instead of operating the business itself.⁴¹

³⁸ 24 F.3d 1441, 1445 (D.C. Cir. 1996)

³⁹ 24 F.3d at 1445 (quoting Loretto v. Teleprompter Manhattan CATV, *supra*, 458 U.S. at 426). See also Eastern Enterprises v. Apfel, 118 S.Ct. 2131, 2146 (1998) (plurality opinion) ("'It is against all reason and justice' to presume that the legislature has been entrusted with the power to enact 'a law that takes property from A. and gives it to B.'" (quoting Calder v. Bull, 3 Dall. 386, 388 (1798) (Chase, J.) (emphasis in original)).

⁴⁰ Kimball Laundry v. United States, 338 U.S. 1, 12 (1949). See also Los Angeles Gas & Elec. Corp. v. Railroad Comm'n, 289 U.S. 287, 313 (1933).

⁴¹ See Hawaii Housing Auth. V. Midkiff, 467 U.S. 229, 244 (1984).

The government's taking of only a portion of a landowner's property is no defense to a takings claim. If the government were to require cable operators to turn over their systems in their entirety to broadcasters, there would be no question that a taking had occurred. There is no constitutional exception that allows the government to avoid the Takings Clause by leaving some channels – even majority of the system's capacity – under the control of the cable operator. The Supreme Court has repeatedly rejected any such all-or-nothing principle.⁴²

B. There Is No Guarantee of Just Compensation

That a regulation effectuates a taking does not by itself, of course, render the regulation unconstitutional. But to pass muster under the Fifth Amendment, a taking must be accompanied by “just compensation,” and this means that “there must be at the time of taking ‘reasonable, certain and adequate provision for obtaining compensation.’”⁴³ And, to be adequate, compensation must represent “the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken.”⁴⁴

The Commission cannot provide a mechanism that guarantees adequate compensation for the forced carriage of both analog and digital signals together. It obviously cannot guarantee payment of just compensation by the broadcasters. Section 614(b)(10) of the Act flatly prohibits cable operators from receiving compensation from such broadcasters.⁴⁵

⁴² See e.g., Hodel v. Irving, 481 U.S. 704 (1987); Babbitt v. Youpee, 117 S.Ct. 727 (1997).

⁴³ Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-125 (1974) (quoting Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890)).

⁴⁴ United States v. Miller, 317 U.S. 369, 373 (1943).

⁴⁵ See 47 U.S.C. §534(b)(10).

Nor can the Commission guarantee compensation by the government. The Constitution vests Congress with the exclusive powers of raising revenue and appropriating money from the Treasury.⁴⁶ Accordingly, the courts have made clear that neither the Executive Branch nor administrative agencies may effect a taking that binds the government to pay Just Compensation under the Fifth Amendment unless there is clear congressional authorization for the taking.

In determining whether the Communications Act authorizes a Fifth Amendment taking by the Commission, the deference that is ordinarily afforded the Commission's construction of the Act does not apply.⁴⁷ Instead the operative rule is that the statute be construed where possible to avoid constitutional questions.⁴⁸ An administrative order that results in a taking, therefore, "must fall unless any fair reading of [the statute] would discern the requisite authority."⁴⁹

For these reasons, even if the Commission believes that the statutory language is ambiguous and does not on its face prohibit a dual carriage requirement, it must construe the language in a manner that does not authorize or compel dual carriage – and thereby avoids several serious constitutional problems.

⁴⁶ Art. I, §8, cl. 1; Art. I, §9, cl. 7.

⁴⁷ See Bell Atlantic Telephone Companies v. FCC, *supra*, 24 F.3d at 1445.

⁴⁸ *Id.* See Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). See also United States v. Security Indus. Bank, 459 U.S. 70, 78, 82 (1982) (rejecting construction of statute that would raise taking questions).

⁴⁹ Bell Atlantic Telephone Companies v. FCC, *supra*, 24 F.3d at 1446 (emphasis added).

IV. THE COMMISSION SHOULD ADOPT A NARROW DEFINITION OF “PROGRAM-RELATED” DIGITAL MATERIAL

The Further Notice seeks comment on whether certain theoretical uses of the digital spectrum might also piggy-back on a station’s must carry rights because they are “program-related material” under Sections 614 and 615.⁵⁰ The specific uses on which the Further Notice seeks comment are a digital television broadcast of a sporting event that uses multiple camera angles that a viewer might choose among, sports statistics that “complement” a sports broadcast, “detailed financial information to complement a financial news broadcast,”⁵¹ or “interactive enhancements like playing along with a game or chatting during a TV program.”⁵² And it also asks whether multicast educational programming aired by non-commercial stations could be considered “program related.”

These speculative examples merely highlight the hazards of expanding the scope of “program-related material” beyond the narrow range that Congress intended. The FCC to date has understood the tight fit necessary between the primary program being shown and the supplemental related material. The potential for unintended consequences and disruption to customers’ viewing experiences in the digital world – not to mention the potential for numerous disputes that the FCC would need to adjudicate – caution against loosening the stringent tests that have been adopted. Thus, to be “program-related” in the digital world, the information must be both integrally part of the single primary video and not ancillary or supplementary. As

⁵⁰ Further Notice at ¶122.

⁵¹ Id.

⁵² Id.

described below, most of the uses about which the Further Notice theorizes would flunk those tests.

A. The Statutory Language and Legislative History Demonstrate a Narrow Obligation

Section 614 requires carriage of “the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers.” The statute goes on to note that: “Retransmission of other material in the vertical blanking interval or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator.”⁵³

Congress at that time anticipated that broadcasters might seek to “enhance” the primary video and audio signal, but excluded these enhancements from any right to forced carriage. As the House Report accompanying the 1992 Act noted:

Subsection (b)(3)(A) requires that a cable system transmit in its entirety the primary audio and video signal and the closed captioning transmission of each local commercial television station carried on the system, and, to the extent technically feasible, also retransmit any program-related material transmitted by the broadcaster on a subcarrier or in the vertical blanking interval (VBI). The Committee intends that the cable operator shall retain discretion whether or not to retransmit other material which may be transmitted in the vertical blanking interval or on subcarriers which may be unrelated to the main program service. Carriage of other program-related material in the vertical blanking interval and on subcarriers or other enhancements of the primary video and audio signal (such as teletext and

⁵³ Section 615 imposes a similarly limited requirement on cable operators to transmit in its entirety “the primary video, accompanying audio, and line 21 closed caption transmission of each qualified noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator.” Section 615(g)(1).

other subscription and advertiser-supported information) is left to the discretion of the cable operator.⁵⁴

And Congress said that “program-related material” under Section 615 was intended to include integral matter such as subtitles for hearing-impaired viewers and simultaneous translations into another language. In fact, it expressly contemplated – and excluded – many of the uses raised in the Further Notice: “It was not meant to include tangentially related matter such as a reading list shown during a documentary or the scores of games other than the one being telecast or other information about the sport or particular players.”⁵⁵

In the analog must carry Order, the FCC added its own gloss to aid in evaluating whether material is “program-related,” relying on the test articulated in the WGN case: (1) the broadcaster must intend for the information in the VBI to be seen by the same viewers who are watching the video signals; (2) the VBI information must be available during the same interval of time as the video signal; and (3) the VBI information must be an integral part of the program.⁵⁶

Applying these tests, the FCC has identified only a handful of uses of the digital broadcast spectrum that are sufficiently closely related to the primary video to warrant a requirement that cable operators carry them. These include closed captioning information, program ratings data for use in conjunction with the V-chip function of receivers, Source Identification Codes used by Nielsen Media Research in the preparation of program ratings, and the channel mapping and tuning protocols that are part of PSIP.⁵⁷ NCTA does not oppose these common-sense

⁵⁴ H.R. Rep. No. 92-628, 102d Cong. 2nd Sess. 92-93 (hereinafter “House Report.”) See also S.Rep. No. 102-92, 102d Cong. 1st Sess. 85 (“The cable operator has discretion on whether to retransmit other material which may be transmitted in the vertical blanking interval or on subcarriers which are unrelated to the main program service.”)

⁵⁵ Id. at 101 (emphasis supplied.)

⁵⁶ First Report and Order at ¶61.

⁵⁷ Id.

explications of program-related materials, which are closely related to the primary video. The new uses raised in the Further Notice, however, go way beyond these narrow exceptions to operator discretion.

B. “Ancillary and Supplementary” Services Are Not Entitled to Carriage, Even if “Program-Related”

Indeed, many of the additional uses would not be entitled to must carry rights, even if related to the primary video, because they are “ancillary and supplementary.” The advent of digital television did not enlarge operators’ carriage obligation beyond this narrow focus. To the contrary, Congress in the 1996 Telecommunications Act narrowed it even further. The 1996 Act restricts carriage obligations by ensuring that “no ancillary or supplementary service shall have any rights to carriage under section 614 or 615...”⁵⁸ Thus, even if a service might be deemed to be “program-related,” a cable system cannot be forced to carry it at all if it falls into the ancillary and supplementary category.

The Commission has already delineated a wide variety of services that a broadcaster might offer that fall within this category, as the Report and Order recognizes.⁵⁹ These services include “[c]omputer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, [and] subscription video...”⁶⁰ The broadcaster may offer these enhancements free over the air or on a subscription basis⁶¹ – but in either case, they are ancillary and supplementary and hence are not entitled to mandatory carriage.

⁵⁸ 47 U.S.C. §336(b)(3).

⁵⁹ First Report and Order at ¶59.

⁶⁰ 47 C.F.R. §73.624(c).

⁶¹ Certain ancillary and supplementary services are feeable – those for which “the payment of a subscription fee is required in order to receive such services” or for which a broadcaster received compensation from a third party in return for transmitting material furnished by that party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required.) 47 U.S.C. §336(e)(1).

Thus, services like e-mail, chat, or interactive materials would be ancillary and supplementary and not entitled to forced carriage. While the FCC provided broadcasters flexibility to offer a variety of services using their digital spectrum, forcing cable carriage of these services has nothing to do with the purposes of must carry. Congress accordingly directed that must carry categorically would not attach to these types of ancillary or supplementary materials.

C. Multiple Video Program Streams Are Not “Program-Related” Within the Meaning of Sections 614 and 615

Other potential uses of the digital spectrum that the Further Notice describes, such as multiple camera angles and multicast educational programming, are far afield from what Congress had in mind in creating this narrow exception to operator discretion. A cable operator may be required to consume one additional digital channel for each camera angle – just as it would for each additional educational program service.

But the Commission has already determined that the primary video in the digital context means carriage of only one digital programming stream.⁶² There is no evidence that Congress intended to eviscerate this limitation by allowing broadcasters to sneak in additional carriage obligations by creating additional channels of video services, and the Further Notice fails to cite to any statutory support for such an expansion of carriage obligations.

Nor would it make sense from a policy standpoint to require such carriage. Additional bandwidth that might be forced to be set aside for carriage of multiple camera angles would come at the expense of other diverse services that viewers may well value more highly – such as a full-time cable program service.

⁶² First Report and Order at ¶57.

It is also impossible to square the narrow language of Section 615 with a broad obligation to carry all digital educational program streams. Section 615 governs carriage of program-related material aired by non-commercial educational stations, *i.e.*, material “that may be necessary for receipt of programming by handicapped persons or for educational or language purposes.” The legislative history of this provision confirms what a plain reading of the statute makes clear: Congress intended the program-related obligation to be a narrow one. In describing examples of educational uses of the vertical blanking interval that might be “program-related,” the House Report explains that “PBS also delivers lessons plans and other data on the VBI to accompany the educational programming delivered to the nation’s schools.”⁶³ This language describes a close fit between the main channel and the VBI material. It requires more than that an additional program stream might have “educational” material. Rather, this legislative history says the supplementary material must be integrally related to the primary video service required to be carried.⁶⁴

Merely because a separate program stream might be educational does not make it related to the primary educational video stream. The additional carriage duty is a program-related one. Congress limited that carriage obligation to carriage of the “primary video” of any non-commercial educational television station – that is, a single program stream.⁶⁵ This is not to suggest, however, that multicast educational public broadcasting services would not be carried absent must carry. In fact, negotiations are ongoing between cable operators and public stations over voluntary carriage arrangements.⁶⁶

⁶³ House Report at 101.

⁶⁴ *Id.* (explaining narrow reach of Section 615 “program-related” obligation).

⁶⁵ 47 U.S.C. §615(g)(1).

⁶⁶ *See* “PTV Stations, Cable Operators Pursue DTV Carriage Deals,” *Communications Daily*, Apr. 19, 2001 (describing discussions between public broadcasters and cable operators over digital carriage agreements.)

D. Cable Operators Need Only Carry Program-Related Material If “Technically Feasible”

A further limitation on subsidiary carriage requirements is particularly relevant due to the nature of digital transmissions. Carriage of “program-related” material is only required if “technically feasible.” In the analog world, the FCC has defined “technical feasibility” to mean that the operator generally is not required to “incur additional expenses and to change or add equipment in order to carry such material.”⁶⁷ The FCC should ensure that any new and different digital carriage obligations beyond those already addressed do not cause technical problems.

V. THE COMMISSION SHOULD PERMIT OPERATORS TO PLACE DIGITAL SIGNALS ON DIGITAL TIERS DURING THE TRANSITION

During the transition, cable systems will already be carrying the analog signal of every broadcaster (other than superstations) on the basic tier.⁶⁸ The FCC asks whether to allow operators and broadcasters flexibility to enter into retransmission consent agreements that permit digital signals to be carried on a digital tier during the transition.⁶⁹

That would surely be the right approach. To engage in any overly strict reading of the statute would be to impose a disincentive to cable carriage of digital signals during the transition. Tier placement should be an element of negotiation between the station and the cable system. If a broadcaster is willing to have its signal carried on the digital tier during the transition period, that should be the end of the matter.

⁶⁷ Report and Order, 8 FCC Rcd 2965, 2986 (1993).

⁶⁸ 47 U.S.C. §543(b)(7) requires that each cable operator shall provide its subscribers a separately available basic tier which at a minimum, consists of all must carry signals, any PEG channels, and any signal of any television broadcast station that is provided by the cable operators to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of the station. The FCC has exempted systems that face effective competition from this obligation. First Report and Order at ¶102.

⁶⁹ Id. at ¶132.

The Commission's rules should encourage, rather than stymie, experimentation and flexibility during this interim period. The marketing, packaging, and delivery of digital signals is still in an experimental stage. Requiring basic tier carriage during the transition would not make sense under these circumstances.

Moreover, to the extent that the Commission permits cable operators to carry digital signals on an unregulated digital tier during the transition period, there is little need to address the potentially difficult rate regulation questions alluded in the Further Notice.⁷⁰ Assuming that cable operators are not required to carry digital signals during the transition, the need to devise a new rate regulation methodology is minimized. After the transition, a cable operator presumably will simply carry the digital broadcast signal on its basic tier in lieu of the analog signal previously carried without occupying a new channel.

⁷⁰ Further Notice at ¶133.

CONCLUSION

The FCC was right to tentatively conclude, in its January 2001 decision, that a dual must carry requirement would be unconstitutional. We applaud the Commission for adopting a practical approach that relies on marketplace demand to determine cable carriage of digital programming. As a matter of policy, it would be a mistake to allow dual must carry during the transition to be the driver of the ultimate outcome of the provision of digital programming to cable customers. And, as a matter of law, neither the Communications Act nor the Constitution allows it.

Respectfully submitted,

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APPENDIX

NATIONAL AND REGIONAL CABLE PROGRAM NETWORKS

@Max	Planned Services
5StarMax	Planned Services
A&E Network (A&E)	National Video Services
AACN	Planned Services
ActionMax	National Video Services
AEI Music	Network Audio Services
All News Channel	National Video Services
AMC (American Movie Classics)	National Video Services
AMC's American Pop!	National Video Services
American Legal	Network Planned Services
American West Network, The	Planned Services
America's Store	National Video Services
ANA Television	National Video Services
Animal Planet	National Video Services
Anthropology Programming and Entertainment	Planned Services
Anti-Aging	Network Planned Services
Applause	Networks Planned Services
Arabic Channel, The	Regional Video Services
ART (Arab Radio & Television)	National Video Services
Asian American Satellite TV	National Video Services
Auto Channel, The	Planned Services
Baby TV	Planned Services
BAYTV	Regional Video Services
BBC America	National Video Services
Beauty Channel, The	Planned Services
BET (Black Entertainment Television)	National Video Services
BET Gospel	National Video Services
BET on Jazz: The Jazz Channel™	National Video Services
Biography Channel, The	National Video Services
Black STARZ!!	National Video Services
Black Women's TV	Planned Services
Bloomberg Television	National Video Services
Boating Channel, The	Other Services
Bonjour USA	Regional Video Services
Booknet	Planned Services
Box Music Network, The	National Video Services
Bravo, The Film and Arts Network	National Video Services
C/NET, Inc.	Other Services
Cable Radio	Network Audio Services
California Channel, The	Regional Video Services
Canal Sur	National Video Services

Canales ñ	National Video Services
Cartoon Network	National Video Services
Casa Club TV	Regional Video Services
CCTV-4	National Video Services
Celtic Vision	National Video Services
Central Florida News 13	Regional Video Services
CFN–TV Children's Fashion	Network Planned Services
ChicagoLand Television News (CLTV)	Regional Video Services
CHOP TV	Planned Services
Cinemax	National Video Services
Classic Arts Showcase	National Video Services
CMT: Country Music Television	National Video Services
CN8 - The Comcast Network	Regional Video Services
CNBC	National Video Services
CNN (Cable News Network)	National Video Services
CNN en Espanol	National Video Services
CNN Headline News	National Video Services
CNN Money	National Video Services
CNN/Sports Illustrated	National Video Services
CNNI (CNN International)	National Video Services
Collectors Channel	Planned Services
College Entertainment Network	National Video Services
Comcast SportsNet	Regional Video Services
Comcast SportsNet (Mid Atlantic)	Regional Video Services
Comedy Central	National Video Services
County Television Network SAN DIEGO	Regional Video Services
Courtroom Television Network (Court TV)	National Video Services
Crime Channel, The	National Video Services
C–SPAN (Cable Satellite Public Affairs Network)	National Video Services
C-SPAN 3	National Video Services
C–SPAN2	National Video Services
CTN- Chinese Television Network	National Video Services
Deep Dish TV	National Video Services
Discovery Channel	National Video Services
Discovery Civilization Channel	National Video Services
Discovery En Español	National Video Services
Discovery Health Channel	National Video Services
Discovery Home & Leisure	National Video Services
Discovery Kids Channel	National Video Services
Discovery Science Channel	National Video Services
Discovery Wings Channel	National Video Services
Disney Channel	National Video Services
DMX MUSIC	Audio Services
Documentary Channel, The	Planned Services

Do-It-Yourself	National Video Services
Dream Network, The	National Video Services
E! Entertainment Television	National Video Services
ECOLOGY Communications	National Video Services
Ecumenical Television Channel	Regional Video Services
Empire Sports Network	Regional Video Services
ENCORE Thematic Multiplex SM	National Video Services
Encore® National	Video Services
ESPN National	Video Services
ESPN Classic National	Video Services
ESPN Extra National	Video Services
ESPN Now National	Video Services
ESPN2 National	Video Services
ESPNEWS National	Video Services
ETC National	Video Services
Eurocinema	Planned Services
EWTN	National Video Services
Extasy	Other Services
FAD TV (Fashion and Design Television)	Planned Services
FASHION Network	Planned Services
Filipino Channel, The	National Video Services
FLIX	National Video Services
Food Network	National Video Services
FOX Family Channel	National Video Services
FOX Movie Channel	National Video Services
FOX News Channel	National Video Services
Fox Sports Latin America	National Video Services
FOX Sports Net (West)	Regional Video Services
FOX Sports Net 2	Regional Video Services
FOX Sports Net Arizona	Regional Video Services
FOX Sports Net Bay Area	Regional Video Services
FOX Sports Net Chicago	Regional Video Services
Fox Sports Net Detroit	Regional Video Services
FOX Sports Net New England	Regional Video Services
Fox Sports Net North	Regional Video Services
Fox Sports Net Northwest	Regional Video Services
FOX Sports Net Ohio	Regional Video Services
Fox Sports Net Pittsburgh	Regional Video Services
Fox Sports Net Rocky Mountain	Regional Video Services
FOX Sports Net South	Regional Video Services
Fox Sports Net Southwest	Regional Video Services
Fox Sports World	National Video Services
Fox Sports World Espanol	National Video Services
FoxNet	National Video Services
FREE SPEECH TV (FStv)	National Video Services

FX (Fox Basic Cable)	National Video Services
Galavision	National Video Services
Game Show Network	National Video Services
GEMS Television	National Video Services
GETv Program Network	Planned Services
Global Village Network	Planned Services
Golden Eagle Broadcasting	National Video Services
Golf Channel, The	National Video Services
GoodLife TV Network	National Video Services
Gospel Network, The	Planned Services
Great American Country (GAC)	National Video Services
Hallmark Channel, The	National Video Services
HBO (Home Box Office)	National Video Services
HBO Comedy	National Video Services
HBO Family	National Video Services
HBO Latino	National Video Services
HBO Plus	National Video Services
HBO Signature	National Video Services
HBO ZONE	National Video Services
Health Network/Web MD, The	National Video Services
Hip Hop Network	Regional Video Services
History Channel International, The	National Video Services
History Channel, The	National Video Services
Hobby Craft Interactive	Planned Services
Home and Garden Television (HGTV)	National Video Services
Home Shopping Network (HSN), The	National Video Services
Honey Vision	Planned Services
Hot Choice	National Video Services
Hot Networks, The	National Video Services
HTV	National Video Services
Idea Channel, The	National Video Services
iN DEMAND	National Video Services
Independent Film Channel, The	National Video Services
Inspiration Network (INSP), The	National Video Services
Interactive Channel	Other Services
International Channel	National Video Services
International Television Broadcasting, Inc. (ITV)	Regional Video Services
Investment TV	Planned Services
Ladbroke Racing Network	National Video Services
Learning Channel (TLC), The	National Video Services
Lifetime Movie Network	National Video Services
Lifetime Television	National Video Services
Lightspan Partnership, Inc.,The	Other Services
Local News Network	Planned Services

Locomotion Channel, The	National Video Services
Lottery Channel, Inc., The	Regional Video Services
Love Network, The	Planned Services
Madison Square Garden Network	Regional Video Services
Martial Arts Action Network, The	Planned Services
MBC Network, The	National Video Services
MBC Network, The	National Video Services
Melli TV	National Video Services
MGM	Regional Video Services
Michigan Government Television	Regional Video Services
Military Channel, Inc.	National Video Services
Moody Broadcasting Network	Audio Services
MoreMax	National Video Services
Movie Channel (TMC), The	National Video Services
MOVIEplex	National Video Services
MSNBC	National Video Services
MTV "S"	National Video Services
MTV "X"	National Video Services
MTV 2	National Video Services
MTV Latin America	National Video Services
MTV: Music Television	National Video Services
MuchMusic USA	National Video Services
Music Choice	Audio Services
My Pet TV	National Video Services
NASA Television	National Video Services
National Geographic Channel	National Video Services
National Jewish Television	National Video Services
Native American Nations Program Network (NAN TV)	Planned Services
New England Cable News	Regional Video Services
New England Sports Network (NESN)	Regional Video Services
New York 1 News	Regional Video Services
News 12 Bronx	Regional Video Services
News 12 Connecticut	Regional Video Services
News 12 Long Island	Regional Video Services
News 12 New Jersey	Regional Video Services
News 12 Westchester	Regional Video Services
NewsChannel 8	Regional Video Services
Newsworld International	National Video Services
NGTV – National Greek Television	Regional Video Services
Nick at Nite/Nick at Nite's TV Land	National Video Services
Nick Too	National Video Services
Nickelodeon GAS-Games & Sports Network	National Video Services
Nickelodeon/Nick at Nite	National Video Services

Nippon Golden Network	Regional Video Services
Noah's World International	Planned Services
Noggin	National Video Services
NorthWest Cable News	Regional Video Services
NTN Communications, Inc.	Other Services
NUE-TV	National Video Services
Oasis TV, Inc.	National Video Services
Ohio News Network (ONN)	Regional Video Services
Opportunity Television Network	Planned Services
Orange County NewsChannel	Regional Video Services
ORB TV	Planned Services
Outdoor Channel, The	National Video Services
Outdoor Life Network	National Video Services
OuterMax	Planned Services
OVATION - The Arts Network	National Video Services
Oxygen Media, Inc.	National Video Services
PAX TV	National Video Services
Pennsylvania Cable Network (PCN)	Regional Video Services
Performance Showcase	Planned Services
Pittsburgh Cable News Channel (PCNC)	Regional Video Services
Playboy TV	National Video Services
Pleasure	National Video Services
Praise Television	National Video Services
Product Information Network (PIN)	National Video Services
Proto x	National Video Services
Puma TV	National Video Services
Puppy Channel (SM), The	Planned Services
QVC	National Video Services
RadioTV	Network Planned Services
RAI International	National Video Services
Rarities-Exchange	Regional Video Services
Real Estate Network, Inc.- TREN®, The	Planned Services
Recovery Network	National Video Services
RomanceLand	Planned Services
Scandinavian Channel	National Video Services
SCI FI Channel	National Video Services
SCOLA	National Video Services
Seminar TV, The Seminar TV Network	Planned Services
Senior Citizens Television	Network Planned Services
Shop at Home	National Video Services
Short TV	National Video Services
Showtime	National Video Services
Showtime Beyond	National Video Services
Showtime Event Television	National Video Services
Showtime Extreme	National Video Services

Showtime Family Zone	National Video Services
Showtime Next	Planned Services
Showtime Women	National Video Services
Sí TV	Planned Services
Six News Now	Regional Video Services
SkyView World Media	National Video Services
Skywatcher Channel	Planned Services
Soapnet	National Video Services
Speedvision Network	National Video Services
Spice 1	National Video Services
Spice 2	National Video Services
SportsChannel Florida	Regional Video Services
STARNET	Other Services
STARZ!	National Video Services
STARZ! Action	National Video Services
STARZ! Cinema SM	National Video Services
STARZ! Family SM	National Video Services
STARZ! Love Stories	National Video Services
STARZ! MOVIEplex	National Video Services
STARZ! Mystery	National Video Services
STARZ! Theater	National Video Services
STARZ! True Stories	National Video Services
STARZ! WAM!	National Video Services
STARZ! Westerns	National Video Services
style.	National Video Services
Sun TV	National Video Services
Sundance Channel	National Video Services
Sunshine Network	Regional Video Services
SUPERAUDIO Cable Radio Service	Audio Services
TBN – Trinity Broadcasting Network	National Video Services
TBS Superstation	National Video Services
Tech TV	National Video Services
Telemundo	National Video Services
TeN – The Erotic Network	National Video Services
Texas Cable News	Regional Video Services
TFN, The Football	Network Planned Services
Theatre Channel, The	Planned Services
ThrillerMax	National Video Services
TNN	National Video Services
TNT (Turner Network Television)	National Video Services
Toon Disney	National Video Services
Travel Channel	National Video Services
TRIO	National Video Services
True Blue	National Video Services
Turner Classic Movies (TCM)	National Video Services

TV 5 – USA Inc.	National Video Services
TV Asia	National Video Services
TV Games	National Video Services
TV Guide Channel	Other Services
TV Guide Interactive	Other Services
TV Guide International	Other Services
TV Guide Online	Other Services
TV Guide Sneak Prevue	National Video Services
TV JAPAN	National Video Services
TV33	Regional Video Services
TVN Direct	Other Services
TVN Entertainment Corporation	National Video Services
TVR (TV Russia Network, Inc.)	National Video Services
Universal Torah Broadcasting Network	National Video Services
Univision	National Video Services
USA Network	National Video Services
UVTV/KTLA	National Video Services
UVTV/WGN	National Video Services
UVTV/WPIX	National Video Services
ValueVision	National Video Services
VH1 (Music First)	National Video Services
VH1 Country	National Video Services
VH1 Soul	National Video Services
WAM! America's Kidz Network	National Video Services
We: Women's Entertainment	National Video Services
Weather Channel, The	National Video Services
Weather Channel/Latin America, The	National Video Services
WeatherScan Local by The Weather Channel	National Video Services
WFMT	Audio Services
Wisdom Television	National Video Services
Wmax	Planned Services
World Cinema	Planned Services
Worship Network, The	National Video Services
Yesterday USA	Audio Services
Youth Sports Broadcasting Channel (Y.S.B.C.)	Planned Services
Z Music Television	National Video Services
Zee TV	