

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Carriage of Digital Television Broadcast Signals)	CS Docket No. 98-120
)	
Amendment 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
)	

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COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T"), by its attorneys, hereby files its comments in response to the Commission's Further Notice of Proposed Rule Making ("*Notice*") in the above-captioned proceeding.¹

¹ *In the Matter of Carriage of Digital Television Broadcast Signals*, First Rept. & Order & Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 01-22 (rel. Jan. 23, 2001) ("*Digital Must-Carry Order*" or "*Notice*"). For ease of reference, this comment will cite to the *Digital Must-Carry Order* when discussing items in the First Report and Order and to the *Notice* when addressing items in the Further Notice of Proposed Rulemaking.

I. INTRODUCTION AND SUMMARY

Some observers believe the digital transition is failing because sales of digital TVs and production of digital broadcast programming are lagging. They suggest that dual must-carry is necessary to jump-start the transition. AT&T disagrees with this view. In fact, the digital transition is not failing but *succeeding* impressively, and there is no factual, policy, or legal basis to support dual must-carry. Consider the following:

- Investment in digital facilities. AT&T has invested billions of dollars upgrading its cable facilities to provide its customers with new digital services. Over 74% of AT&T's broadband plant has been upgraded to at least 550 MHz with the majority of the network upgraded to 750 MHz; and 72% of the plant is two-way capable. On an industry-wide basis, cable has spent \$42 billion in facility upgrades since 1996, including \$12.4 billion in 2000 alone.
- Creation of new digital video programming. Cable programmers have already launched more than 60 new digital channels. Examples include the Biography Channel, History Channel International, Discovery Science and Discovery Kids, Noggin, and Nickelodeon Games & Sports. There are six new Spanish language channels offered by Liberty Cañales, new music channels from MTV and BET, and separate channels targeting Indian, Italian, Arabic, Filipino, French, South Asian, and Chinese viewers.
- Development of innovative new digital services. AT&T and other cable operators are experimenting with new digital services such as video-on-demand, personal video recorders, enhanced television, interactive program guides, and Internet-related services, such as e-mail and instant messaging.
- Consumer enthusiasm for digital services. Consumer demand for digital services has been extraordinary. AT&T now has over 3.1 million digital video customers, with 340,000 net additions for the first quarter 2001, a 54% increase from a year earlier. AT&T has witnessed similarly strong gains for its high-speed Internet and telephony services. AT&T now has approximately 1.3 million high-speed Internet subscribers, with approximately 206,000 net additions for the first quarter of this year, a 57% increase from a year earlier. Likewise, AT&T added approximately 153,000 broadband telephony customers in the first quarter, a greater than 100% increase from a year earlier.

By contrast, broadcasters' efforts to facilitate the digital transition have lagged significantly. Commission officials have described the broadcasters' digital efforts as "limited,"

“weak,” and “a bit of a letdown.” And it is widely assumed that the broadcasters will fail to meet their obligation to convert to digital by 2006. Certainly, on the basis of their digital efforts to date, broadcasters have no legitimate claim to preferential digital carriage.

Moreover, the focus in the *Notice* on whether cable operators have the capacity to carry both analog and digital broadcast signals is misplaced. Cable operators upgrade their system capacity for the sole purpose of providing their customers with services they desire, such as new non-broadcast video services, additional premium services, multiplexed versions of existing premium services, multiple channels of pay-per-view, and digital music services, as well as high-speed data services, Internet connectivity, and competitive telephony. Thus, even in upgraded systems, dual must-carry could deprive consumers of innovative and diverse video and non-video services, a result that is all the more unjustified because the digital broadcast programming would be duplicative of analog programming consumers already receive. AT&T submits that the question is not whether cable operators have the capacity to carry dual broadcast signals, but why, out of all the competing uses, broadcasters should receive a government guaranteed right to that capacity.

Not only is dual must-carry unjustified on public policy grounds, it would violate the Constitution. AT&T strongly supports the Commission’s tentative conclusion that dual must-carry would burden cable operators’ First Amendment interests substantially more than is necessary to further any important governmental interests it might conceivably promote, and urges the Commission to reaffirm that determination in this *Notice*.

The *Turner II* decision establishes an especially high hurdle for any Commission-promulgated must-carry regime. And, given the recent competitive developments in the MVPD marketplace, a reviewing court may apply an even higher burden on the Commission to justify

dual must-carry. Moreover, a dual must-carry requirement would not further any of the governmental interests identified in *Turner II*. Nor would it improve the prospect for a timely transition from analog to digital broadcasting.

Dual must-carry would also fail the First Amendment requirement that any restriction on speech be "narrowly tailored." A critical part of the justification for must-carry in *Turner II* was that the analog regulations did not burden substantially more speech than necessary because cable operators had carried most broadcast signals prior to the implementation of the rules. By contrast, each additional digital broadcast service afforded mandatory cable carriage would result in a 100% increase over current mandatory carriage, thereby *significantly* infringing on a cable operator's editorial discretion.

Similarly, the Communications Act prohibits dual carriage during the transition period. The plain language of Section 614(b)(4)(B) reflects Congress' intent to ensure retransmission of a high-quality signal *after* completion of the conversion by broadcasters to an advanced television format, not to expand the carriage requirement to include an additional digital broadcast signal *during* the transition period. Other provisions of the Act also cast serious doubt on the Commission's authority to impose dual must-carry.

Finally, AT&T recommends that the Commission define "program-related" content eligible for must-carry as content that: (1) satisfies the *WGN* standard²; (2) can be carried by a cable system in a technically-feasible manner; (3) is not fee-based or advertiser-supported; (4) is created and/or distributed by the broadcaster itself as opposed to a third-party purchaser/lessor;

² See *WGN v. Continental Broadcasting, Co. v. United Video, Inc.*, 693 F.2d 622, 624-25 (7th Cir. 1982) ("*WGN*").

and (5) does not constitute an “ancillary or supplementary” service. All of these criteria are based upon and consistent with specific provisions of the Communications Act.

II. A DUAL MUST-CARRY REQUIREMENT WOULD BE SQUARELY AT ODDS WITH SOUND PUBLIC POLICY.

Some observers believe that the digital transition is failing. They point to lower than expected sales of digital TVs, lagging production of digital broadcast programming, and the likelihood that broadcasters will not meet the 2006 deadline for return of their analog spectrum. They suggest that digital must-carry is a panacea that will jump start the digital transition.

AT&T disagrees with this view. In fact, the digital transition is *succeeding* impressively, and there is no factual, policy, or legal justification for dual must-carry. The transition to digital is not limited to the sale of digital TVs and the production of digital broadcast programming. It involves the deployment of digital cable facilities and equipment, the development of non-broadcast digital video programming, and the creation of new interactive digital services, such as video-on-demand, personal video recorders, enhanced television, interactive program guides, and Internet-related services, such as e-mail and instant messaging.

AT&T and the cable industry have been at the forefront of these efforts. AT&T has invested billions of dollars in recent years upgrading its cable facilities to provide its customers with new digital services. As of March 31, 2001, 74% of AT&T’s broadband plant had been upgraded to at least 550 MHz with the majority of the network upgraded to 750 MHz; and 72% of the broadband plant was two-way capable at the end of the quarter.³ On an industry-wide

³ See *First Quarter Earnings Were \$0.06 Per Diluted Share*, AT&T Group Earnings Commentary, Quarterly Update -- First Quarter 2001, Apr. 24, 2001, at 10-11 (“*AT&T Earnings Commentary*”).

basis, cable has spent \$42 billion in facility upgrades since 1996, including \$12.4 billion in 2000 alone.⁴

Likewise, cable programmers have already launched more than *60 new digital channels* offering consumers additional choice and further program diversity.⁵ Examples include the Biography Channel, History Channel International, Discovery Science and Discovery Kids, Noggin, and Nickelodeon Games & Sports. There are six new Spanish language channels from Liberty Cañales, new music channels from MTV and BET, and separate channels targeting Indian, Italian, Arabic, Filipino, French, South Asian, and Chinese viewers. In addition, cable programmers are leading the production of high definition programming. For example, HBO is already providing more HDTV programming in any given week than all the broadcast networks combined. Showtime, Madison Square Garden Network, A&E, and Discovery are also producing high definition programming.⁶

Consumer demand for digital services has been extraordinary. By the end of this March, AT&T had approximately 3.1 million digital video customers, with 340,000 net additions for the first quarter 2001, a 54% increase from a year earlier.⁷ AT&T has witnessed similarly strong

⁴ See NCTA Opposition to Petition for Reconsideration, filed in MM Dkt. No. 00-39, at 5 (Apr. 12, 2001); *Cable Television Handbook*, NCTA, Jan. 2001, at 1-C-3, available at <http://www.ncta.com/industry_overview/aboutIND.cfm?indOverviewID=50&prevID=1>.

⁵ See *Cable Television Handbook* at 1-D-3.

⁶ See Michael S. Willner, President & CEO, Insight Communications, Testimony before the House Subcommittee on Telecommunications and the Internet (Mar. 15, 2001), available at <<http://energycommerce.house.gov/107/hearings/03152001Hearing108/Willner143.htm>> (“Willner Testimony”).

⁷ See *AT&T Earnings Commentary* at 9. See also *Digital Cable and DBS Continue to Score Big Market Gains*, Comm. Daily, June 6, 2001, at 9 (noting that based on recent survey, (footnote continued ...))

gains for its high-speed Internet and telephony services. AT&T now has approximately 1.3 million high-speed Internet subscribers, with approximately 206,000 net additions for the first quarter of this year, a 57% increase from a year earlier. Likewise, AT&T added approximately 153,000 broadband telephony customers in the first quarter of this year, a greater than 100% increase from a year earlier. AT&T now provides telephony service to over 700,000 customers in 16 major markets, and has approximately 6.4 million marketable homes for telephony service.⁸

By contrast, broadcasters' efforts to facilitate the digital transition have lagged significantly. As the Commission's Mass Media Bureau Chief recently said, "[c]urrently, broadcasters are providing only a limited amount of digital content that takes advantage of the technology's capabilities."⁹ Chairman Powell agreed that digital programming "has been weak"

(... footnote continued)

digital cable penetration has increased from 10% to 21% over the last year and the market potential is 41%, and that consumers continue to cite more channels, better picture quality, and good value as leading reasons for upgrading to digital service). The cable industry as a whole has over 10 million customers who subscribe to a digital tier of programming, and this number of subscribers is expected to grow to 48.6 million by 2006. *See Cable Television Handbook* at 6-B-2.

⁸ *See AT&T Earnings Commentary* at 9.

⁹ Roy Stewart, Chief, Mass Media Bureau, *Digital Television Transition: Presentation to the FCC*, Apr. 19, 2001, at 7, available at <<http://www.fcc.gov/dtv>>.

and “a little bit of a letdown.”¹⁰ And, it appears increasingly unlikely that the broadcasters will meet the 2006 deadline for converting their technology to digital.¹¹

Certainly, on the basis of their digital efforts to date, the broadcasters have no legitimate claim to preferential digital carriage. This is especially true because cable operators have shown that they are willing to negotiate for carriage of digital broadcast programming. AT&T Broadband already has agreements with NBC and Fox to carry the digital signals of their owned and operated stations for the next several years,¹² and is actively negotiating retransmission agreements with other broadcasters. Other cable operators are reaching similar agreements.¹³ Some parties may argue that more digital carriage agreements should have been signed. But this overlooks the fact that there simply is not much digital broadcast programming available today.

¹⁰ Bureau of National Affairs, *Powell: FCC Must Be More Responsive, Restrained as Convergence Issues Call*, Communications Alert, Jan. 30, 2001, at 12.

¹¹ See Congressional Budget Office, *Completing The Transition To Digital Television*, Sept. 1999, at vii (“It now appears likely that the transition will extend beyond 2006 in most markets, with its ultimate date uncertain.”).

¹² See *AT&T Broadband & Internet Services and Fox Entertainment Group Enter Into Long-Term Retransmission and Digital Agreement for Fox Owned-and Operated Stations*, AT&T Press Release (Sept. 9, 1999); *NBC and AT&T Broadband & Internet Services Enter Into Long-Term Agreement on the Analog and Digital Future of NBC Program Services*, AT&T Press Release (June 10, 1999).

¹³ See Willner Testimony, *supra* n. 6 (referencing retransmission consent agreements of AOL Time Warner and AT&T). See also NCTA *Ex Parte*, filed in CS Dkt. No. 98-120, at 3, 12-14 (Nov. 1, 1999) (Stuart N. Brotman, “*Priming the Pump: The Role of Retransmission Consent in the Transition to Digital Television*”) (noting that “[r]etransmission consent thus works to promote programs that will attract viewers, and, if digital, may convince viewers to buy digital receivers that can display such programs in full resolution” and noting further that, if such programming does not convince consumers to buy digital receivers, “must-carry programming, which does not have the same market attraction, hardly can be expected to spur digital receiver sales”).

It is illogical to expect that a great number of digital carriage deals should have been reached for programming that does not yet exist. The more rational expectation is that cable operators and broadcasters will negotiate and resolve carriage issues as broadcasters roll out digital programming.

Moreover, the focus in the *Notice* on whether cable operators have the capacity to carry both analog and digital broadcast signals during the transition period is misplaced. First, dual must-carry would limit operators' ability to add new and diverse niche programming,¹⁴ as well as non-programming services such as competitive local telephony or high-speed data services. This will be true even as operators increase their channel capacity.¹⁵ This result is all the more unjustified because the digital broadcast programming would be largely, if not entirely, duplicative of analog programming that consumers already receive.¹⁶

¹⁴ Niche services are highly valued by cable customers. For example, the average prime-time ratings for the Travel Network increased 134% over the last year, and several other niche programmers made significant gains as well, including: The Food Network, up 38%; Animal Planet, up 36%; The History Channel, up 26%; and Toon Network, up 19%. *See Toon Extends Ratings Ascent*, Cable Program Investor, Feb. 16, 2001, at 8.

¹⁵ There are about 281 national satellite-delivered cable programming services (and many other regional and local cable programming services), *see In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, CS Dkt. No. 00-132, FCC 01-1, at ¶173 (rel. Jan. 8, 2001) (“*2000 Video Competition Report*”), many of which are not currently carried on AT&T systems due, in part, to capacity constraints. As systems are upgraded, AT&T is adding many of these services to the system’s channel lineup as well as new premium services, multiplexed versions of existing premium services, multiple channels of pay-per-view, and digital music services.

¹⁶ In fact, the Commission’s rules require broadcasters to simulcast their analog programming on their digital channels from 2003 until the analog spectrum is returned to the government. *See* 47 C.F.R. § 73.624(f). Even in the absence of the rules, however, broadcasters have made plain their intention to duplicate programming on their analog and digital signals. For example, Paxson’s Chicago digital television station multicasts six network feeds, including Eastern, Central, and Pacific time zone feeds of *exactly the same programming*. *See Paxson*
(footnote continued ...)

Second, it would be inappropriate for the government to force cable operators to carry digital broadcast programming just because they currently may have the capacity to do so. Indeed, as discussed further below, the courts have made clear that the government cannot require one speaker to carry the speech of another unless there is a compelling affirmative reason to do so. The mere fact that the speaker whose speech the government proposes to restrict may be capable of enduring the restriction without immediate commercial harm does not make the restriction lawful.

Finally, preferential digital carriage is unjustified in light of the diminishing importance of the broadcast industry in the video marketplace. As Chairman Powell has pointed out on several occasions, approximately 84% of all Americans subscribe to cable, DBS, or another multichannel service provider, and this plainly calls into question the continuing need for the government to protect the broadcast industry.¹⁷ Former Chairman Kennard expressed a similar view:

(... footnote continued)

Communications is First Broadcast Station Group in the U.S. to Multicast Six Network Feeds, Paxson Press Release, June 8, 2000, available at http://www.pax.tv/about/press.cfm?page_to_get=www.businesswire.com/webbox/bw.060800/201600231.htm. See also *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act*, Order on Reconsideration, 13 FCC Rcd. 19973, at ¶ 27 (1998) ("It seems likely that almost all of the programming content that becomes available in the early years of the transition to digital video reception will also be available in analog form . . ."); *Media Daily*, at No. 5, Vol. 4 (Apr. 6, 1998) (NBC indicating that it will simulcast analog programming on its digital feed because "[w]e don't have enormous surpluses of library materials that are going to make those other channels all that exciting.").

¹⁷ See, e.g., Michael K. Powell, Chairman, FCC, Press Statement on Dual Network Report and Order (Apr. 19, 2001) (noting dwindling importance of broadcast television given that "approximately 84% of all Americans subscribe to cable, DBS, or another multi-channel service provider . . . [and] with other 200 cable networks there are more sources of programming than any time in history."); Pamela McClintock, *Powell Expects Court To Overturn Ownership Reg.*, (footnote continued ...)

Broadcasters want the government to extend their right to cable carriage to new digital channels, asserting they bring a unique, free public service to America. As cable operators create local programming, particularly news and public affairs shows, and with almost three quarters of Americans actually paying to receive those channels, what remains that makes broadcasters unique? And is this uniqueness significantly tangible, demonstrable, and assured to justify requiring cable carriage?¹⁸

AT&T submits that the question is not whether cable operators have the capacity to carry dual broadcast signals, but why, out of all the competing uses, broadcasters should receive a government guaranteed right to that capacity.

III. A DUAL MUST-CARRY REQUIREMENT WOULD VIOLATE THE CONSTITUTION AND THE COMMUNICATIONS ACT.

AT&T strongly supports the Commission's tentative conclusion that dual must-carry would burden cable operators' First Amendment interests substantially more than is necessary to further any important governmental interests it might conceivably promote,¹⁹ and urges the Commission to reaffirm that determination. This is especially so because the Communications

(... footnote continued)

Daily Variety, Apr. 25, 2001, at 10 (noting that “[Chairman Powell] also confirmed that he believes the broadcasting industry could become endangered if it ignores the fact that 84% of the viewing public now pay for cable or direct satellite broadcasting”); *Powell Questions Future Role of Over-The-Air TV*, Comm. Daily, Apr. 6, 2001 (quoting Chairman Powell as saying “I think there are real questions about the changing nature of TV. . . . If 100% of Americans don't get free over-the-air TV, what are we protecting?”).

¹⁸ William E. Kennard, Chairman, FCC, Remarks to the International Radio and Television Society, New York, N.Y., Sept. 15, 1998, at 3.

¹⁹ See *Digital Must-Carry Order* at ¶ 3 (“[W]e tentatively conclude that, based on the existing record evidence, a dual carriage requirement appears to burden cable operators' First Amendment interests substantially more than is necessary to further the government's substantial interests of preserving the benefits of free over-the-air local broadcast television; promoting the widespread dissemination of information from a multiplicity of sources; and promoting fair competition in the market for television programming.”).

Act does not require -- and, indeed, does not permit -- the imposition of a dual must-carry obligation.

A. A Dual Must-Carry Requirement Would Be Unconstitutional Under the First Amendment.

In the 1992 Cable Act, Congress provided an explicit must-carry mandate predicated on specific findings and judgments regarding the need at that time for such regulation. Those must-carry obligations were ultimately upheld in the *Turner II* case as a permissible congressional response to the particular problems identified by Congress.²⁰

In its first examination of the 1992 Cable Act must-carry requirements in the *Turner I* case, the Court determined that they were “content-neutral” regulations subject to “intermediate” First Amendment scrutiny under *United States v. O’Brien*.²¹ That standard required the government to show that the regulations: (1) advanced a substantial governmental interest unrelated to the suppression of free speech; and (2) were narrowly tailored to further that identified interest.²² The Court remanded for fact-finding on these issues.

In *Turner II*, a 5-4 majority of the Court concluded that the identified congressional purpose of preserving the existing structure of the free, over-the-air broadcast television medium in order to promote diversity and preserve fair competition in the market for television programming was a substantial governmental interest and that the must-carry statutory scheme

²⁰ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”).

²¹ 391 U.S. 367, 377 (1968). See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”).

²² *Turner I*, 512 U.S. at 662.

adopted by Congress to achieve that interest was sufficiently narrow in its impact on the free speech rights of cable operators and programmers.²³

1. *Turner II* Establishes An Especially High Hurdle For Any Commission-Promulgated Must-Carry Regime.

The constitutional analysis prescribed in *Turner I* and applied in *Turner II* draws a significant distinction between a regulation explicitly imposed by Congress and one devised by a regulatory agency. The evidentiary basis for action where Congress has acted directly is to be measured “by a standard more deferential than we accord to judgments of an administrative agency.”²⁴ Indeed, the Commission’s past efforts to impose must-carry obligations on cable operators without explicit statutory direction were rejected on First Amendment grounds in the *Century* and *Quincy* cases,²⁵ and Congress has suggested that signal carriage obligations could *only* withstand First Amendment scrutiny if imposed pursuant to *Congressional* authorization, not agency rulemaking.²⁶

It is therefore important to emphasize that Congress has neither directed nor expressly authorized the Commission to adopt any dual must-carry requirement. That circumstance

²³ *Turner II*, 520 U.S. at 193; *see also Turner I*, 512 U.S. at 652.

²⁴ *Turner II*, 520 U.S. at 195.

²⁵ *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir), *cert. denied*, 486 U.S. 1032 (1988) (“*Century*”); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (“*Quincy*”).

²⁶ *See* H.R. Rept. No. 102-628 at 58 (1992) (“1992 Cable Act House Report”) (stating that Congress “recognize[d] that two previous versions of must-carry regulation *imposed by FCC rulemaking* were held unconstitutional by the United States Court of Appeals for the District of Columbia Circuit” but that these decisions did “not foreclose *Congress* from crafting valid regulations for cable carriage of local television signals”) (emphasis added).

requires the Commission to meet the tests for agency-initiated must-carry regimes established in *Century* and *Quincy*. In *Century*, the D.C. Circuit noted particularly that the usual deference to administrative agency expertise typical in judicial review of agency action under the Administrative Procedure Act ought not to be given where First Amendment freedoms are at stake.²⁷ Therefore, the Commission has a heavier burden than Congress had to meet in *Turner II* to show that there is a sound basis to believe that dual must-carry rules will serve a substantial governmental interest in a narrowly tailored way.

Analog must-carry implicates, at most, one channel per broadcaster and, even so, the requirements only narrowly survived judicial scrutiny. By contrast, dual must-carry presents the prospect that cable operators would be required to carry not just one but two channels per broadcaster. Given that any Commission action adopting dual must-carry would be subject to less deference than Congress enjoyed with the 1992 Act rules, and that dual must-carry poses a significantly greater burden than the 1992 Act rules, it is plain that a dual must-carry requirement would be unconstitutional.

2. Given The Significant Recent Competitive Evolution in the MVPD Marketplace, A Reviewing Court May Impose An Even Higher Burden to Justify A Dual Must-Carry Obligation.

In *Turner I* and *Turner II*, the Court applied “intermediate scrutiny,” rather than the more rigorous “strict scrutiny,” to the analog must-carry requirements. Its decision to do so was premised, in part, on the alleged “gatekeeper” characteristic of cable systems.²⁸ The dramatic and continuing evolution of the MVPD business creates a genuine likelihood that a reviewing

²⁷ *Century*, 835 F.2d at 299.

²⁸ *See Turner I*, 512 U.S. at 656.

court would revisit the question of the level of scrutiny to which a new must-carry regime would be subject. The Supreme Court has expressed a willingness to modify the standard applicable to a media outlet upon receiving some signal from Congress or the Commission that industry developments warrant a new approach.²⁹ Subsequent to *Turner II*, significant marketplace developments have substantially diminished -- if not eliminated -- any basis for a claim that cable operators have unique “gatekeeper” powers. For example, Congress enacted the Satellite Home Viewer Improvement Act (“SHVIA”) enabling DBS operators to carry local broadcast signals (and requiring that if any such signals are carried, then all signals in that market must be carried), thereby providing a ubiquitous additional outlet for broadcast programming.³⁰ Of course, the DBS industry has grown significantly since *Turner II* and now has over 16 million subscribers.³¹ The Commission has noted that the “significant increase in DBS subscribership has been attributed, at least in part, to the authority granted to DBS providers to distribute local broadcast television stations in their local markets”³² Similarly, the Commission has determined that DBS is a substitute for cable services and an increasingly important competitor

²⁹ See *FCC v. League of Women Voters of California*, 468 U.S. 364, 375 n.11 (1984).

³⁰ See Intellectual Property and Communications Omnibus Reform Act of 1999, Title I, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (1999).

³¹ See *2000 Video Competition Report* at ¶ 61 (“DBS is the principal competitor to cable television service with . . . a gain of almost three million subscribers, and an increase of over 28 percent since June 1999.”) In fact, DBS now accounts for approximately 18% of all MVPD subscribers. See Kagan Media Index, Apr. 25, 2001, at 8.

³² *2000 Video Competition Report* at ¶ 13.

to cable operators, partly due to SHVIA's elimination of the restriction on DBS delivery of local television broadcast network signals.³³

This material marketplace transformation justifies a reconsideration of the Court's approach and renders it entirely possible that hereafter reviewing courts will subject impingements on the First Amendment rights of cable operators to a higher level of scrutiny, a standard that a dual must-carry regime could never meet.³⁴

In any event, the analysis below demonstrates that, even under the less stringent requirements of intermediate scrutiny, the imposition of dual must-carry on cable operators has not been and cannot be justified.

3. A Dual Must-Carry Requirement Would Not Further A Substantial Governmental Interest.

The *Turner I* Court concluded that Congress had identified three substantial governmental interests to be advanced by the statutorily-prescribed analog must-carry requirements: “(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

³³ See *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, Report on Cable Industry Prices, MM Docket No. 92-266, FCC 01-49, at ¶ 53 (rel. Feb. 14, 2001).

³⁴ See *Time Warner Entertainment v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (“*Time Warner*”) (notwithstanding a statutory provision relating to restrictions on cable operators to ensure fair video competition, applying a somewhat less deferential level of intermediate scrutiny that requires the Commission to explain why alternative programming outlets are not sufficient to counteract perceived restraints on fair competition and explaining that the Commission must take into account such new alternatives as DBS).

(3) promoting fair competition in the market for television programming.”³⁵ These are the only bases on which any must-carry regime has ever been judicially sustained.

As noted, the Commission’s burden in demonstrating the existence of a substantial governmental interest for dual must-carry is greater than the burden that Congress must meet. And, as the D.C. Circuit recently reiterated in its decision vacating the Commission’s horizontal and vertical ownership limits, the Commission must demonstrate that substantial evidence in the record supports the conclusion that the governmental interests on which any such requirements are predicated are “real, not merely conjectural.”³⁶

To meet its obligation, the Commission might either attempt to rely upon the governmental interests acknowledged to justify analog must-carry in *Turner I* and *Turner II*, or it might attempt to resort to some rationale linked to the transition to digital television broadcasting. As shown below, there is no factual basis to link any of those potential rationales to any sort of dual must-carry obligation.

a. A Dual Must-Carry Requirement Would Not Promote The Availability Of Free, Over-The-Air Broadcast Television.

Dual must-carry will do nothing to preserve the availability of free over-the-air broadcast television for non-cable customers. Congress has permitted broadcasters to continue using analog channels indefinitely, until digital television is utilized by virtually all U.S. television households.³⁷ During the entire transition, these analog channels will be carried by cable

³⁵ *Turner I*, 512 U.S. at 662.

³⁶ *Time Warner*, 240 F.3d at 1130 (quoting *Turner I*, 512 U.S. at 664).

³⁷ See Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 § 3003 (1997) (codified at 47 U.S.C. § 309(j)(14)).

operators.³⁸ The inclusion of the entire universe of cable subscribers through analog must-carry renders broadcast audiences sufficiently large during the transition to attract advertising revenues for over-the-air broadcasters. Revenues received by broadcasters from their digital signal would be above and beyond their traditional analog-based revenues. Consequently, the absence of a dual must-carry obligation will not jeopardize the continued availability of free over-the-air broadcast channels for non-cable customers.

b. A Dual Must-Carry Requirement Would Not Increase The Number Of Information Sources.

The promotion of the widespread dissemination of information from a multiplicity of sources would not be advanced by a dual must-carry obligation. The existing analog must-carry requirements ensure that over-the-air broadcast voices continue to be heard on every cable system in the nation (as well as over the airwaves). A dual must-carry requirement would simply double the dose of the *same* broadcast voices and therefore do nothing to increase the number of information sources. Indeed, to the extent it limited a cable operator's ability to carry more unique, diverse non-broadcast program services, dual must-carry would actually *reduce* the number of information sources.

c. A Dual Must-Carry Requirement Would Not Achieve Improvements In "Fair Competition."

A dual must-carry requirement would not further the government's interest in fair competition in the market for television programming any more than the analog must-carry requirement ostensibly already has done. It is self-evident that the growth in competition for the delivery of video programming -- a phenomenon that has increased dramatically since the time

³⁸ See *Digital Must-Carry Order* at ¶ 7.

of the congressional findings relied upon by the *Turner II* Court -- counteracts any perceived abilities for cable operators to engage in anticompetitive behavior linked by the Congressional findings to horizontal and vertical concentration and relied upon by the Court in *Turner II*. Moreover, the ability to engage in favoritism toward affiliated programmers to the detriment of broadcasters has been eliminated entirely by the analog must-carry obligations. That is, broadcasters already are guaranteed a “seat at the table.” Apart from this interest, no other interests in “fair competition” were identified by Congress. Therefore, a transitional dual must-carry requirement would not advance “in a direct and material way” the asserted governmental interests that already have found their solution.³⁹

d. A Dual Must-Carry Requirement Would Not Improve The Prospect For A Timely Transition From Analog To Digital Broadcasting.

Broadcasters frequently assert that dual must-carry is required in order to accelerate the DTV transition. However, even assuming *arguendo* that it were permissible for the Commission to consider an additional governmental interest beyond the three governmental interests considered in *Turner II*, no broadcaster has ever explained -- nor could it -- *how* dual must-carry would accelerate the transition to DTV. In fact, given the negative effects of a dual must-carry requirement on program diversity and consumer choice, it likely would have the opposite effect. As the Commission has previously recognized, the best way to accelerate the digital transition is

³⁹ *Turner I*, 512 U.S. at 664 (citing *Edenfeld v. Fane*, 507 U.S. 761, 770-71 (1993); *Los Angeles v. Preferred Comm., Inc.*, 476 U.S. 488, 496 (1986); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1997)).

to offer consumers high-quality digital programming and services.⁴⁰ As noted above in Section II, AT&T and the cable industry generally have made significant progress in this regard. Indeed, if the Commission properly declines broadcasters' dual must-carry request, broadcasters will have a *greater* incentive to develop high-quality digital programming in order to compete more effectively with non-broadcast programmers. This, in turn, will make broadcasters' programming more attractive for carriage by cable operators and other MVPDs and will more likely motivate consumers to purchase DTV sets.

4. A Dual Must-Carry Requirement Would Fail the “Narrow Tailoring” Requirement.

Even if there were substantial evidence that dual must-carry rules would serve some substantial governmental interest, the Commission would still have to show that such rules were “narrowly tailored,” meaning that they restrict no more protected speech than is necessary to achieve their purpose.⁴¹ The First Amendment protects cable operators' editorial discretion.⁴² This editorial discretion involves the cable operator's selection of programming for its system, even where the speech itself originates from third-party programmers.⁴³ It cannot be credibly

⁴⁰ See *Advanced Television Systems*, Fifth Report and Order, 12 FCC Rcd. 12809, at ¶ 55 (1997) (citing comments of NAB) (“[M]any consumers' decisions to invest in DTV receivers will depend on the programs, enhanced features, and services *that are not available on the NTSC service.*”) (emphasis added).

⁴¹ See *Turner I*, 512 U.S. at 662.

⁴² *Id.* at 636 (“Cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)).

⁴³ See *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (“Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts.”) (citing *Hurley v. Irish-American Gay*, (footnote continued ...)

disputed that dual must-carry would impinge directly upon the cable operators' First Amendment right of editorial discretion.

The Supreme Court's conclusion in *Turner II* that the statutory analog must-carry requirements did not burden substantially more speech than necessary was based in significant part on evidence that cable operators historically had carried most broadcast signals prior to the adoption of the statutory requirements.⁴⁴ By contrast, cable systems today generally are not carrying local broadcasters' digital channels. Hence, a dual must-carry requirement during the transition imposes new burdens on the First Amendment rights of cable operators that are substantially greater than those considered by the *Turner* Court. Indeed, such a requirement might literally double the number of channels occupied by programming placed by government *fiat* rather than by cable operators' editorial discretion.

The substantial new burdens created by a dual must-carry requirement cannot legitimately be considered temporary or limited in duration. There is conceivably no end to the so-called "transition" period. However, even if one were to limit the requirement to a finite duration (such as, for example, three years⁴⁵), the burden of mandatory occupation of channels with programming other than that which the cable operator believes best serves the interests of

(... footnote continued)

Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 570 (1995) ("a speaker need not 'generate as an original matter, each item featured in the communication'").

⁴⁴ See *Turner II*, 520 U.S. at 214 (noting that "cable operators nationwide carry 99.8 percent of the programming they carried before enactment of must-carry."). Similarly, Congress was encouraged to draft the analog must-carry legislation because "the great majority of the capacity of any cable system . . . is unaffected by signal carriage regulations." 1992 Cable Act House Report at 62. In other words, the burden on cable speech was relatively small.

⁴⁵ See *Notice* at ¶ 118 (seeking comment on a three-year limit for dual must-carry).

its subscribers is no less onerous or constitutionally objectionable. The First Amendment's protections exist independent of temporal factors -- in this context, a temporary infringement on those rights is no less unlawful than a permanent one.⁴⁶

Moreover, the Commission's request for further information on current cable system capacity and forecasts for capacity growth invites a focus on information that is irrelevant to the constitutional inquiry. The narrow tailoring requirement focuses on the regulation, not the speaker. That is, it looks to the tailoring of the regulation, not how well the speaker can "handle" the burden. The constitutional inquiry is unconcerned with whether cable operators currently possess very limited channel capacity on their systems or enjoy currently unused capacity. Rather, it requires consideration of the question whether the simultaneous, mandatory carriage of both analog and digital broadcast signals (often with duplicative programming) for an unspecified period of time is "*no greater than is essential*" to further the Government's avowed substantial interest.⁴⁷

* * *

In sum, neither the interests sought to be achieved through analog must-carry, nor an accelerated DTV transition, would be promoted by a dual must-carry obligation. There simply is no legitimate governmental interest to be furthered by dual must-carry requirements that would justify the further impingement on cable operators' constitutional rights.

⁴⁶ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (in which the restriction on speech justifying a First Amendment inquiry lasted only a few hours). In addition, imposing a three-year waiting period could imperil struggling cable program networks, which, unlike digital broadcasters, do not have a companion analog service on the basic tier in every cable home in their market and are unable to reach their intended audience over-the-air.

⁴⁷ See *O'Brien*, 391 U.S. at 377 (emphasis added).

B. The Commission Lacks Statutory Authority To Impose A Dual Must-Carry Requirement On Cable Operators.

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.*”⁴⁸ However, nothing in Title VI expressly authorizes the Commission to require dual must-carry, and, in fact, several provisions bar, or cast serious doubt on the Commission’s authority to impose, dual must-carry.

For example, imposing digital must-carry on cable operators before broadcasters return their analog spectrum is inconsistent with Section 614(b)(4)(B), which requires the Commission, upon modifying the technical standards for broadcast signals, to “revise its rules “to ensure cable carriage of such broadcast signals of local commercial television stations *which have been changed* to conform with such modified standards.”⁴⁹ Under the plain language of this provision, cable operators’ obligation to carry digital broadcast signals does not apply unless and until the broadcasters *change* their method of broadcast from an analog to a digital format. If broadcasters continue to provide their analog signals, then the signals have not “been changed” and Section 614(b)(4)(B) has not been triggered. This analysis is fully consistent with the recent *700 MHz Order*, in which the Commission determined that “existing analog stations *that return their analog spectrum allocation and convert to digital* are entitled to mandatory carriage for their digital signals[.]”⁵⁰

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

⁴⁹ *Id.* § 534(b)(4)(B) (emphasis added).

⁵⁰ *In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, 15 FCC Rcd. 20,845, at ¶ 65 & n. 128 (2000) (“700 MHz (footnote continued ...)”

There are other statutory provisions that raise serious questions about the Commission's authority to impose dual must-carry as well. For example, Section 614(b)(5) states that cable operators may not be required to "carry the signal of any local commercial television station that *substantially duplicates* the signal of another local commercial television station which is carried on its system."⁵¹

The Commission already has required broadcasters to "simulcast" their programming on their analog and digital channels from 2003 until the analog channel is returned to the government.⁵² Moreover, broadcasters have made a business judgment to carry duplicative programming on their analog and digital broadcast signals prior to 2003.⁵³ Since Section 614(b)(5) *precludes* mandatory carriage of duplicative content and since the Commission's simulcast rule *requires* simultaneous broadcast of duplicative content (and, at any rate, broadcasters have chosen to duplicate), must-carry of both a broadcaster's analog and digital signals during the transition period would appear especially problematic under Section 614(b)(5). In fact, the Commission has already indicated that, because a simulcast requirement would result

(... footnote continued)

Order") (emphasis added). *See also Digital Must-Carry Order* at ¶ 7 ("[T]he Commission stated [in its *700 MHz Order*] that existing analog stations that return their analog spectrum allocation and convert to digital are entitled to mandatory carriage for their digital signals[.]").

⁵¹ 47 U.S.C. § 534(b)(5) (emphasis added). Similar non-duplication restrictions apply in the case of network affiliates, *see id.*, as well as noncommercial educational broadcast television stations. *See id.* § 535(e). Consequently, the foregoing analysis applies in these circumstances as well.

⁵² *See* 47 C.F.R. § 73.624(f).

⁵³ *See supra* note 16.

in "carrying duplicative programming" on both the digital and analog channel, both stations need not be carried.⁵⁴

The argument that Section 614(b)(5) is inapplicable because it addresses duplicative programming by two different broadcast stations is unavailing. First, a "local commercial television station" under Section 614 is "any full power television broadcast station . . . licensed and operating on a *channel* regularly assigned to its community . . ."⁵⁵ There is no doubt that the digital transmission takes place on a channel separate from the analog channel. Therefore, two stations, not one, are operating during the transition. Indeed, the Commission's rules contain a separate Digital Table of Allotments and a standalone section, entitled "Digital Television Broadcast *Stations*," which provides that "Digital television ("DTV") broadcast *stations* are assigned channels 6 MHz wide."⁵⁶

Second, such an interpretation is at odds with Congress' focus on ensuring that the carriage rules do not reduce diversity by requiring the carriage of duplicative content. In enacting the must-carry requirement in the 1992 Cable Act, Congress noted that "[i]f there are

⁵⁴ See *In Re Advanced Television Systems*, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, 10 FCC Rcd 10540, at ¶ 82 (1995).

⁵⁵ 47 U.S.C. § 534(h)(1)(a) (emphasis added).

⁵⁶ 47 C.F.R. § 73.624(a) (emphasis added). Moreover, the Commission has recognized that the digital and analog facilities of a broadcaster are separate local commercial television stations in granting broadcasters a waiver of the Commission's multiple ownership rules, including the duopoly rule. See *In Re Advanced Television Systems*, Second Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd. 3340, at ¶ 17 (1992) ("We will suspend application of the television multiple ownership rules, 47 C.F.R. § 73.3555, for ATV stations on a limited basis. . . . We will thus permit existing licensees that are awarded an additional ATV channel to hold both their NTSC and ATV licenses, even though their signals overlap . . . until such time as existing licensees are required to convert to ATV service exclusively.") (citations omitted).

duplicate qualified signals, the cable operator is not obligated to carry more than one since carriage of duplicate signals would do nothing to increase the diversity of local voices.”⁵⁷ Congress made clear that “substantially duplicates” refers to the simultaneous transmission of “*identical programming*.”⁵⁸ The fact that broadcasters use different transmission *formats* to deliver their analog and digital signals is irrelevant to Congress’ goal of ensuring that a cable operator is not required to sacrifice valuable channel capacity by carrying the same *content* on two different channels.

Finally, even if the Commission were to determine that a broadcaster's digital and analog feeds were not separate stations but a *single* local television station for purposes of Section 614(b)(5), the statute would still preclude a requirement that cable operators carry *both* signals. As the Commission recently held, the statute provides that a cable operator may only be required to carry the *primary video* feed of each local broadcast station eligible for must-carry.⁵⁹ Consequently, to the extent that a broadcaster is a single station transmitting two signals, a cable operator’s must-carry obligation would be satisfied by carriage of the broadcaster’s analog signal.

⁵⁷ 1992 Cable Act House Report at 66.

⁵⁸ *Id.* at 94 (emphasis added).

⁵⁹ *See Digital Must-Carry Order* at ¶ 57.

IV. DEFINITION OF “PROGRAM-RELATED.”

A. The Commission Should Define “Program-Related” As Content That Satisfies The WGN Standard And Certain Other Statutory Requirements.

The Commission has thus far defined program-related content narrowly to include that which is “an integral part” of the particular program received by the viewer,⁶⁰ such as closed captioning information, V-chip program ratings data, Nielsen ratings data, and channel mapping information.⁶¹ It has also rejected petitions to expand the scope of program-related beyond what was contemplated by Congress,⁶² and has ruled that program-related does *not* extend to:

(1) Internet offerings, such as e-commerce applications;⁶³ (2) program guide data that are not specifically linked to the video content of the digital signal being shown;⁶⁴ and (3) multicast services.⁶⁵

Consistent with this precedent, the Communications Act and its legislative history, and the Supreme Court’s *Turner* precedent, the Commission should define “program-related” content

⁶⁰ See *In Re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 6723, at ¶ 50 (1994) (“1994 Must-Carry Reconsideration Order”).

⁶¹ See *Digital Must-Carry Order* at ¶¶ 57, 61.

⁶² See, e.g., *1994 Must-Carry Reconsideration Order* at ¶ 46 & n. 151 (rejecting NAB’s proposal to require cable carriage of “material which supplements the main program service of the broadcaster,” such as previews of upcoming programs or a program schedule which may not be related to the main program being aired at the time).

⁶³ See *Digital Must-Carry Order* at ¶ 60 (noting that “carriage of Internet offerings by a cable operator would likely not be required under the must carry provisions”).

⁶⁴ See *id.* at ¶ 64.

⁶⁵ See *id.* at ¶ 57 (“[I]f a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage.”).

as content that: (1) satisfies the *WGN* standard; (2) can be carried by a cable system in a technically-feasible manner; (3) is not fee-based or advertiser-supported; (4) is created and/or distributed by the broadcast licensee itself as opposed to a third-party purchaser/lessor; and (5) does not constitute an “ancillary or supplementary” service. AT&T explains each part of this proposed test below.

1. WGN Standard.

AT&T agrees with the Commission’s determination in the *Digital Must-Carry Order*,⁶⁶ that, in order to qualify as program-related, the content must satisfy the three factors enumerated in the *WGN* case: (1) the broadcaster intends for it to be seen by the same viewers who are watching the video signal; (2) the data is available during the same interval of time as the video signal; and (3) the data is an integral part of the video program.⁶⁷ Congress enacted the must-carry requirement to preserve free, over-the-air broadcasting by ensuring a cable audience for broadcasters’ video programming. The *WGN* test is consistent with that purpose because it ensures that content is program-related *only* if it is an essential part of the broadcaster’s primary video programming.⁶⁸

⁶⁶ See *Digital Must-Carry Order* at ¶ 61 (“In general, we will continue to use the same factors enumerated in *WGN*, that are used in the analog context to determine what material is considered program-related.”). See also *In Re Implementation of the Cable Television and Consumer Protection and Competition Act of 1992*, Rept. & Order, 8 FCC Rcd 2965, at ¶ 81 (1993) (“*1993 Must-Carry Order*”) (noting that factors enumerated in *WGN* “provide the best guidance for what constitutes program-related material”).

⁶⁷ *WGN*, 693 F.2d at 624-25.

⁶⁸ While the Commission previously concluded that SID codes are program-related even though they “may not precisely meet each factor in *WGN*,” it based this determination on the fact that the codes are “*intrinsically related to the particular program received by the viewer.*” *1994 Must-Carry Reconsideration Order* at ¶ 50 (emphasis added).

2. Technical Feasibility.

Pursuant to the express terms of Sections 614 and 615, in order for content to qualify as program-related, it must also be technically feasible for the cable operator to carry it.⁶⁹ The Commission has previously held that such carriage should be considered “technically feasible” if: (1) it does not require the cable operator to “incur additional expenses and to change or add equipment in order to carry such material[;]” or (2) only “nominal costs, additions or changes of equipment are necessary.”⁷⁰

3. No Subscription Fee or Advertiser Support.

The content may not be subscription-based or advertiser-supported. This restriction also derives from the express terms of Section 614(b)(3), which provides that cable operators shall have discretion over whether to carry material that is “*subscription and advertiser-supported.*”⁷¹

⁶⁹ See 47 U.S.C. § 534(b)(3) (“A cable operator shall carry in its entirety, on the cable system of that operator, 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....”) (emphasis added); *id.* § 535(g)(1) (“A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial education 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.”) (emphasis added).

⁷⁰ 1993 *Must-Carry Order* at ¶ 82.

⁷¹ 47 U.S.C. § 534(b)(3) (emphasis added). See also 1992 Cable Act House Report at 93 (underscoring limitations on program-related content).

By definition, therefore, program-related content cannot include fee-based (*i.e.*, subscription) or advertiser-supported content.⁷²

4. No Third-Party Purchaser/Lessor of Broadcaster's Spectrum.

The content must be created and/or distributed by the broadcaster itself, rather than a purchaser/lessor of time on the broadcaster's spectrum. Congress made this requirement clear in the legislative history to the 1992 Act. The House Report accompanying Section 614 explains that Congress "did not intend that this provision be used to require carriage of *secondary uses of the broadcast transmission, including the lease or sale of time on subcarriers or the vertical blanking interval for the creation or distribution of material by persons or entities other than the broadcast licensee.*"⁷³

5. Not an "Ancillary or Supplementary" Service.

The content may not constitute an "ancillary or supplementary" service. The Commission asks for comment on the extent to which program-related is limited by the statutory provision on ancillary or supplementary programming.⁷⁴ AT&T explains this limitation below.

Section 336(b)(3) makes clear that *no* ancillary or supplementary services are entitled to must-carry.⁷⁵ The Commission's rules state that ancillary or supplementary services include, but

⁷² Even though the non-commercial must-carry provisions in Section 615(g)(1) do not include similar restrictions relative to fee-based and advertiser-supported content, mandatory carriage of such data is otherwise prohibited by the Communications Act and Commission rules and precedent. *See* 47 U.S.C. § 399B(b)(2) ("No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement."); 47 C.F.R. § 75.621 (rules for non-commercial broadcast stations); *In the Matter of Subscription Video*, 2 FCC Rcd. 1001 (1987) (holding that subscription television does not constitute broadcasting).

⁷³ 1992 Cable Act House Report at 93 (emphasis added).

⁷⁴ *See Notice* at ¶ 122.

are not limited to: “computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, [and] subscription video”⁷⁶ The rules further provide that telecommunications services provided on the VBI or in the visual signal, in either analog or digital mode, are ancillary.⁷⁷ Consistent with the statutory prohibition in Section 336, the Commission held in its *Digital Must-Carry Order* that the ancillary or supplementary services listed in its rules are not entitled to digital must-carry.⁷⁸ AT&T agrees with this holding. Consequently, any content that qualifies as an ancillary or supplementary service under the Commission’s rules may not, by definition, qualify as program-related content eligible for must-carry.

AT&T notes that this conclusion is consistent with the well-established rule of statutory construction requiring that “the more recent enactment prevails as the latest expression of

(... footnote continued)

⁷⁵ See 47 U.S.C. § 336(b)(3) (stating that “no ancillary or supplementary service shall have any rights to carriage under section 614 or 615”) (emphasis added); 47 C.F.R. § 73.624(c)(1). See also H. Rept. 104-204, Part I, at 116 (1995) (noting that this section “specifically does not confer ‘must carry’ status on any of these ancillary or supplementary services”) (emphasis added); S. Conf. Rept. 104-230 at 160-161 (1996) (citing House report language and noting conference agreement adopted House amendment).

⁷⁶ 47 C.F.R. § 73.624(c).

⁷⁷ *Id.* § 73.646.

⁷⁸ See *Digital Must-Carry Order* at ¶ 59 (“[W]e find that the services specified in Section 73.624(c) and 73.646 are ancillary or supplementary in the context of digital cable carriage and are not entitled to mandatory carriage.”). See also 47 C.F.R. § 76.62(g) (“With respect to carriage of digital signals, operators are not required to carry ancillary or supplementary transmissions or non-program-related video material.”).

legislative will.”⁷⁹ In this case, Section 336(b)(3), the provision establishing no must-carry rights for ancillary or supplementary services, was enacted as part of the 1996 Telecommunications Act, whereas Sections 614 and 615, the provisions establishing must-carry rights for program-related content, were enacted as part of the 1992 Cable Act. Therefore, Section 336(b)(3) controls and no service that qualifies as ancillary or supplementary may also qualify as program-related content eligible for must-carry.

B. “Program-Related” In The Context Of NCE Stations.

The Commission also seeks comment on the scope of the program-related definition in the context of NCE stations given that the statutory language describing program-related for NCE stations differs somewhat from the language regarding program-related content for commercial stations.⁸⁰ Section 615(g)(1) of the Act states:

A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial education 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.*⁸¹

AT&T believes that the intent and effect of Congress’ addition of the language “that may be necessary for receipt of programming by handicapped persons or for educational or language purposes” is to narrow the scope of program-related content beyond that of Section 614(b)(3).

⁷⁹ 2A *Sutherland Statutory Construction* § 51.02 (2000) (Norman J. Singer ed., 2000). *See also id.* § 51.05 (providing that where there is a conflict between general and specific statutes, the latter will prevail).

⁸⁰ *See Notice* at ¶ 122.

⁸¹ 47 U.S.C. § 535(g)(1) (emphasis added).

Stated another way, the “may be necessary” clause *qualifies*, rather than *expands*, the NCE program-related content subject to must-carry.

Based on this plain language, in order for subcarrier-type content to be eligible for must-carry in the context of NCE stations, the content must both: (1) meet the five-part program-related test discussed above for commercial stations; and (2) be “necessary for receipt of programming by handicapped persons or for educational or language purposes.” This approach makes perfect policy sense: Congress wanted to ensure that NCE stations, whose mission is to provide educational programming on a non-commercial basis, would only receive must-carry status for program-related content that is consistent with this mission.⁸² In this way, NCE stations would be further encouraged to maintain their focus on program-related content that is handicapped-, education-, or language-based in order to secure its must-carry rights.

Finally, the Commission should reject the proposals of commenters who have “argued that if an NCE station multicasts programming for ‘educational’ purposes the cable operator should carry all such program streams.”⁸³ In this regard, AT&T notes that the Commission’s holding with respect to “primary video”⁸⁴ applies to the must-carry provisions of Sections 614

⁸² The report language accompanying the must-carry rules for non-commercial stations states that program-related is intended to include matter that is “integral” to the broadcaster’s video programming service, not “tangentially related matter such as a reading list shown during a documentary or the scores of games other than one being telecast or other information about the sport or particular players.” *1992 Cable Act House Report* at 101. The report language specifies the types of data that would be eligible for must-carry. In particular, program-related content for the *handicapped* would include closed-captioning and video description; program-related content for *educational purposes* would include lesson plans; and program-related content for *language purposes* would include second language services for minority viewers. *See id.*

⁸³ *Notice* at ¶ 122 (citation omitted).

⁸⁴ *See Digital Must-Carry Order* at ¶¶ 50-57; 47 C.F.R. § 76.56(f).

and 615, and therefore undermines the suggestion by these commenters that the program-related language in Section 615 provides an independent basis for mandatory carriage of educational multicasts. Chairman Powell has made this point as well:

Public broadcasters indicated in comments on the record their plans to multicast a range of programming streams delivering a variety of content for different audiences. *Inasmuch as these programming streams represent separate, distinct and multiple transmissions, I am unable to defensibly conclude that they are entitled to must carry as 'program-related' content.* To do so would not comport with what I derive to be the congressional directive: that a broadcaster must select only one programming stream as primary and a cable operator is required to provide mandatory carriage to only one such designated stream.⁸⁵

AT&T wishes to emphasize that the foregoing analysis by no means suggests that AT&T is unwilling to carry NCE's digital programming, only that there is no statutory predicate for *requiring* AT&T or other cable operators to do so. AT&T commends the public TV industry for the vision it has embraced for using its digital spectrum.⁸⁶ AT&T is currently exploring various carriage options with NCE stations (as well as commercial TV stations) and has every incentive

⁸⁵ *Digital Must-Carry Order* (Statement of Commissioner Michael K. Powell) (emphasis added).

⁸⁶ See Robert Sachs, President & CEO, NCTA, *Cable, Broadcast and the First Amendment*, Remarks to the Media Institute, Washington, D.C., Apr. 18, 2001, at 4 (“Beth Courtney, the Chair of the Association of America’s Public TV stations, testified before Congress recently, that more than 95 percent of public stations plan to carry at least one formal educational multicast service, such as adult continuing education, K-12 instructional programming, job training, or college courses. Three out of four public television stations plan to offer two or more of these educational services. Others plan to air children’s programming, local public affairs, foreign language programming, or teacher training. In contrast, most commercial broadcasters don’t have a business plan for how to use their free digital spectrum. With the exception of CBS, commercial broadcasters are doing little or no HDTV, and some broadcasters, like Paxson Communications, see spectrum as valuable “beachfront property” to be auctioned *by them* to wireless companies.”).

and intention, particularly in light of the robust competition from DBS and other MVPDs, to carry their innovative digital programming content that AT&T's customers desire.

V. CONCLUSION

For the foregoing reasons, AT&T respectfully urges the Commission to reject a dual must-carry requirement and adopt a definition of "program-related" that is consistent with the comments herein.

Respectfully submitted,

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