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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Carriage of Digital Television Broadcast Signals )  
and Implementation of the Satellite Home Viewer )  
Protection Act )

CS Docket No. 98-120  
CS Docket No. 00-96  
CS Docket No. 00-2

To: The Commission

**COMMENTS OF MARANATHA BROADCASTING COMPANY, INC.**

Maranatha Broadcasting Company, Inc. ("MBC"), licensee of independent television broadcast station WFMZ-TV, Channel 69, Allentown, Pennsylvania, and permittee of WFMZ-DT, Channel 46, Allentown (currently operating pursuant to special temporary authority granted by the FCC staff), through counsel, submits these Comments in response to the FCC's *Further Notice of Proposed Rule Making* in the above-referenced proceeding, FCC 01-22, released January 23, 2001, published in summary form at 66 *Fed. Reg.* 16523 (March 26, 2001) (the "*FNPRM*").

The *FNPRM* was released as part of the FCC's *Report and Order* in this proceeding, in which the FCC tentatively concluded that requiring cable systems to carry the analog and digital signals of local television broadcast stations would violate the First Amendment rights of cable operators. The *Report and Order*, therefore, adopted a "must-carry" rule that requires carriage of digital signals only when stations elect carriage of only their DTV signals or broadcast only in a digital format, or when all stations have completed the transition to DTV. Otherwise, under the rule adopted in the *Report and Order*, television stations can

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secure carriage of both their analog and DTV signals only through retransmission consent arrangements with cable operators.

The *FNPRM* seeks comments on the FCC's tentative conclusion that a rule requiring cable operators to carry both analog and digital signals violates the First Amendment. Because the *Report and Order* and *FNPRM* were published separately in the *Federal Register*, Petitions for Reconsideration of the *Report and Order* were due prior to the date for comments in response to *FNPRM*. Several broadcast parties filed Petitions for Reconsideration of the limited DTV must-carry rule adopted in the *Report and Order*. Among the points made in these petitions was that the FCC lacks authority to question the constitutionality of its governing statute, in this case, Section 614(a) of the 1992 Cable Act.<sup>1</sup> *E.g.*, *NAB/MSTV/ALTV Petition for Reconsideration*, p. 9.

Because the *Report and Order*, and its conclusions, were fundamentally flawed, these proceedings engendered by the *FNPRM* should be superfluous. Nonetheless, MBC will respond to the FCC's request for "empirical evidence" demonstrating "how mandatory dual carriage would satisfy the requirements of both *Turner* and *O'Brien*." *FNPRM*, ¶ 114.<sup>2</sup> However, as to the FCC's request that commenters eschew further legal arguments, MBC is constrained to observe that the FCC arrived at the tentative conclusion from which the *FNPRM* proceeds in a far different manner than it when it dealt with a substantially similar question under the Satellite Home Viewer Improvements Act. In its *Report and Order* in CS

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<sup>1</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, codified at 47 U.S.C. § 534 (1996).

<sup>2</sup> *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) ("*Turner Broadcasting System I*"); *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) ("*Turner Broadcasting System II*"); *U.S. v. O'Brien*, 391 U.S. 367 (1968).

Docket No. 00-96 (“Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues; Retransmission Consent Issues”), FCC 00-417, released November 30, 2000 (the “*SHVIA Report and Order*”), the FCC dismissed challenges to the constitutionality of the SHVIA’s provisions mandating carriage of all local television signals where a direct satellite operator takes advantage of the SHVIA’s compulsory license provisions:

We observe that Congress enacted Section 338 to preserve free over-the-air broadcasting, promote a multiplicity of voices, and promote fair competition between video providers. . . . The goals, and the means to further them, are similar to those Congress enacted in 1992 when it promulgated the cable carriage provisions in the 1992 Cable Act. . . . [T]he Supreme Court found that the Act’s cable carriage provisions were constitutional. In this matter, we defer to Congress’s determination that Section 338 is lawful. Thus, . . . our task in this proceeding is to implement the statutory directives set forth in the SHVIA.

*SHVIA Report and Order*, ¶ 13 (footnotes omitted).

Thus, less than two months prior to the release of the *Report and Order and FNPRM* in this proceeding, considering a statute the FCC regarded as substantially similar to the statute at issue in this proceeding, the FCC acknowledged its duty, notwithstanding constitutional challenges, to implement the statute as directed by Congress. In the present case, however, the FCC has aggrandized unto itself the role of arbiter of the constitutionality of dual carriage. This inconsistency, itself, condemns the *Report and Order*, and the premises underlying the *FNPRM*, as the antithesis of reasoned decision-making.

The Supreme Court, in the *Turner* decisions, found three important governmental interests in adopting a mandatory carriage requirement for local television signals – (1) preservation of the benefits of free, over-the-air broadcast television service, (2) promotion of dissemination of information from a broader number of sources, and (3) promotion of fair

competition in the market for television programming. *Turner Broadcasting System II*, 520 U.S. at 189. In particular, the Supreme Court found, in *Turner Broadcasting System II*, that cable operators were most likely to discriminate against independent local television stations (such as WFMZ-TV/WFMZ-DT) because such stations “tend to be the closest substitutes for cable programs, because their programming tends to be similar, and because both primarily target the same type of advertiser: those interested in cheaper (and more frequent) ad spots than are typically available on network affiliates.”

The transition to DTV will not change the fundamental facts that the Supreme Court found to justify mandatory carriage of the NTSC signals of local television stations. WFMZ-TV and WFMZ-DT operate in the Philadelphia television market. Nearly 83 percent of TV households in the market subscribe to cable television, a figure significantly higher than the national average. Comcast Cablevision owns cable systems that include nearly 85 percent of cable television homes in the Philadelphia market, meaning that Comcast controls access to more than 70 percent of total market TV households. Comcast’s own regional news, sports and entertainment network, with which WFMZ-TV/WFMZ-DT directly competes, now reaches 3.9 million cable households in four states (Pennsylvania, New Jersey, Delaware and Maryland) on a substantially uniform cable channel, Cable Channel 8. The need to limit the ability of cable operators to discriminate against stations such as WFMZ-TV/WFMZ-DT, preserve free, local broadcast service, and promote adoption of DTV technology is, therefore, clear.

The Congressional Budget Office has identified the availability of DTV signals through cable television systems as the single most important factor in completing the transition to

DTV. *Completing the Transition to Digital Television*, Congressional Budget Office, Chapter II (September 1999). The CBO describes the problem thusly:

Broadcasters do not have an immediate incentive to spend money upgrading their facilities for digital broadcasts if no viewers have TV set capable of receiving the broadcasts. Likewise, viewers have no incentive to buy TV sets capable of receiving digital broadcasts or digital-to-analog set-top converter boxes until broadcasters start broadcasting a digital signal.

*Ibid.*, Chapter I. There is, however, an even more fundamental problem. Consumers will not have an incentive to buy DTV-capable receivers or converters until they can actually receive DTV programming. If cable operators are permitted to act as gatekeepers to prevent subscribers from receiving the DTV signals of local television stations, the transition from NTSC to digital broadcasting will never be completed.

The completion of the digital transition, in addition to providing consumers with additional programming choices, will serve the additional governmental interest of recovering spectrum now devoted to broadcasting for other uses. WFMZ-TV operates on Channel 69, which is to be reallocated for public safety communications. Other channels in the bands from 746-764 and 776-794 MHz, allocated for new broadband wireless communications devices, are expected to yield billions of dollars for the U.S. Treasury in spectrum auctions. Through a variety of means, the FCC is seeking to encourage television stations on Channels 60-69 to voluntarily relinquish their NTSC assignments and shift operations to channels in the so-called "core spectrum." Television broadcasters, however, will not voluntarily relinquish their NTSC assignments without assurances that cable systems will deliver their digital signals. This means assuring not only that cable operators will carry the DTV signal of the station making an early transition, but also the DTV signals of other local stations, so that cable

subscribers have the maximum incentive to adopt the receiver technology required to view all DTV signals.

MBC was one of the first independent television station licensees to commence digital broadcasts, in June 1999, simulcasting WFMZ-TV on DTV Channel 46. Beginning February 1, 2001, WFMZ-DT became the first digital station in the Philadelphia market providing a second programming service, an all-local, 24-hour weather service, "The Accu-Weather Channel." The Accu-Weather Channel provides updated, localized forecasts for the Philadelphia market, supplemented by live video images from cameras mounted at various locations throughout the station's viewing area.<sup>3</sup>

MBC has negotiated agreements for direct video feeds of The Accu-Weather Channel to be carried by the two cable systems (Service Electric and RCN) operating in Lehigh and Northampton Counties, but only after one-and-a half years of negotiations. MBC is hopeful of reaching a similar agreement with Comcast, to reach Comcast's 1.9 million cable subscribers in the Philadelphia market, but those negotiations have not yet come to fruition.

MBC's experience demonstrates the limitations of the FCC's reliance on retransmission consent as an alternative to a meaningful must-carry requirement. MBC is planning other programming innovations to exploit the technical advantages of digital broadcasting. For example, WFMZ-TV currently broadcasts 38 local newscasts each week. Each weekday, one half-hour newscast focuses specifically on news of particular interest to nearby Reading, Pennsylvania. Potentially, on its digital channel, MBC could provide segments in each newscast for different regional areas in the Philadelphia market -- much like regional editions

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<sup>3</sup> For a fuller description of The Accu-Weather Channel, see *Broadcasting/Cable*, May 28, 2001.

of a metropolitan newspaper -- that could be accessed by viewers depending on their location and interest. MBC is also studying providing a Spanish-language channel, to meet the needs of a growing Hispanic community in the Lehigh Valley and elsewhere in the Philadelphia market.

These potential uses of WFMZ-DT's digital signal should not be held hostage to the possibility that MBC can reach retransmission consent agreements with Comcast and other cable operators. As previously noted, the agreements with Service Electric and RCN to carry The Accu-Weather Channel required more than a year of negotiation. At this moment, there is no way of knowing whether negotiations with Comcast will be successful. MBC cannot be expected to incur the time and expense of developing other digital programming options without knowing that FCC rules will guarantee cable subscribers access to that programming. If WFMZ-DT and other local television stations are not assured access to the 2.2 million cable television subscribers in the Philadelphia market, the opportunity to provide digital programming will default to cable operators and the development of the fullest potential of over-air-digital broadcasting will be short-circuited.

Access, moreover, means more than the unreasonably narrow definition of "primary video" adopted in the *Report and Order*. See, NAB/MSTV/ALTV Petition for Reconsideration, pp. 10-16; *Joint Petition for Reconsideration of APTS, PBS and CPB*, pp. 11-4. Among WFMZ-DT's two current standard definition channels, neither can be classified as "primary" or "secondary." Neither do the future programming possibilities MBC is contemplating lend themselves to a primary/not primary classification scheme. Each stands on its own.

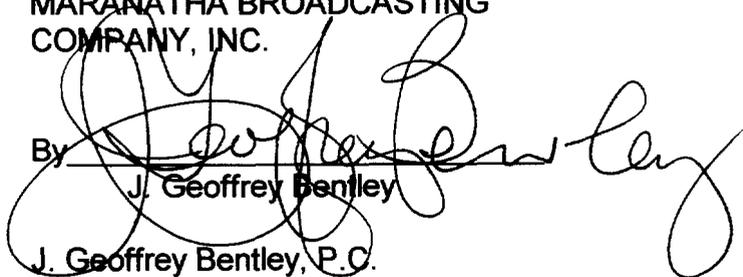
The Communications Act requires cable carriage of the "signals" of local commercial television stations. It does not distinguish between analog and digital signals. Adoption of a

dual carriage requirement will serve goals that are essentially no different than those found by the Supreme Court to justify must-carry rules for NTSC signals: (a) fostering the development of free, over-the-air broadcasts of digital television programming; (b) promoting the dissemination of greater diversity of programming from a greater variety of sources, and (c) protecting competition in the market for television programming.

The FCC, therefore, must implement the express intention of Congress and adopt a dual carriage rule that guarantees cable subscribers access to the digital signals of local television broadcasters during the transition.

Respectfully submitted,

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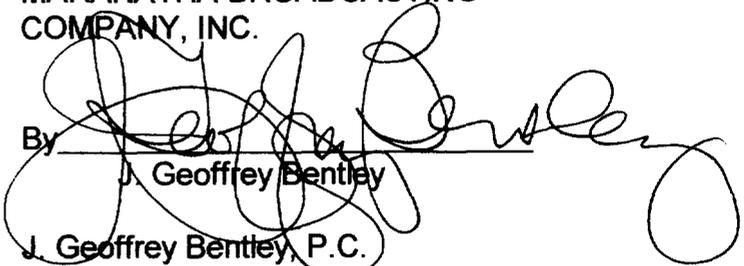
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