DOCKET FILE COPY ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

RECEIVED
JUN 11 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
UNIVISION COMMUNICATIONS INC.

Scott R. Flick
Brendan Holland

Its Attorneys

SHAW PITTMAN
2300 N Street, NW
Washington, D.C. 20037
(202) 663-8000

Dated: June 11, 2001

Summary

The Commission must here resolve the central issue threatening to undermine the DTV transition and require cable operators to carry both the analog and digital television signals of local broadcast stations during the DTV transition period. Without mandatory dual carriage, successful conversion to DTV will not happen. Fully two-thirds of the television households in America rely on cable systems for their reception of broadcast programming. Accordingly, those viewers must have access to both digital and analog signals during the transition if they are to be asked to invest in DTV receivers. The availability of local DTV signals over cable is made even more critical by the difficulty of over-the-air reception of DTV signals, particularly in urban environments. As a Spanish-language programmer with a minority viewing audience, Univision is well aware that if local DTV signals are carried only through retransmission consent agreements, cable companies will either forgo carriage of DTV signals entirely, or will refuse to carry foreign-language DTV stations in favor of English-language stations. However, leaving minority viewers behind in the digital transition is hardly sound public policy.

Ultimately, Congress and the public as a whole have a vested interest in the rapid success of the DTV transition. Should the DTV transition fail, or drag on interminably beyond the 2006 deadline established by Congress, the harm to the public will be substantial, both in terms of a loss of program diversity, and delay in obtaining access to new communications services. In fact, the best way of reducing the burden of the DTV transition on cable operators is to require dual carriage, and thereby shorten the period during which dual carriage is even an issue. For these and numerous other reasons discussed herein, the Commission should require cable system operators to carry both the NTSC and DTV signals of local broadcast stations during the DTV transition. Such a requirement is constitutional and is clearly in the public interest, as it would ensure a prompt conclusion to the DTV transition, promote localism and program diversity, and speed the provision of new communications services to the public.

Table of Contents

Summary i

Table of Contents ii

INTRODUCTION 2

DISCUSSION 5

I. Dual Carriage of Both the Analog and Digital Signals of a Local Television Station During the Transition Is Paramount to the Ultimate Success of the DTV Transition and the Preservation of Localism 5

A. As Cable Is Now the Dominant Method for Delivering Television Programming to American Households, It Is Imperative to the Success of the DTV Transition That This Audience Have Access to All Local DTV Signals 5

B. Given the Significant Problems Facing Over-the-Air DTV Reception, Delivery of DTV Signals Via Cable Will Be Imperative for Widespread DTV Penetration 8

C. Congress Has Stated Its Interest in a Successful Transition to DTV, as Well as Its Concerns With Over-the Air Reception of DTV Signals, Thereby Compelling the Commission to Take the Necessary Steps to Ensure a Successful Transition and the Prompt Return of Analog Television Spectrum 9

D. Cable Carriage Is Even More Important to the Hispanic Community, Which Resides Predominantly in Multipath-Ridden Urban Areas and Frequently Does Not Have Access to a Directional Rooftop Antenna 12

II. If the Commission Fails to Require Dual Must-Carry During the Transition, the Public Will be Harmed by the Resulting Loss of Service and Extended Transition Period 13

A. Because Cable Viewership Will Not Count Toward the 85 Percent Benchmark Necessary to Conclude the DTV Transition Unless Cable Systems Carry Each DTV Station in Their Local Market, the Transition Will Never Be Completed Without Dual Must-Carry 15

B. A Drawn Out DTV Transition Harms Diversity and Localism 16

C. Until the DTV Transition Is Completed, Spectrum for New Services and Public Safety Operations Will Be Limited 16

III. Cable Operators Have Shown Little Interest in Carrying Local Stations' DTV Signals, and the Economic Impact on Minority-Oriented Broadcasters Will Be Severe Without Transitional DTV Must-Carry 17

IV. Dual Must-Carry Rules Requiring Carriage of Both Digital and Analog Signals During the Transition Are Constitutionally Permissible 18

A. Dual Must-Carry Rules Are Consistent With the Requirements of the First Amendment 18

B. Dual Must-Carry During the Transition Does Not Constitute a "Taking" Under the Fifth Amendment. 20

CONCLUSION 23

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
UNIVISION COMMUNICATIONS INC.

Univision Communications Inc. ("Univision"), by its attorneys, hereby submits its comments to the Commission's Further Notice of Proposed Rule Making[1] ("FNPRM") regarding the must-carry rules to be applied to digital transmissions by television broadcast stations during

---

[1] In the Matter of Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rule Making, CS 98-120, FCC 01-22 (released January 23, 2001).

the transition to digital television ("DTV").[2] For the reasons set forth below, Univision urges the Commission to mandate cable carriage of both the analog and digital television signals of local broadcast stations during the DTV transition period. Without strong action by the Commission requiring dual carriage during the transition, the successful conversion to DTV will not be achieved for decades, if ever.

INTRODUCTION

Univision is the leading Spanish-language television broadcaster in the United States. It indirectly owns and operates twelve full-power UHF and eight low-power UHF television stations, which are located in fifteen of the largest Hispanic markets, including nine of the top ten.[3] Univision operates the Univision Network, with 26 full-power television station affiliates. The Univision Network is currently available to 93% of all Hispanic households, and is the fifth largest full-time television network, delivering larger prime time audiences than all broadcast and cable networks except ABC, CBS, NBC, and Fox.[4] In addition, Univision is in the process of acquiring 14 additional full-power UHF television stations to serve as the backbone of a new, separately programmed broadcast network.

---

2 These comments are timely filed pursuant to the Commission's Order in this proceeding extending the time for filing comments until June 11, 2001. *See* In the Matter of Carriage of Digital Television Broadcast Signals, Order, CS Docket No. 98-120, DA 01-982, (released April 19, 2001).

3 Univision's full-power stations include KDTV(TV), San Francisco, California; KFTV(TV), Hanford (Fresno), California; KMEX-TV, Los Angeles, California; KTVW-TV, Phoenix, Arizona; KUVI-TV, Bakersfield, California; KUVN(TV), Garland (Dallas), Texas; KUVS(TV), Modesto (Sacramento), California; KWEX-TV, San Antonio, Texas; KXLN-TV, Rosenberg (Houston), Texas; WGBO(TV), Joliet (Chicago), Illinois; WLTV(TV), Miami, Florida; and WXTV(TV), Paterson (New York), New Jersey.

4 Nielsen Hispanic Television Index and Nielsen Television Index (Adults 18-49, September 1999-March 2000).

The Univision Network is the primary source of news and entertainment for America's 35.3 million Hispanics. All but one of the full-power television stations that carry the Univision Network programming operate on UHF channels. Moreover, a substantial proportion of the Univision viewing audience lives in urban areas and does not have access to outdoor antennas. This makes cable carriage of Univision's DTV signal during the transition period critical if Univision's Hispanic audience is to participate in the DTV transition. Thus, the Commission's decision regarding the applicability of the must-carry rules to digital signals during the transition to DTV is of extreme importance to Univision and its viewers.

As discussed below, Univision supports mandatory carriage of both analog and digital television signals during the DTV transition period. Without mandatory carriage of both signals, DTV will never achieve widespread acceptance within the television viewing community. With two-thirds of the population utilizing cable systems for their reception of broadcast programming, mandatory carriage of DTV is imperative if DTV is to be accepted and succeed. As a Spanish-language programmer with a minority viewing audience, Univision fears that, without mandatory carriage requirements, cable companies will forgo carriage of Univision's digital signal in favor of English-language networks. This would not only be harmful to the large and growing Hispanic community, but would also make it difficult for DTV to succeed on a nationwide basis.

Mandatory carriage of both analog and digital signals also will ensure that broadcasters and other affected industries will finally begin to realize the benefits necessary to counterbalance the enormous costs involved in building digital facilities and operating two stations during the transition. Broadcasters are expending considerable sums in this venture, and equipment manufacturers are also investing heavily to develop digital set-top converters and receivers to

ensure the viability of this new medium. While consumers finally have the opportunity to benefit from this large investment by broadcasters and electronics manufacturers, cable companies serve as the gatekeepers for two-thirds of television viewers and have little incentive to promote the success of DTV. For consumers to realistically consider the purchase of digital equipment, they need assurances that DTV signals are available through the coaxial cable that two-thirds of them rely upon for their television program signals, and that those signals will continue to be available through cable after those viewers invest in a digital television set.

However, without mandatory carriage, it appears unlikely that cable companies will deliver local digital broadcast signals, particularly those that serve a minority audience. Given Univision's extensive prior experience with cable systems unwilling to carry a Spanish language signal even where the law requires such carriage, Univision does not believe that cable operators will voluntarily carry a Spanish language digital signal that currently can be viewed only by the very small subset of Univision's audience that owns a digital television set. If the Commission does not step in and ensure the broad availability of DTV programming for all segments of the viewing public, DTV will have little chance of success among the general population, and it will be impossible to terminate NTSC broadcasting without abruptly disenfranchising tens of millions of minority viewers from their main (and perhaps only) source of local news and programming.

DISCUSSION

I. Dual Carriage of Both the Analog and Digital Signals of a Local Television Station During the Transition Is Paramount to the Ultimate Success of the DTV Transition and the Preservation of Localism

Among other things, the Commission's FNPRM solicits comments on "the need for dual carriage for a successful transition to digital television and return of the analog spectrum."[5] Without exaggeration, dual must-carry is the single most important issue for the success of the DTV transition and the continued vitality of local television in a digital world. Cable's prevalence as the dominant means of delivering television programming to households, coupled with the technical difficulty of receiving over-the-air DTV signals, forces broadcasters to recognize the reality that cable carriage of DTV will be necessary if the DTV transition is to end in the foreseeable future. Availability of local DTV signals on cable is essential if DTV is to ever to reach the critical mass necessary to bring DTV set prices down and complete an orderly and complete transition to DTV.

A. As Cable Is Now the Dominant Method for Delivering Television Programming to American Households, It Is Imperative to the Success of the DTV Transition That This Audience Have Access to All Local DTV Signals.

In enacting the Communications Act of 1934, Congress recognized that licensing broadcasters to utilize the public airwaves to provide local news and entertainment programming provided an essential public service. With the advent and tremendous growth of cable distribution, the dominant pathway for delivering television news and information into the home is no longer through the public airways, but across the public rights of way used by cable operators pursuant to a government franchise. The rights that were originally granted to cable

---

[5] FNPRM at ¶ 112.

operators to install equipment and transmit signals across public lands have created natural monopolies over access to viewer's homes that have proven difficult to overcome. Two-thirds of American viewers receive their television programming, including that which originates as over-the-air broadcasts, via cable systems. The more than 10,000 cable systems in the United States pass almost 92 million homes and have almost 65 million subscribers.[6] If local DTV signals are not carried on these cable systems, DTV will have a dim future.

Some would argue that this is merely economic Darwinism at work, and that the Commission should, if DTV cannot survive on its own, let DTV die a slow and painful death as we turn our national attention back to NTSC broadcasting. However, having compelled broadcasters to construct hundreds of DTV stations and endure the challenges and expense of operating two stations serving the same audience, the Commission should not abandon its technological child, but instead must nurture it through these difficult initial years until it is strong enough to fend for itself.[7] If it is to grow and eventually benefit us all, it must be made accessible to all segments of the public, and not just to the portion of the public that has an outdoor antenna. Cable carriage is critical to providing that accessibility.

Indeed, the Congressional Budget Office has recognized the importance of must-carry requirements to the success of DTV in its independent review of the digital transition.[8] In its

---

6 Warren Television & Cable Factbook 2001, Cable Edition Vol. 2, p. F-3 (2001).

7 The California energy crisis has shown the folly of trying to create an economic model in which half the market is constrained by strict government regulations, and the other half is permitted to behave according to pure market forces. Here the Commission cannot rely on a "market" in which a key element of the market has been forced to invest billions of dollars in constructing new DTV facilities, while another key element of the market is free to ignore those mandatory investments and to continue to operate unfettered by governmental constraints.

8 *See* Completing the Transition to Digital Television, Congressional Budget Office (September 2000) (hereinafter "Congressional Budget Office Report").

report "Completing the Transition to Digital Television," the Congressional Budget Office emphasized that a "fundamental element of the timely introduction of digital TV is the availability of digital programming on cable systems. Indeed, cable carriage of such broadcasts is perhaps the most important factor affecting how quickly digital TV reaches the largest number of households."[9] The report goes on to say that

> [t]he availability of digital programming on cable systems is a necessary, though not sufficient, condition for a timely transition. Without it, reaching the 85 percent penetration rate needed to end analog broadcasts in a market will take much longer because whenever the transition is completed, the largest number of households will probably be receiving DTV programming from cable providers. Growing uncertainty about cable carriage of DTV signals is a major factor leading CBO to conclude that the transition from analog to digital programming is likely to stretch beyond 2006.[10]

The Congressional Budget Office's analysis demonstrates the clear benefits to be gained by requiring dual must-carry during the transition:

> First and foremost, it would ensure that by 2006, DTV signals reached, on average, a projected 70 percent of the nation's TV households. Second, depending on the form of the rules, those signals could be available to cable subscribers relatively early in the transition, thereby boosting the early demand for DTV sets. Third, the guarantee of cable carriage would be an incentive for nonnetwork and smaller market stations to begin broadcasting their digital signals earlier than required by the FCC-mandated deadlines.[11]

Furthermore, as discussed below in Section II (A), in order for viewership of DTV signals via cable systems to count toward the 85 percent benchmark established by the statute as the conclusion of the transition, a cable system must carry digital programming from *each* local station broadcasting such programming in the market. This will never be accomplished without a dual must-carry requirement.

---

9 CBO Report at Section I, p. 3.

10 CBO Report at Section III, p. 4.

11 CBO Report at Section III, p. 6.

B. Given the Significant Problems Facing Over-the-Air DTV Reception, Delivery of DTV Signals Via Cable Will Be Imperative for Widespread DTV Penetration

The need for dual carriage during the DTV transition becomes even more pressing when combined with the real world ability (or more aptly, inability) of viewers to receive DTV signals broadcast over-the-air. There continues to exist a significant concern about the ability of the 8VSB transmission standard to provide ubiquitous over-the-air reception, and there has been much publicity regarding this fact. As a result, even as receiver chipsets improve, DTV will have a tough time overcoming this reputation in the eyes of the public. It is a rare individual who will spend the money and effort lugging a heavy DTV set home and installing an antenna without any assurance of being able to reliably receive local DTV signals. The availability of such signals on the local cable system ensures such a consumer that his efforts will not be wasted, and that under even the most adverse reception conditions, multiple local DTV signals will be available.

Even if over-the-air reception could be assured, however, the process of switching between the antenna and cable input is frequently an awkward one that will be viewed by consumers as a technological regression. Two-thirds of television viewers have come to rely on cable systems to provide the complete range of television programming options, especially the signals of their local broadcast stations. The disappearance of tens of millions of outdoor television antennas in the last two decades is an indication of the public's disdain for juggling multiple television reception systems, and attempting to drastically reverse that trend is a futile effort.

C. Congress Has Stated Its Interest in a Successful Transition to DTV, as Well as Its Concerns With Over-the Air Reception of DTV Signals, Thereby Compelling the Commission to Take the Necessary Steps to Ensure a Successful Transition and the Prompt Return of Analog Television Spectrum

Congress has a strong interest in the success of DTV and the ultimate return and reallocation of that portion of the spectrum currently being used by NTSC television stations. In this regard, Congress has directed the Commission to ensure the prompt and successful conversion to DTV, and has strongly urged the Commission to move forward with implementation of DTV. In the Telecommunications Act of 1996, Congress directed the Commission to quickly reclaim spectrum after the DTV conversion[12] and instructed the Commission to report on the progress of DTV after 10 years.[13] In the Balanced Budget Act of 1997, Congress codified the Commission's aggressive deployment schedule and set deadlines for the return of analog spectrum.[14] Without digital must-carry, the industry and the Commission will have no chance of meeting the Congressional deadline for DTV conversion.

However, ensuring a prompt conclusion to the DTV transition is only part of the Commission's Congressional mandate. Congress has often expressed its support for local

---

12 "If the Commission grants a license for advanced television services to a person that, as of the date of such issuance, is licensed to operate a television broadcast station or holds a permit to construct such a station (or both), the Commission shall, as a condition of such license, require that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation." 47 U.S.C. § 336(c).

13 Within 10 years after the date the Commission first issues additional licenses for advanced television services, the Commission shall conduct an evaluation of the advanced television services program." 47 U.S.C. § 336(f).

14 Balanced Budget Act of 1997, 11 Stat. 251 (1997).

television broadcasting.[15] In fact, one of the reasons it cited for adopting the must-carry provisions of the 1992 Cable Act was to ensure the survival of free, over-the-air local television.[16] As the Supreme Court noted in Turner I,

> Congress concluded that unless cable operators are required to carry local broadcast stations, "there is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried," §2(a)(15); the "marked shift in market share" from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television, §§ 2(a)(13)-(14); and that, as a consequence, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized," § 2(a)(16).[17]

The rationale that motivated the 1992 Cable Act -- that, absent cable carriage, broadcasters face financial uncertainties sufficient to threaten their economic viability and the local service they provide -- applies equally to local digital and analog transmissions. Moreover, the intent of Congress in adopting NTSC must-carry was merely to *preserve* free, over-the-air television. With regard to DTV, must-carry is even more vital, as Congress and the Commission are trying to *initiate* a new free, over-the-air television system, which is a far more difficult task.

Beyond the obvious legislative mandate guiding the entire conversion to digital television, Congress has recently held hearings indicating its concern with the progress of the

---

15 *See, e.g.*, S. Rep. No. 104-23, 104th Cong. 1st Sess. at 69 (1995) ("Local television stations provide vitally important services in our communities. Because local programming informs our citizens . . . and provides other community-building benefits, we cannot afford to undermine this valuable resource." (Additional views of Senator Hollings)).

16 "Congress declared that the must-carry provisions serve three interrelated interests: (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." Turner I, 512 U.S. at 662 (*citing* S. Rep. No. 102-92, p. 58, (1991); H. R. Rep. No. 102-628, p. 63 (1992); U.S. Code Cong. & Admin. News 1992, p. 1191; §§ 2(a)(8), (9), and (10) of the 1992 Cable Act).

17 Turner I, 512 U.S. at 634.

DTV transition. On March 15, 2001, the House of Representatives' Subcommittee on Telecommunications and the Internet held hearings regarding the status of the DTV transition. In his remarks before the Subcommittee, Chairman Billy Tauzin, the Chairman of the House Committee on Energy and Commerce, indicated that the hearings were

> intended to be the first in a series of subcommittee hearings intended to explore why the transition to digital television is 'off-track' and how to put it back on track. To the extent the Committee can determine why the digital transition is being delayed, Congress stands in a position to encourage a more orderly process.[18]

As evidenced by the provisions in the Communications Act of 1934, as amended, requiring the return, reallocation, and auction of paired analog channels, Congress has larger plans for the efficient use of the spectrum; plans which will be thwarted by a DTV transition that drags on for years beyond the end of 2006. Therefore, the Commission must take action to meet Congress's mandate for a speedy DTV transition and require dual carriage during the transition period. As demonstrated by Chairman Tauzin's remarks before the Subcommittee earlier this year, Congress is concerned that the "soft deadline" of 2006 "is thwarting the certain and swift transition to digital."[19] The only way to maintain the timetable set by Congress is to provide people with the ubiquitous ability to view DTV signals and programming, thereby encouraging them to purchase DTV sets.

It is also worth noting that Congress adopted NTSC must-carry requirements even though it was relatively easy to use an indoor antenna to receive NTSC broadcasts and circumvent the gatekeeping abilities of the local cable system. With DTV signals being much more difficult to

---

18 Committee on Energy and Commerce News Release, *"Chairman Tauzin Issues a Statement on Digital Television,"* (released March 15, 2001).

19 Id.

receive, particularly with an indoor antenna, the case for must-carry of DTV signals is far stronger. Ultimately, any short-term adversities visited upon cable operators from a dual carriage requirement are minor when compared to the long-term gains that Congress has determined will result from a successful transition to DTV and the reallocation of spectrum.

D. Cable Carriage is Even More Important to the Hispanic Community, Which Resides Predominantly in Urban Multipath-Ridden Areas and Frequently Does Not Have Access to a Directional Rooftop Antenna

With fully 84 percent of all Hispanic households being located in urban areas[20] where multipath interference makes over-the-air DTV reception difficult, cable carriage of DTV signals is essential if DTV is to penetrate this large segment of the population. Further complicating the acceptance of DTV in the Hispanic community is the fact that this segment of the population resides heavily in multiple dwelling units ("MDUs"), where outdoor antennas may not be feasible. While 25.1 percent of all households in America reside in MDUs,[21] the proportion of Hispanic households residing in MDUs is 41.9 percent.[22] With large outdoor antennas unavailable, and urban multipath interference making indoor reception difficult if not impossible, many Hispanic television viewers will either receive local DTV signals through cable, or not at

---

20 This figure is based on the 1999 Nielsen Television Index and the 1999 Nielsen Hispanic Television Index, which define "urban area" as a metropolitan area that has a population in excess of 85,000 people.

21 This figure is based on the American Housing Survey for the United States 1997, produced by the U.S. Department of Housing and Urban Development and the U.S. Department of Commerce. The Commission has also noted that, as of 1990, there were almost 31.5 million households in MDUs in the U.S., comprising approximately 28 percent of the total housing units nationwide. *See* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report, 13 FCC Rcd 24284, 24364 (December 23, 1998).

22 This figure is based on the American Housing Survey for the United States 1997, produced by the U.S. Department of Housing and Urban Development and the U.S. Department of Commerce.

all. The Commission must therefore ensure that DTV will be available by cable, or knowingly leave the Hispanic and other urban populations behind in the DTV transition.

Allowing this large segment of the population to become digital "have nots" is unacceptable public policy, and also ensures that most major cities will never reach the 85% DTV penetration necessary to conclude the DTV transition. The stakes are exceedingly high here, and the government's numerous interests in the rapid and widespread adoption of DTV overwhelm cable operator's claims that the burden of dual carriage is too great.

II. If the Commission Fails to Require Dual Must-Carry During the Transition, the Public Will be Harmed by the Resulting Loss of Service and Extended Transition Period

Faced with the option that the Commission has presented to broadcast stations, *i.e.*, carriage of either the digital or analog signal, broadcasters will not transition to DTV cable carriage until nearly all of their viewing audience has purchased digital televisions. As those viewers who purchase DTV sets will still be able to watch NTSC broadcasts through those sets, while those with NTSC sets cannot watch DTV broadcasts, surrendering NTSC cable carriage rights before nearly all viewers have DTV sets would be both financially suicidal and the source of great public acrimony. Given the historic penetration and adoption rates for new technologies like digital television, this transition point will never occur. Consumers will not purchase digital television sets until DTV programming is readily accessible by cable, and broadcasters cannot abandon their existing audience (nor would the Commission want them to) in order to secure cable carriage of their DTV signal. The circular nature of the DTV transition will never be broken, and the result will be broadcasters using up their programming and other resources to keep two stations on the air, while DTV never moves beyond the homes of a small number of early adopters. Under these circumstances, the DTV transition will not just take a long time; it

will take an infinite amount of time. As the transition drags on, the cost of operating two stations will ultimately harm the station's programming, as funding must be diverted from enhancing local programming to paying the ever-growing electric bill for operating two stations.

Furthermore, without mandatory dual carriage during the transition, cable viewers will not receive the digital signals of their local stations unless each station has enough leverage to negotiate a retransmission consent agreement with the cable system. As discussed in greater detail below, it is unlikely that many broadcast stations, particularly those not affiliated with ABC, CBS, NBC or Fox, will be able to obtain retransmission agreements with cable operators. As a result, cable viewers will have access to few, if any of their local DTV signals, and those who rely heavily on specialized formats such as Spanish language programming are particularly likely to be left out of the DTV transition. This is hardly the ideal scenario for encouraging the sale of DTV sets and completing the transition to DTV.

The Commission's FNPRM states that with regard to dual carriage, it believes "that the record is insufficient to demonstrate the degree of harm broadcasters will suffer without the carriage of both signals."[23] As discussed above, the harm to broadcasters of an infinitely long transition will be quite substantial. However, beyond the harm to broadcasters, the harm to the public and to the DTV transition itself will be even greater if the Commission does not impose dual must-carry rights. A successful DTV transition is measured by the ability to bring the benefits of DTV to *all* Americans, and to complete the process promptly. Thus, the DTV transition requires cooperation and expenditures by *all* affected industries, including cable operators.

---

[23] FNPRM at ¶ 115.

A. Because Cable Viewership Will Not Count Toward the 85 Percent Benchmark Necessary to Conclude the DTV Transition Unless Cable Systems Carry Each DTV Station in Their Local Market, the Transition Will Never Be Completed Without Dual Must-Carry

One of the things the FNPRM solicits comments on is the circumstances and statutory criteria for the conclusion of the DTV transition.[24] Pursuant to the provisions of the Communications Act of 1934, as amended, a cable system must carry at least one channel of programming from each and every DTV broadcaster in the market in order for the cable-viewing households to be counted as part of the DTV viewing audience for calculation of the 85% benchmark.

Specifically, Section 309(j)(14)(B)(iii)(I) of the Communications Act of 1934, as amended, creates an extension of the December 31, 2006 deadline for ending analog broadcasting if 15 percent or more of the television households in such market do not have either a DTV receiver or a digital-to-analog converter and "do not subscribe to a multichannel video programming distributor (as defined in Section 602) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market."[25] If this requirement is not met, the deadline for concluding the conversion to DTV will be extended.[26] This poses a tremendous hurdle for the DTV conversion, and a significant impetus for imposing mandatory dual carriage of both a broadcaster's DTV and analog signals. Without must-carry requirements, no cable system will voluntarily reach retransmission agreements with every DTV broadcaster in the market, and the statutory standard will never be met. As a practical matter, it is only through dual must-carry requirements that

---

24 FNPRM at ¶ 117.

25 47 U.S.C. §309(j)(14)(B)(iii)(I).

26 *See also* Congressional Budget Office Report at Section II, p. 3.

cable systems will carry all of the DTV signals in a market and thereby speed the conclusion of the DTV transition. Congress is committed to a quick transition to DTV in order to bring its benefits to all Americans as soon as possible, and, as the Congressional Budget Office report confirms, dual carriage is necessary for that to happen.

B. A Drawn Out DTV Transition Harms Diversity and Localism

As discussed above, the cost of indefinitely operating two broadcast facilities simply to maintain a station's existing viewing audience imposes a huge burden on television stations, which in the short term will result in a reduction of investment in programming, and in the long term may threaten the viability of small market stations. The longer the DTV transition drags on, the greater the financial strain on local stations will be, leading to a loss of programming for the public, a loss of service where stations cannot survive, and a loss of programming diversity in either case. Local stations provide an invaluable and essential service to the public through the provision of local news, weather, and entertainment. The intent of transitioning broadcast service to DTV was to augment broadcasters' ability to provide these local services to the public, and the Commission should not allow the DTV transition to have the opposite effect.

C. Until the DTV Transition Is Completed, Spectrum for New Services and Public Safety Operations Will Be Limited

Finally, without a prompt nationwide conclusion of the transition to digital television, the spectrum currently being used for the transition cannot be reallocated for alternate uses, thereby depriving the public of new, advanced technologies, including 3G wireless, as well as public safety frequencies. As the demand for this spectrum steadily mounts, the delay in concluding the DTV transition grows increasingly harmful to the public.

III. Cable Operators Have Shown Little Interest in Carrying Local Stations' DTV Signals, and the Economic Impact to Minority-Oriented Broadcasters Will Be Severe Without Transitional DTV Must-Carry

The FNPRM requests information regarding whether retransmission consent agreements between local broadcast stations and cable systems will succeed in achieving carriage of local digital signals.[27] To that end, the Commission cites several examples of agreements reached for the retransmission of digital signals and requests that commenters provide information regarding their success in negotiating such agreements.[28] In reality, however, carriage via retransmission consent is not a realistic option for Univision, or any other independent, foreign-language, or non-commercial television station that lacks the mass market audiences and economic bargaining chips of ABC, NBC, CBS and Fox. Retransmission agreements might be possible for such entities, but that is small comfort for the Hispanic populace looking to Univision and Telemundo for their DTV programming and finding none on the local cable system.

Univision and its audience have given more than most to see that the DTV transition succeeds. In addition to the expenditures necessary to build digital facilities for each of its full-power stations, a large number of Univision's 29 owned or affiliated low power television stations have been displaced from their channels by full power DTV allotments. As a result, Univision's ability to reach many areas of Hispanic population with a broadcast signal has been reduced. The Hispanic community, which already has limited Spanish language programming options, has seen its options diminished in many communities because of the advent of DTV. Having faced the downside of the DTV transition, they should not be deprived of its ultimate benefits. However, given Univision's experience with many cable system operators that have

---

27 FNPRM at ¶ 128.

28 FNPRM at ¶¶ 129-130.

displayed a bias against minority-oriented NTSC stations,[29] minority-oriented DTV stations are certain to have difficulty reaching their audience if DTV must-carry is not enacted.

IV. Dual Must-Carry Rules Requiring Carriage of Both Digital and Analog Signals During the Transition Are Constitutionally Permissible

A. Dual Must-Carry Rules Are Consistent With the Requirements of the First Amendment

It is settled law that must-carry requirements are permissible under the First Amendment to the Constitution. In Turner I, the Supreme Court held that must-carry rules are a content neutral regulation of speech.[30] The proper standard for judging such regulations, as set forth in United States v. O'Brien,[31] is that the regulation must "advance[] important governmental interests unrelated to the suppression of free speech and . . . not burden substantially more speech than necessary to further those interests."[32] In Turner II, the Court examined the must-carry rules in the 1992 Cable Act and held that they meet these requirements.[33] The Court noted that

---

29 Univision has discussed the intransigence of cable companies when it comes to the carriage of Spanish-language stations in its Reply Comments in the digital must-carry proceeding. *See* Reply Comments, Univision Communications Inc., In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120, filed December 22, 1998, at 6-7. *See also* Petition for Special Relief, CSR No. 5327-M (November 19, 1998); Petition for Special Relief, CSR No. 5153-A (October 29, 1998); In re Complaint of KDTV License Partnership, G.P. against TCI Cablevision of California, Inc., Petition for Special Relief, 13 FCC Rcd 10331 (1998); In re Complaint of KDTV License Partnership, G.P. against TCI Cablevision of California, Inc.; Request for Carriage of KDTV, San Francisco, California, 13 FCC Rcd 2444 (1998).

30 "It is true that the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry. . . . [S]peaker distinctions of this nature are not presumed invalid under the First Amendment." Turner I, 512 U.S. at 645.

31 United States v. O'Brien, 391 U.S. 367 (1968).

32 Turner II, 117 S. Ct. at 118 (*citing* United States v. O'Brien 391 U.S. at 377 (1968)).

33 520 U.S. 180 (1997).

the governmental interests stated by Congress, namely the preservation of the benefits of free, over-the-air local broadcast television, the promotion of widespread dissemination of information from a multiplicity of sources, and the promotion of fair competition in the market for television programming, are of great importance, and that these interests are directly advanced by the legislation in question.

As demonstrated above, Congress has numerous important governmental interests with regard to requiring dual must-carry during the DTV transition. First, the government has the same interests that were found sufficient in *Turner II* -- the preservation of the benefits of free, over-the-air local broadcast television, the promotion of widespread dissemination of information from a multiplicity of sources, and the promotion of fair competition in the market for television programming. In fact, the case for must-carry is far stronger here, where Congress is seeking not just to preserve free, over-the-air broadcasting, but is attempting to improve the technical quality and capabilities of that free public service, and to make sure that all members of the public, both urban and rural, have access to that service.

In addition, Congress has an interest in expediting the conclusion of the DTV transition and the spectrum auction revenues that it will bring, as well as in seeing that spectrum made available for public safety operations and new communications services for the public. In total, the government interests in expediting the conclusion of the DTV transition by requiring dual carriage are overwhelming.

Thus, there is no basis for the argument that application of the must-carry rules to digital broadcasts presents an unconstitutional restriction of free speech. The requirement that cable operators carry digital signals is of exactly the same character as the analog must-carry requirement, and thus the same O'Brien analysis would apply. All of the governmental interests

cited in Turner I and Turner II also apply in the digital arena, along with the even more compelling interests articulated above. Furthermore, dual carriage will be less intrusive than the analog must-carry requirement upheld in Turner II, as the imposition of dual carriage will be for a limited period of time. Cable systems will only have to carry both the digital and analog signals of a station until the DTV transition is completed, a process that will be expedited by the dual carriage requirement itself. Also, there is no alternative that will promote the various government interests here that would be less burdensome, thereby meeting the constitutional requirement that the government's action not burden substantially more speech than is necessary. In short, the inclusion of digital signals in the must-carry rules would not impermissibly burden free speech rights under the First Amendment.

B. Dual Must-Carry During the Transition Does Not Constitute a "Taking" Under the Fifth Amendment.

The imposition of a dual must-carry requirement during the DTV transition also would not constitute a "taking" under the Fifth Amendment. Indeed, in adopting the current must-carry rules, Congress concluded that must-carry rules do not constitute a Fifth Amendment taking.[34]

The U.S. Supreme Court has held that takings are most readily found "when the interference with property can be characterized as physical invasion by government . . . ."[35] Cable operators, however, cannot point to any such invasion, as there is no specific physical location in their cable systems that is "occupied" as a result of must-carry rules, nor has any

---

34 "Finally, the Committee notes that some cable operators have contended that signal carriage regulations would constitute a 'taking' of their channels in violation of the Fifth Amendment . . . . The reestablishment of signal carriage requirements will not . . . result in any unconstitutional taking of cable operators' property without compensation." H. R. Rep. No. 102-628, 102d Cong., 2d Sess. at 67 (1992).

35 Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1982) (*citing* United States v. Causby, 328 U.S. 256 (1946)).

tangible object been placed on their property. For example, in Loretto v. Teleprompter Manhattan CATV Corporation,[36] the Court held that the required placement of a cable operator's wires -- an actual, tangible object -- on the real property of an apartment building owner constituted a taking. Similarly, in Bell Atlantic Corporation v. FCC,[37] the D.C. Circuit declared invalid the Commission's requirement that local exchange carriers give up a portion of the physical space in their central office for the placement of competitors' tangible switching equipment. The Commission then revised its rules to merely require virtual (electronic) co-location, and held that such a requirement was not a taking.[38] However, even where a physical invasion is involved, that does not necessarily make a regulation a taking. In FCC v. Florida Power Corp.,[39] which involved the attachment of wires to utility poles, the U.S. Supreme Court still held that there was no taking involved, regardless of the physical invasion of the utility poles.

Moreover, even if the imposition of DTV must-carry rules actually were a physical invasion, it is not a permanent physical invasion. In Loretto, the Supreme Court noted that "this Court has consistently distinguished between . . . cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . ."[40] A dual must-carry requirement would necessarily be temporary in nature, as it would exist only until the

---

36 458 U.S. 419 (1982).

37 24 F.3d 1441 (D.C. Cir. 1994).

38 The Commission's regulations at issue in Bell Atlantic Corporation v. FCC were subsequently rendered moot by the passage of the Telecommunications Act of 1996, which provided explicit congressional authorization for physical collocation. *See* 47 U.S.C. § 251(c)(6).

39 480 U.S. 245 (1987).

40 458 U.S. at 428.

conclusion of the DTV transition, and the proposed rules therefore would not constitute a permanent physical invasion.

The proposed dual must-carry requirement also does not constitute a regulatory taking. The Loretto Court reaffirmed that "the Court has often upheld substantial regulation of an owner's use of his property where deemed necessary to promote the public interest."[41] Factors relevant to determining when a regulation has gone so far as to constitute a taking include (1) the character of the governmental action, (2) the economic impact of the regulation, and (3) the regulation's interference with investment-backed expectations.

Cable operators have chosen to enter a highly regulated industry, and depend on government consent to their continuous use of rights of way in order to operate their facilities. These operators are in many cases local monopolies, and are subject to substantial economic regulation. In such an environment, a government action that alters the economic benefits and burdens of the cable industry in order to promote the public interest is not a taking, and is merely the trade-off accepted by cable operators to obtain the use of public properties.

Furthermore, the requirement of digital cable carriage does not destroy any property of cable operators, and is unlikely to cause a material economic loss to cable operators. As one court has noted, "Congress never promised that it would abstain from all actions having an economic impact upon the cable industry . . . ."[42] This knowledge of the likelihood of regulatory change undermines any possible claim of interference with investment-backed expectations:

> [g]iven that the cable industry . . . [is] subject to significant regulation under Title VI of the Communications Act, the expectations of entities in the cable industry must be

---

41 458 U.S. at 426.

42 Cox Cable Communications, Inc. v. United States, 866 F. Supp. 553, 559 (M.D. Ga. 1994).

based on those regulations, the premise of the law underlying them, and that regulations are amended to respond to changing circumstances.[43]

Finally, as the cable industry itself has noted, the conversion to DTV has been a long time coming,[44] and operators have therefore been aware for some time of the potential for digital must-carry regulation.

In short, because dual must-carry rules would not constitute a permanent physical occupation, but merely a reasonable regulation intended to further numerous important governmental interests, the proposed rules do not constitute a taking of property in violation of the Fifth Amendment.

CONCLUSION

For the numerous reasons discussed herein, the Commission should require cable system operators to carry both the NTSC and DTV signals of local broadcast stations during the DTV transition. Such a requirement is constitutional and is clearly in the public interest, as it would

---

43 Telecommunications Services Inside Wiring, Customer Premise Equipment, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, 13 FCC Rcd 3659 (1997), at ¶ 229.

44 "Congress was aware, through the FCC's numerous notices, that the Commission had been considering since 1987 adoption of a new 'advanced television' standard to replace the existing NTSC standard. This paper record, and the widespread reporting about 'advanced television,' revealed that the Commission was contemplating a transition period during which broadcasters would continue to transmit NTSC signals while also transmitting new, advanced television signals." Comments of NCTA at 8 (citations omitted).

ensure a prompt conclusion to the DTV transition, promote localism and program diversity, and speed the provision of new communications services to the public.

Respectfully submitted,

UNIVISION COMMUNICATIONS INC.

By: _____
Scott R. Flick
Brendan Holland

Its Attorneys

SHAW PITTMAN
2300 N Street, NW
Washington, D.C. 20037
(202) 663-8000

Dated: June 11, 2001