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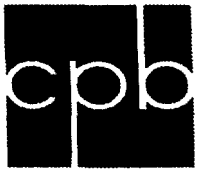

June 11, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

EX PARTE OR LATE FILED

Dear Chairman Powell:

Re: *Ex Parte* submission in CS Docket Nos. 98-120, 00-96, and 00-2

Three and a half years into the transition to digital television, three things are clear: (1) at least for noncommercial television, digital television's remarkable potential benefit to the public is even greater than originally thought, (2) the transition is faltering, and (3) prompt implementation of a comprehensive plan is essential if the transition is to succeed in realizing this promise.

With a new Commission taking hold of the agency's responsibilities and with the above facts now being widely acknowledged by those in the government, industry, and the public, now is the time for the Commission to develop such a plan. Accordingly, Public Broadcasters— represented here by the Association of America's Public Television Stations (APTS), the Public Broadcasting Service (PBS) and the Corporation for Public Broadcasting (CPB) — hereby submit the attached outline of a "Working Draft: Comprehensive Plan For Digital Transition." The full Working Draft will be submitted later today as part of Public Broadcasters' initial comments in this important proceeding. The purpose of the Working Draft is to provide a reasonable framework for urgent and inclusive discussions dedicated to developing a comprehensive plan for setting the transition on a coherent and effective course to achieve its compelling public policy ends.

I. Premises of the Working Draft

1. The digital transition is stalled and in jeopardy not merely of being delayed but of failing altogether. As House Commerce Committee Chairman Billy Tauzin said earlier this year: The transition is "really off track now." (Tauzin remarks January 28, 2001). We agree.

2. The digital transition is a product of the government's intervention in the marketplace to achieve compelling public policy ends. The government has strong interests in a successful and speedy transition: to use spectrum efficiently, to reclaim broadcast channels

above 51 and to reclaim the return analog spectrum so that it can be auctioned for third generation wireless and other applications; to avoid the waste and expense of indefinite dual digital and analog operations; and to realize the potential for consumers of the heightened and broadened services made possible by digital technology. These important government interests cannot be achieved without limited government intervention tailored to market circumstances.

3. The Commission, as the agency with primary oversight responsibility for the digital transition, needs promptly to diagnose why the transition is at an impasse and chart a new course that addresses those problems. In the past, the FCC has followed a fragmented approach, despite the fact that only an integrated cross-Bureau and cross-industry strategy could possibly succeed. For example, the FCC has addressed the issue of cable/receiver interoperability in five different proceedings; the crucial cable carriage proceeding was split in two; and responsibility for the various interdependent DTV issues has been scattered among at least five different bureaus and offices (the Auction Branch of the Wireless Bureau, the Cable Services Bureau, the Office of Plans and Policy, the Office of Engineering and Technology and the Mass Media Bureau). We respectfully submit that the Commission should designate a task force or other coordinating entity within the Commission. The Commission might also wish to appoint a particular Commissioner to oversee the transition task force (which might be coordinated by the Mass Media Bureau since this is a television transition).

4. To be effective the plan should cover broadcasters, cable operators and receiver manufacturers. The comprehensive plan should coordinate voluntary commitments and regulatory obligations among all industries key to the transition, so that the public policy objectives of the digital television transition are achieved. Noncommercial broadcasters, pursuant to mandatory construction deadlines, are now delivering digital broadcast signals to most American households. Yet the lack of progress in getting those signals the last few feet from the airwaves through the pipes, boxes and sets controlled by other parties has demonstrated that the market alone does not, and cannot, suffice.

5. To be effective the plan must include some limited, transitional digital carriage requirement. As the Congressional Budget Office recognized two years ago, cable carriage is the single most important determinant of whether the transition will succeed. Because 70% of American households receive their local television service over cable, it is not remotely possible to attain the 85% DTV penetration level necessary to trigger the analog spectrum give-back required by Congress without cable carriage of digital signals during the transition. Broadcasters' widespread inability to gain cable carriage for their digital signals in the nearly three years since they began transmitting demonstrates that the market alone will not assure consumers' access to digital signals.

6. Where market incentives are lacking and government intervention is needed, regulation should be transitional, limited and tailored to market circumstances. Voluntary industry commitments should be encouraged as a substitute for regulation but should be backed by a commitment by the Commission to take swift action if they are not entered into promptly.

Where the FCC believes it lacks authority to intervene, the plan should include recommendations to Congress for necessary legislative action. By tailoring regulatory approaches to market developments, the government's role can be limited to achieve the important government policies of spectrum efficiency, spectrum recovery and enhanced digital service to the public.

7. No plan for the digital transition of noncommercial stations can be effective unless there is a comparably effective plan for the transition of all television stations. However beneficial public television's digital offerings may be (and we believe they will provide powerful benefits to the American public), if they are among the few digital signals cable systems carry, their value will not be enough to induce sufficient numbers of viewers to purchase digital sets. In turn, without healthy growth in DTV penetration, smaller noncommercial stations will be unable to activate their digital channels. In short, a fair and reasonable transitional digital carriage requirement for public television alone would be welcome but will not suffice.

II. What's at Stake Here?

This proceeding puts in issue the future of both noncommercial and commercial television; it is not simply a matter of whether our nation's only video service that is free, local and universal can successfully add new enhancements to existing service. The goal of the transition is to reach an end at which the existing analog service will be shut off. Straddling between digital and analog operations for the indefinite future is intolerable for both broadcasters and the public and certainly for Congress, which had targeted 2006 for the spectrum giveback.

What's at stake here is the long-term viability of free, over-the-air television, which may not survive a prolonged transition. In the *Turner II* decision, the Supreme Court affirmed Congress's determination that preservation of the public's local television service is a compelling public policy objective. Noncommercial television alone reaches 99% of American homes in every corner of the country. Local television also reaches all economic strata. Even among cable subscribers, 60% of viewing is devoted to over-the-air television programming. Neither cable nor satellite offers services comparable to public television's mix of instructional, informative and cultural programming, which will be significantly enhanced and expanded if public television can realize its ambitious plans to provide a rich array of HDTV, interactive TV and multicast services. Nor do cable and satellite achieve universal reach or provide service to the underserved. Though, in combination, cable and satellite penetrate 80% of American *households*, because most homes have multiple receivers, only one or two of which are hooked up to cable, they may still reach only half of American television *sets*.

In short, the DTV transition must be completed if free, local and universal television service is to survive, and the transition cannot succeed without transitional carriage rules. As further described in the comments we will file later today, the FCC is empowered (and, we believe, statutorily directed) to fashion a transitional cable carriage requirement, and this requirement can be tailored in such a way as to pass constitutional muster. The government interests served by a transitional carriage requirement are even more compelling than those that

justified the analog requirement. In addition to preserving the public's stake in free, local and universal television service, a narrowly tailored digital carriage requirement would serve powerful government interests in the efficient use of the spectrum and the recovery of the spectrum for auction to next-generation telecommunications providers. That requirement can be structured so that, generally, it imposes no greater proportional burden for cable systems when measured against the total upgraded and expanded cable capacity than did the analog carriage rules that the Supreme Court upheld in *Turner II.*

In the past, inflexible "all or nothing" advocacy positions have tended to polarize the "must carry" debate. As a result, more limited, market-based solutions have not been given adequate consideration. The rewards to the public of a successful transition, which noncommercial television has worked hard to implement, should provide a powerful and positive incentive for the Commission to develop a comprehensive strategy to resolve the present impasse.

III. Working Draft: Comprehensive Plan for Digital Transition

Public television has developed its "Working Draft: Comprehensive Plan For Digital Transition" as a possible starting point for the cooperative, creative, forward-looking and coordinated planning process to which this Commission's leadership is so essential. This draft proposal would limit government's role to situations where market forces will not suffice, would coordinate regulations and commitments among the relevant industries and would mesh them with market developments. Our proposals, which are set out in the attached outline, are illustrative of one possible approach, but we recognize that they are not the "last word" and they are not offered as such. Whether or not the Commission uses any or all of the concepts in the Working Draft, Public Broadcasters urge that it immediately launch an effective and comprehensive digital planning initiative.

Respectfully submitted,

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cc: Commissioner Gloria Tristani
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OUTLINE June 11, 2001

WORKING DRAFT: COMPREHENSIVE PLAN FOR DIGITAL TRANSITION

I. STATION BUILD-OUT AND CARRIAGE REQUIREMENTS

Stage One: Revitalizing the Transition Where Stations Are Already On the Air

In those markets (predominantly, but not exclusively, in large markets) where broadcasters have constructed DTV facilities and are broadcasting digital signals, cable operators with upgraded systems would be required, within a reasonable period (*e.g.*, 60 days) and subject to a suitable cap, to carry all local digital signals. These carriage and build-out requirements would be accompanied and supported by the parallel receiver and receiver/cable interface requirements or commitments described in Part II below.

1. *Carriage Requirements Tied to Market Size and DTV Activation* A requirement that upgraded cable systems carry all local digital signals on the air (up to the capacity cap) would apply to:

   a) the top 30 television markets *plus*

   b) any additional markets with two or more digital stations on the air, except any one station in the case of one or two-station markets ("the two-station test").

2. *Carriage Requirements Tied to Cable Capacity*

   a) Within the markets described above, only those cable systems with 750 MHz would be immediately subject to the carriage requirement.

   b) Cable systems in these markets that have not upgraded to 750 MHz must carry local digital broadcast signals when they upgrade to 750 MHz *or* within one year of the carriage requirement's effective date, whichever is earlier.[1]

   c) As in the analog context, "small cable systems" satisfying the FCC's definition (which the FCC could adjust for the duration of the transition) would be exempt from carriage requirements until such time as they surpass the subscriber limit for a "small cable system."

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[1] This principle would discourage cable systems from delaying (or scaling back) system upgrades to avoid digital carriage obligations.

3. *Reduced Cable Capacity Cap*

a) Option 1: Once a cable system has upgraded to 750 MHz and incurred transitional carriage obligations, the proportion of usable activated channels[2] subject to carriage obligations might be reduced to a percentage somewhat lower than the analog commercial carriage cap of 33%, with both commercial *analog and DTV* stations counting toward the cap.[3]

b) Option 2: The Commission might adopt a carriage cap for commercial *analog and DTV* signals combined based on the percentage of capacity that each cable system devoted to carriage of analog signals at the time the analog carriage rules went into effect.[4]

c) Public Broadcasters will work with the Commission and others to develop reasonable provisions for carriage of analog and digital noncommercial stations during the transition that would generally limit the proportion of cable capacity devoted to noncommercial stations consistent with the analog rules.

d) If a cable system becomes obligated to carry DTV signals because a year has transpired since the two-station test was met (and not because the system has upgraded to 750 MHz), it would not be entitled to the lower transition-period cap, which is intended to provide incentives and reward systems that add capacity.

Stage Two: Market-Triggered Build-out and Carriage Requirements For Other Stations and Other Markets

For Stage II, the Commission should tie obligations to construct digital broadcast stations and carry digital signals to some proxy reflecting market developments. Phasing in future cable carriage requirements will not run afoul of the Commission's statutory mandate to assure cable carriage for DTV signals because the timing would be linked to build-out deadlines for broadcast stations in those markets.

The Commission should use DTV receiver penetration at the *national* level to trigger regulatory obligations at the *local* level because (1) momentum at the national level (*i.e.*,

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[2] Usable activated channels must be determined on the basis of *all* capacity available to the cable operator that could be used for video programming, not just capacity the operator chooses to dedicate to video programming.

[3] Because the one-third analog commercial channel cap is statutory, Congress may need to amend the statute in order to lower the cap. However, given the Commission's discretion, albeit limited, to adapt the carriage rules for the digital environment, *see* 47 U.S.C. § 614(b)(4)(B), it might be able, without legislation, to limit the total burden a transitional carriage requirement would place on a cable operator's capacity.

[4] Such a requirement would, by definition, impose no greater burden on cable systems than did the analog carriage rules that were upheld in *Turner II*.

in the larger markets and in smaller markets where broadcasters are pioneering) will have an impact on demand for DTV products and services in smaller markets; and (2) DTV receiver penetration at the national level brought on by the Stage I carriage requirements will create economies of scale that will bring down prices and make DTV transmission equipment and receivers more affordable.

1. *Broadcast Build-Out Deadlines*

   a) The Commission should tie build-out requirements – for public stations, for commercial stations in the top 30 markets that are not affiliated with a major network, and for commercial stations below the top 30 – to a market-defined milepost, such as national DTV receiver penetration levels.[5]

   b) After the milepost is reached, stations would have one year to construct and become operational, unless they were entitled to waivers.

   c) Stations not affiliated with a major network should be given an additional year beyond the build-out deadline for major network affiliates, and noncommercial stations should be given two years beyond the build-out deadlines for major networks.

Proposed Build-Out Matrix

Affected Markets/Stations	National Penetration Trigger*
Markets 31-100 (plus stations in top 30 markets that are not affiliated with a major network)	X%
Markets 101-150	Y%
Markets below 150	Z%

* Major network affiliates would have one year after the trigger is reached to complete construction and begin DTV operations. Commercial stations not affiliated with a major network would have an additional year, and noncommercial stations would be given two additional years to become operational.[6]

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[5] The level of DTV receiver penetration would be determined by comparing the number of DTV receivers with DTV tuners sold against the number of national television households.

[6] Dates for choosing a post-transition channel, replicating analog Grade B service areas, providing a stronger signal over cities of license and various simulcast deadlines would also need to be adjusted accordingly.

2. *Future Cable Carriage Obligations* As national progress in the DTV transition stimulates DTV activation by additional stations, cable carriage obligations would be triggered in their markets.

   a) Cable carriage obligations would be triggered as the above-described thresholds are met. Thus, cable systems would be required to carry the new DTV signal within 60 days after it goes on the air in each of the following three situations:

      (i) when at least two DTV stations are already being carried,

      (ii) in a three or more station market when the new DTV signal is the second DTV signal to be broadcast in the market, and

      (iii) in a one or two-station market whenever the new DTV signal goes on the air.

   b) This requirement would apply only to systems that have upgraded to 750 MHz capacity. A non-upgraded system would have to carry those signals within a year *or* after it upgrades to 750 MHz capacity, whichever is earlier.

   c) As described above, systems that become obligated to carry DTV signals because a year has expired but that have failed to upgrade could not take advantage of the lower transition capacity cap.

Stage Three: Possible Sunset of Transitional Carriage Requirement

If the Commission believes it necessary to further moderate the transitional carriage requirement, it could provide for a possible sunsetting of the requirement. Under such an approach, cable systems' obligation to carry both analog and digital signals would terminate at a point when market stimuli were thought to be sufficient to propel the DTV transition forward to completion. The Commission could take up this issue at some defined point in the future, such as when national DTV receiver penetration reaches 60%. Two sample sunset provisions are described below. In either case, the sunset would be available only where the cable operator has confirmed with the affected broadcaster that the broadcaster's digital signal substantially duplicates the content carried on the station's analog signal.

1. One sunset regimen might allow a cable system to drop the analog signal of a local station for which it is carrying a digital signal once:

   a) [75%] of its subscribers own DTV receivers *and*

   b) set-top boxes capable of down-converting DTV signals delivered over the cable system for reception on an analog set are commercially available in the local market at a reasonable price and are fully functional with the conditional access POD provided by the cable system.

2. A second sunset option would allow a cable system to drop the analog signal of a local station for which it is carrying a digital signal, *provided that* the digital signal could be viewed by all the cable system's subscribers (either because a down-converted analog signal, in addition to the digital signal, is transmitted from the cable headend or because subscribers owning only an analog receiver are provided with a set-top box that can output an analog signal).

II. RECEIVER AND RECEIVER/CABLE INTERFACE COMMITMENTS OR REQUIREMENTS

The following three sets of commitments or requirements are necessary to serve the public's stake in an effective digital transition. They are also strongly justified by the need to protect consumers who are being counted on to make large outlays for new digital receivers.

DTV Tuners

Developments to date demonstrate that market-based incentives for equipment manufacturers to make effectively performing DTV sets available to consumers have not been enough.

1. Of the 32 million sets sold in 2000, fewer than a million were DTV sets and fewer than 1% were equipped with DTV tuners.

2. Testimony before Congress shows that the transition will not progress effectively without DTV receiver penetration, which will not happen absent at least a commitment that equipment manufacturers will include DTV receivers/tuners in all television sets sold after a date certain.

3. The Commission should:[7]

   a) Seek to secure voluntary commitments to immediate or phased-in requirements that television sets manufactured after a date certain (beginning with either large sets or a portion of all sets sold) include DTV tuners.

   b) Make phased-in tuner requirements fully effective within four years.

   c) If voluntary commitments are not forthcoming, the FCC should adopt requirements to the same end.

[7] See MSTV/NAB/ALTV comments and replies in the *DTV Biennial Review FNPRM* (MM Docket No. 00-39).

DTV Receiver Performance Thresholds

Unless the receiver industry promptly adopts voluntary receiver performance thresholds, the Commission should enact suitable threshold requirements, because actual market performance to date has been insufficient.

1. The thresholds should not be rigid specifications but should be based on the technical performance assumptions on which the DTV table of allotments/assignments was premised.

2. ATSC is developing a multipath performance threshold that should be adopted in a matter of months. It, too, should become a performance threshold.

Cable/Receiver Interface

The third issue that needs to be resolved is receiver/cable interoperability.

1. In the summer of 1999 the Senate Commerce Committee expressed sharp concern that, 18 months after the DTV standard had been adopted, DTV receivers could not plug into cable facilities. Two years later, though progress has been made (an agreement between receiver manufacturers and cable was entered into in March), effective interoperability solutions are not being implemented generally and, therefore, DTV sets currently on the market are not fully compatible with existing cable equipment.

2. Unless remaining disputes are promptly resolved, the Commission should adopt requirements (or, if it feels it is necessary, ask Congress to give it the authority to adopt requirements) assuring full, convenient, effective and prompt cable/receiver interoperability.