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

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	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

To: The Commission

REPLY COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

August 16, 2001

TABLE OF CONTENTS

Page

SUMMARY I

I. THE COMMISSION HAS EXCEEDED ITS AUTHORITY – DIGITAL CARRIAGE MUST BE ENFORCED PRIOR TO THE END OF THE DTV TRANSITION 4

II. DTV MUST CARRY FURTHERS THE SAME IMPORTANT GOVERNMENT INTERESTS IDENTIFIED IN TURNER 7

A. Cable Operators Still Have The Incentive And Ability To Threaten The Economic Viability Of Local Broadcasters 9

B. The Burden of Digital Must Carry on Cable Operators Would Not Exceed the One-Third Cap that Congress Established and the Supreme Court Approved 12

III. DTV MUST CARRY WILL PROTECT THE VIABILITY OF BROADCAST STATIONS 13

IV. THE COMMISSION'S APPROACH TO "PROGRAM-RELATED CONTENT" AND "PRIMARY VIDEO" IS UNWORKABLE AND INCONSISTENT WITH THE 1992 CABLE ACT 16

V. THE PAX DTV MUST CARRY PROPOSAL IS THE WAY TO A SUCCESSFUL DTV TRANSITION 19

CONCLUSION 23

SUMMARY

Without full digital must carry, there is not going to be a DTV transition for television in this country. Therefore, it is mandatory that the Commission adopt and enforce digital must carry rules in accordance with the *PAX DTV Must Carry Proposal* and the 1992 Cable Act. Doing so would carry out the Commission's statutory responsibility and protect the availability of free, over-the-air television in the digital age. In the 1992 Cable Act, Congress directed the Commission to institute this proceeding to adopt technical changes needed to ensure the carriage of local broadcasters' digital signals. Instead, in its *Further Notice* released on January 23, 2001, the Commission has exceeded its authority by proposing an entirely new regulatory scheme that likely would not take effect for many, many years. In doing so, the Commission largely has disregarded the comments of numerous broadcasters, and, more importantly, the mandatory carriage provisions of the 1992 Cable Act as they relate to digital television.

DTV must carry furthers the same important government interests that the Supreme Court approved in *Turner*, and there is no need to invent a new rationale to justify it. In the digital age, cable operators again have the ability and incentive to jeopardize the economic viability of local broadcasters. The horizontal concentration in the Cable industry that concerned Congress and the Supreme Court nearly ten years ago now has effectively doubled, and the filed comments unsurprisingly indicate that a familiar pattern of discriminatory treatment against broadcasters' digital programming already is emerging.

Furthermore, delaying digital must carry until after local stations terminate analog broadcasts is a recipe for perpetuating the DTV "transition," and there is no legal basis

for this. The vast majority of viewers would have little incentive to purchase new digital sets if forced to receive the local programming that they prefer in the same, old analog format. Without DTV market penetration, dual analog and digital broadcasting will not cease, forcing stations to incur expensive dual operating costs indefinitely. As commenters note, if implemented as proposed, digital must carry will either never take effect or come too late for the intended beneficiaries – small stations that can ill-afford a lengthy transition. And, it will prevent the major stations from multicasting, which will increase the multiplicity of diverse voices.

Now more than ever, PCC believes that the *PAX DTV Must Carry Proposal* is the way for the Commission to achieve a successful DTV transition. PCC's proposal is based on the 1992 Cable Act and complies with existing law. Under the *PAX DTV Must Carry Proposal*, a station would elect its full digital **OR** analog signal for carriage on larger, upgraded (750 MHz) cable systems (***we are not asking for dual carriage***)! PCC's proposal is similar to one submitted by Public Broadcasters, and PCC is encouraged that broadcasters are building a consensus in support of the workable and reasonable positions embodied in these proposals. PCC asks the Commission to adopt the *PAX DTV Must Carry Proposal* and abandon its tentative conclusion to delay digital must carry until a station's analog broadcasts cease. In this way, the Commission will enforce the existing must carry laws, promote the continued availability of local television, and create a multiplicity of multicasting voices -- accordingly ensuring the widespread dissemination of information as Congress intended.

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

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	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

To: The Commission

REPLY COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("PCC") hereby submits its Reply Comments in response to comments filed in the above-captioned proceeding.[1] PCC has participated extensively in this proceeding through the submission of formal comments and its widely-circulated *PAX DTV Must Carry Proposal*. **PCC consistently has urged the Commission to carry out Congress's clear directive to establish only the technical changes in the carriage provisions of the 1992 Cable Act**

---

[1] Carriage of Digital Television Broadcast Signals Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120, CS Docket No. 00-96, CS Docket No. 00-2, *First Report and Order and Further Notice of Proposed Rule Making*, 16 FCC Rcd 2598 (rel. Jan. 23, 2001) ("*Further Notice*").

necessary to ensure full cable carriage of local broadcasters' digital television signals, multicast or otherwise. The 1992 Cable Act clearly articulated this mandate**:**

> (B) ADVANCED TELEVISION. At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems NECESSARY TO ENSURE CABLE CARRIAGE OF SUCH BROADCAST SIGNALS OF LOCAL COMMERCIAL TELEVISION STATIONS which have been changed to conform with such modified standards.[2]

This the Commission still has not done more than four years after the issuance of the DTV Table of Allotments. PCC herein responds to those commenters who ask the Commission to deviate from the plain language of the must carry provisions of the 1992 Cable Act, and it urges the Commission to preserve the viability of free, over-the-air broadcasting and the multiplicity of media voices.

PCC has previously noted, in filings before the FCC, that the failure to implement full digital multicast must carry remains one of the main obstacles to the DTV transition – which currently is going nowhere. PCC is pleased to note that a respected group of Public Broadcasters pointed out in its comments that the DTV transition is faltering, will be delayed for decades, and may fail altogether. As part of their comments, these Public Broadcasters urged the FCC to adopt full multicast, digital must carry rules. In recent trade publications, it has been reported that the National Association of

[2] 47 u.s.c. § 534 (b) (4) (B) (emphasis added).

Broadcasters soon will be urging the FCC to adopt full digital multicast must carry rules. As in the 1980's, the industry most affected by the absence of must carry is now speaking with a largely united voice urging this federal agency to adhere to federal law and to immediately adopt the rules called for in the 1992 Cable Act and mandate full digital multicast must carry for broadcast stations.

The Commission's tentative conclusion that broadcasters are not entitled to digital must carry until they terminate analog service has no legal basis and would unnecessarily prolong the digital transition. In fact, it amounts to no transition at all. By continuing to exploit their unquestionable bottleneck control, cable operators will deny viewers access to the digital programming of preferred local broadcasters for as long as they wish, thus dictating on their own the implementation of digital television. This Commission must recognize that a perpetual DTV "transition" would saddle broadcasters with dual operating costs but mostly single-signal viewership, rendering the intended beneficiaries of the mandatory carriage provisions particularly vulnerable to the Cable industry's economically based negotiations for carriage – contrary to the directives of the 1992 Cable Act. Furthermore, it would prevent multicasting of local programming, decreasing diversity and interfering with efforts to clear the analog spectrum for other uses.

Undoubtedly, cable operators wish to delay mandatory DTV signal carriage as long as possible, but the implementation of digital television does not change the fact that Congress and the Supreme Court already have determined that the mandatory carriage provisions permissibly advance important interests of continued availability of local broadcast television and widespread dissemination of information. The

Commission should abandon its tentative decision and adopt the technical changes that will ensure carriage of local broadcasters' digital signals – preferably those embodied in the *PAX DTV Must Carry Proposal*.

I. THE COMMISSION HAS EXCEEDED ITS AUTHORITY – DIGITAL CARRIAGE MUST BE ENFORCED PRIOR TO THE END OF THE DTV TRANSITION.

PCC consistently has stressed the Commission's limited role in this proceeding, for which Congress directed the agency to "establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of [DTV] broadcast signals of local commercial television stations."[3] The law on must carry is clear: "Each cable operator shall carry . . . the signals of local commercial television stations."[4] In establishing the must carry provisions, Congress believed that mandatory carriage of all local broadcast signals was necessary to advance important government interests of promoting the continued availability of free, over-the-air local broadcast television[5] and ensuring the widespread dissemination of information from a multiplicity of sources.[6] After two reviews, the Supreme Court upheld the constitutionality of the must carry provisions, finding that Section 614 suitably advanced these important interests.[7]

---

[3] 47 U.S.C. § 534(b)(4)(B).

[4] 47 U.S.C. § 534(a).

[5] 1992 Cable Act, §§ 2(a)(10),(12).

[6] *Id.*, § 2(a)(6).

[7] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") (determining that intermediate scrutiny applied); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") (upholding must carry provisions under intermediate scrutiny).

Congress granted the Commission no authority to exclude the DTV signals of local television broadcast stations from the mandatory carriage requirements. The language in the carriage requirements makes no distinction between analog and digital signals. Congress plainly could have excluded DTV signals from mandatory carriage, just as it did for ancillary and supplementary services (as the Cable industry acknowledges).[8] Nonetheless, in the *Further Notice* of January 23, 2001, **the Commission failed to recognize that the 1992 Cable Act already mandates full and immediate mandatory carriage of digital broadcast signals**,[9] concluding instead that digital carriage was not permitted until a station terminates analog broadcasts.

To continue to adhere to this conclusion, the Commission necessarily must disregard the plain meaning of the word "*changed*." In the carriage provisions of the Cable Act, Congress stated that the Commission shall

> **establish any *changes* in the signal carriage requirements . . . to ensure cable carriage of [DTV] broadcast signals of local commercial television stations which have been *changed* to conform with [DTV] standards.**[10]

As PCC has said on numerous occasions, to deny digital must carry during the transition, the phrase "signals . . . which have been *changed*" must be reinterpreted to mean "signals . . . which have been *exchanged*." Congress did not say that. The

---

[8] 47 U.S.C. § 336(b)(3). *See, e.g.*, NCTA Comments at 29; AT&T Comments at 30.

[9] The Cable Act, at Section 614(a), mandates that "cable operator[s] . . . shall carry the signals of local commercial television stations." It makes no distinction between analog and digital signals.

[10] 47 U.S.C. § 534(b)(4)(B) (emphasis added).

statute requires DTV carriage when broadcasters' signals are changed, which they were at the moment their DTV transmissions commence.

Notably, Congress used the word "changes" (*i.e.*, "establish any changes") in the same critical sentence. If the unreasonable interpretation of "change" was applied to the preceding use of the term in the statute, the Commission would manufacture expansive authority to *exchange* Congress' carriage requirements for its own. Of course, this is exactly what the Commission has done – *exchanged* Congress's carriage requirements for its own. Fortunately, the Commission's interpretation will not withstand the scrutiny of public opinion or the courts, and the agency accordingly should draw a more Congressionally accurate and legally supportable conclusion than the tentative one it announced. Instead of an exchange of requirements, the term "*change*" is understood as requiring a transformation within some existing framework. This same plain meaning must be applied to the phrase at issue.

In response to the initial *Notice*, PCC cautioned against the Commission using the "broad authority" it unreasonably had asserted to deviate from Congress's plain language.[11] Undeterred, the Commission has exceeded its authority by creating new must carry policies and, as broadcasters noted, largely failing to examine and address numerous issues raised in the extensive comments filed.[12] Accordingly, PCC whole-heartedly agrees with Time Warner Cable's assertion that "'[w]here an administrative

---

[11] *See* Comments of Paxson Communications Corporation, filed Oct. 13, 1998, at 2-3, 11-13, *in response to* Carriage of Digital Television Broadcast Signals Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120, *Notice of Proposed Rule Making*, 13 FCC Rcd 15092, ¶ 13 (1998).

interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.'"[13] The Commission has gone beyond what Congress directed and has not explained its justification or legal grounds for doing so. PCC urges the Commission to take this opportunity to review carefully the federal record and those comments filed in response to the *Further Notice* and establish the technical changes allowed by the provisions of the 1992 Cable Act necessary to ensure digital carriage – no more and no less.

II. DTV MUST CARRY FURTHERS THE SAME IMPORTANT GOVERNMENT INTERESTS IDENTIFIED IN *TURNER*.

As Congress specifically noted in the 1992 Cable Act:

> *A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.*
>
> *As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals,* coupled with the absence of a requirement that such systems carry local broadcast signals*, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.*[14]

---

[12] *See, e.g.*, NAB Comments at 5; Public Broadcasters Comments at 20. The Commission took some two-and-a-half years to produce the *Further Notice*.

[13] Time Warner Cable Comments at 3, *citing Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1131 (D.C. Cir. 2001).

[14] 1992 Cable Act, § 2(a)(15)-(16).

The must carry provisions derived from these Congressional findings satisfied intermediate scrutiny because they advanced the important government interests of preserving the benefits of local broadcast television and promoting the widespread dissemination of information from a multiplicity of sources.[15] Evidence indicated that increasing horizontal concentration and vertical integration provided cable systems with both the incentive and ability to discriminate against television broadcasters in favor of affiliated cable programmers.[16] The Supreme Court found the mandatory carriage provisions permissible because they furthered important government interests without unduly burdening cable operators.[17] Although the Court identified instances of actual harm that the cable industry caused to local broadcasters, it explicitly determined that Congress need not have waited for that actual harm to occur.[18]

Digital television is critical to local broadcasters' present and future viability, and nothing about DTV changes the findings of Congress and the Supreme Court. Digital television does not eliminate the incentive or ability of cable operators to threaten local broadcasters. Digital television does not lessen the importance of preserving the benefits of free, over-the-air local broadcast television. Digital television does not change the importance of promoting the widespread dissemination of information from a multiplicity of sources (which local DTV multicasting surely furthers by increasing diversity). **And it does not change the one-third capacity limit for cable carriage of**

---

[15] *Turner II*, 520 U.S. at 213, 224-25 (applying intermediate scrutiny standard set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[16] 1992 Cable Act, § 2(a)(5).

[17] *Turner II*, 520 U.S. at 224-25.

local signals. There is no need to invent a new rationale to support digital must carry. This territory has been covered by both Congress and the Supreme Court.

The Cable industry contends otherwise, maintaining that the 1992 Cable Act and *Turner II* are inapplicable to DTV must carry. To support their position that DTV must carry is not required, the Cable industry essentially makes two arguments: (1) that circumstances have changed so dramatically that DTV must carry, in and of itself, would not further the identified government interests; and (2) that DTV must carry would result in impermissible harm to cable operators. PCC will address these in turn.

A. Cable Operators Still Have The Incentive And Ability To Threaten The Economic Viability Of Local Broadcasters.

The Cable industry would have the Commission believe that circumstances have changed significantly since the 1992 Cable Act and *Turner II*, thereby removing digital television from the purview of existing law. AT&T asserts that cable operators no longer have a monopoly on multichannel video delivery and that the FCC's new must carry rules require scrutiny under a different standard.[19] Time Warner Cable further insists that, due to the implementation of a new digital transmission format, the Commission must identify with specificity what objectives DTV must carry would achieve.[20]

Actually, very little has changed since *Turner II*. There is every reason to believe that DTV signals will serve the stated governmental interests more than NTSC signals

---

[18] *Id.* at 202-03, 212.

[19] AT&T Comments at 13, 18. *See also* Time Warner Cable Comments at 9-10 (arguing that changed competitive landscape eliminates *Turner Ii* rationales for mandatory carriage); NCTA Comments at 14 (pointing out increased DBS competition and cable outlays for system upgrades).

[20] Time Warner Cable Comments at 5; AT&T Comments at 15-16.

do, and there is every reason to assume that cable operators will harm digital broadcasters. In fact, what is being witnessed with digital carriage is only too familiar.

The Cable industry still has the *ability* to threaten the economic viability of local broadcasters. As the Public Broadcasters assert, the Cable industry still stands as a monopolistic gatekeeper.[21] The Commission's most recent Competition Report shows that the horizontal concentration of the Cable industry has reached new heights, with the top 10 cable multiple system operators now controlling 83.9% of cable subscribers.[22] Yet, in *Turner II*, the Supreme Court expressed concern over the incentives created by horizontal concentration when the top ten operators controlled only 42-54% of those customers.[23] Furthermore, the D.C. Circuit recently struck down the Commission's horizontal and vertical ownership caps as unconstitutional,[24] so additional concentration is all but certain.[25]

Moreover, AT&T's assertion that satellite competition has removed the Cable industry's monopolistic grip on program delivery fails to persuade.[26] DirecTV's data on new subscribers in the first quarter of this year was abysmal, and although Echostar

---

[21] Public Broadcasters Comments at 21.

[22] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00-132, *Seventh Annual Report*, FCC 01-1 at ¶ 169 (rel. Jan. 8, 2001) ("*Competition Report*").

[23] *Turner II*, 520 U.S. at 197-98.

[24] *Time Warner Entertainment Co. v. FCC*, 245 F.3d 1126 (2001).

[25] Consider, *e.g.*, the proposed merger between Comcast and AT&T. The Commission has set itself to the task of reorganizing the cable ownership rules, but the real possibility exists that such rules are gone for good. Brigitte Greenberg and Patrick Ross, *Proposed FCC Rules on Cable Ownership Cap Due Soon*, Communications Daily, Jul. 26, 2001, at 4; Alan Breznick, *Powell Questions Future Role of Over-the-Air TV*, Communications Daily, Apr. 6, 2001, at 1-2.

continued to add viewers at a reasonable pace, there is reason to believe that the competitive threat posed to cable by DBS is on the wane.[27] Indeed, with demand shrinking, the market may support only a single DBS provider, as Echostar has been attempting to acquire DirecTV for the better part of this year.[28] Accordingly, the Cable industry apparently will not be one of those "temporal" or "serial" monopolies, as some might hope.

Nor is the Cable industry a virtuous monopoly. In addition to the Cable industry's *ability* to threaten the viability of broadcasters, they still have the rational *incentive* as well. PCC agrees with NAB that cable operators have become increasingly strong competitors for advertising dollars, and that the added functionality of digital television creates further economic incentives for cable operators to avoid signal carriage.[29] Cable operators candidly acknowledge in their comments that they will carry the digital signals of non-broadcast cable networks while simultaneously opposing mandatory carriage of local broadcast digital signals.[30] With the Commission declining to prevent

---

[26] AT&T Comments at 18.

[27] Jimmy Schaeffer, *DirecTV Subscriber Growth Slackens: New Recruits Down 16 percent in First Quarter*, Satellite News, Apr. 30, 2001, available at <<http://www.satellitetoday.com/snapshot/previous/snap050401.htm>>

[28] *See e.g. Echostar, Hughes Confirm DirecTV Merger Talks,* SPACE NEWS BUSINESS REPORT, June 14, 2001, *available at* http://www.space.com/spacenews/marketmonitor/echostar_hughes_010614.html.

[29] NAB Comments at 19.

[30] "[A] carriage requirement is simply unnecessary to encourage the purchase of digital TV sets: non-broadcast digital signals provide ample encouragement." Time Warner Cable Comments at 14; "With respect to high definition programming, cable programmers offer more of that programming than all the broadcast networks combined – and certainly more than those broadcasters that rely on must carry." NCTA Comments at 11.

material degradation of a broadcaster's digital signals (until after the station terminates analog service),[31] the table is set for cable operators to capture audiences using 21st-century digital programming for its affiliated non-broadcast networks while discriminating against local broadcasters' 20th-century NTSC signals.

Not that broadcasters have to wait until then to be jeopardized. The Cable industry's familiar exercise of ability and incentive to threaten broadcasters – an exercise that ultimately resulted in the 1992 Cable Act – already is being repeated. In their comments, cable operators espouse digital retransmission consent as the preferred "market solution" and offer anecdotal evidence of agreements that have been reached.[32] However, the results of NAB's thorough and extensive survey demonstrate that cable operators generally are not responding to requests for digital carriage.[33] PCC's own experience in Chicago is illustrative. PCC built its local Chicago digital television station, placed six free, multicast program streams on its digital signal and requested must carry from the local cable operators. **PCC did <u>not</u> request dual carriage but a replacement of its digital signal for its analog signal which currently is being carried.** All of the cable operators rejected PCC's carriage request and the FCC refused to order carriage pursuant to its own ill-conceived decision that such carriage must await the resolution of this proceeding.[34] PCC's digital efforts in Chicago have, thus, gone to waste; its efforts to launch multiple, free programming

---

[31] *See Further Notice*, ¶ 73.

[32] *See* NCTA Comments at 12; AT&T Comments at 8.

[33] NAB Comments at 21-26.

services will not gather the cable households. Without viewers, there are no advertisers. Why should broadcasters bother to build their digital stations? **Why should they bother to launch multiple free programming streams? Why should they care about diversity of voices if the FCC does not?**

No one should be surprised. Cable operators' past actions resulted in the creation of a voluminous record demonstrating their propensity to engage in an economically rational strategy of threatening the viability of local broadcasters.[35] Congress adopted the must carry provisions to ensure cable carriage of *all* local signals – especially those of independent stations and affiliates of emerging networks. Contrary to the Cable industry's assertions, the circumstances that resulted in the 1992 Cable Act have not changed but instead are resulting in the familiar pattern of exercised disincentives to broadcasters. The 1992 Cable Act worked. Since the 1992 Cable Act instituted must carry, hundreds of new local television stations and five new television networks have been created.

B. The Burden of Digital Must Carry on Cable Operators Would Not Exceed the One-Third Cap that Congress Established and the Supreme Court Approved.

Cable operators argue that digital must carry would result in constitutionally impermissible harm,[36] but Congress and the Supreme Court long ago considered and rejected these arguments. Congress determined that no more than one-third of a cable

---

[34] Paxson Chicago License, Inc. v. 21st Century TV Cable, Inc., *et al*, *Memorandum Opinion and Order*, FCC 01-226 (rel. Aug. 15, 2001).

[35] *See Turner II*, 520 U.S. 197-213.

[36] NCTA Comments at 14-20; Time Warner Cable Comments at 20-24.

system's capacity must be dedicated to local broadcasters' signals,[37] and this cap is not eliminated by DTV mandatory carriage. The Supreme Court found that this burden was permissible in furtherance of the government's important interests.[38] To the extent cable operators have not exhausted this one-third capacity, they are enjoying a programming windfall. If cable operators had exhausted their one-third capacity, then no additional cable programming would be dropped. Moreover, as cable systems convert to digital, their channel capacity will continue to explode, mooting any concerns about dropped cable programming or reduced multiplicity of non-broadcast voices. As NAB notes, the relative burden of carrying local stations' analog and digital signals would be less today than when the mandatory carriage provisions were first enacted.[39] Hence, digital must carry would not result in impermissible harm, and arguments to the contrary cannot be supported.

III. DTV MUST CARRY WILL PROTECT THE VIABILITY OF BROADCAST STATIONS.

NAB persuasively argues in its comments that DTV must carry is the most effective means for ensuring a short and successful transition to digital television.[40] To see the astuteness of this point, one needs only to consider the consequences of the Commission's tentative decision to delay mandatory digital carriage until analog service is terminated. This delay will needlessly perpetuate analog service because the vast

---

[37] 47 U.S.C. § 534(b)(1)(B).

[38] *Turner II*, 520 U.S. at 224-25.

[39] NAB Comments at 34.

[40] *Id*. at 8-10.

majority of viewers will have little incentive to purchase digital receivers, which is the primary statutory criterion for ending the DTV transition.[41] Without carriage of local stations' digital signals, the only reason for the 70% of households relying on MVPDs to purchase a digital receiver is to view DVD or non-broadcast network programming – undoubtedly insufficient for most viewers who traditionally hold a strong preference for local programming.[42] It would be unreasonable for cable subscribers to trade their analog receivers for expensive digital sets if they are relegated to continue watching local programming in analog format. And remember that the *PAX DTV Must Carry Proposal* is not for dual carriage. It simply protects broadcasters' statutory right to choose to have either their analog or digital channel carried by cable.

This leaves the 30% of households which rely on over-the-air signals to drive digital receivers purchasing, and, even in combination with optimistic numbers for cable subscribers, that is woefully short of the Congressionally mandated 85% penetration level necessary to terminate analog service. Cable operators argue that digital must carry would not contribute to ending the DTV transition because their systems do not reach the critical 85% penetration level,[43] but, even if this is so, then certainly over-the-air broadcast service, with a penetration rate less than half of cable, will be insufficient

---

[41] 47 U.S.C. § 309(j)(14).

[42] *See, e.g., Turner II*, 520 U.S. at 205-06 (citing evidence that local broadcast channels generally have higher ratings than the cable channels with which cable operators replace them); *Competition Report*, ¶ 68 (attributing growth in DBS service to operators' ability under SHVIA to offer local broadcast signals).

[43] NCTA Comments at 10; Time Warner Comments at 18.

to end the transition. Accordingly, prohibiting digital must carry until after the close of the DTV transition is simply a recipe for perpetuating it.

This spells bad news for broadcasters. As NAB correctly notes,

> a prolonged DTV transition leaves broadcasters anchored simultaneously in both the analog and digital worlds, hemorrhaging capital with no near-term return on their digital investment. . . . The longer the transition, the more expensive dual operation becomes, with only analog revenues to support both operations.[44]

The Cable industry is well aware of these consequences, which explains in no small part why it has vigorously resisted DTV must carry. Because all broadcast stations – whether big or small, urban or rural – incur similar construction and operating costs, the small stations which Congress intended to protect with its mandatory carriage provisions will have difficulty surviving a lengthy transition, rendering them particularly vulnerable to the threatening, economically rational actions of cable operators.[45] Moreover, in suggesting that the "timelines we set out for success are unrealistic," [46] the Chairman appears inclined to support a lengthy transition.

PCC concurs with the Public Broadcasters that the Commission's proposed digital must carry regime will either never take effect or come too late for must carry's "chief intended beneficiaries."[47] Congress surely could not have intended such an absurd outcome – that the implementation of digital television would permit cable

---

[44] NAB Comments at 13.

[45] Steve McClellan, *Small Towns, Big Problems*, BROADCASTING & CABLE, Aug. 6, 2001, at 20.

[46] Alan Breznick, *Powell Questions Future Role of Over-the-Air TV*, COMMUNICATIONS DAILY, April 6, 2001, at 1.

[47] Public Broadcasters Comments at 21.

operators to exploit the mandatory carriage provisions to ironically reduce the multiplicity of diverse voices. Likewise, as the Public Broadcasters noted, the 1992 Cable Act cannot be read to authorize the Commission to adopt digital mandatory carriage rules that will be ineffective for years – especially in light of Congress's 85% digital penetration requirement.[48] With these absurd results, traditional canons of statutory construction demand that the Commission abandon its ill-conceived conclusion to delay DTV must carry and instead enforce the existing mandatory carriage provisions.[49] Only in this manner will the Commission protect the continued availability of all free, local broadcast television stations.

IV. THE COMMISSION'S APPROACH TO "PROGRAM-RELATED CONTENT" AND "PRIMARY VIDEO" IS UNWORKABLE AND INCONSISTENT WITH THE 1992 CABLE ACT.

A digital station is entitled to carriage of its "primary video," which the Commission determined to be a single programming stream and its "program-related" content.[50] In the *Further Notice*, the Commission asked parties to comment on the proper scope of program-related in the digital context.[51] Here the Commission is truly off on the wrong foot. As PCC noted in its Petition for Reconsideration, and as reflected in the comments filed in response to the *Further Notice*, the proposed regulatory

---

[48] *Id*. at 19.

[49] *Red River Broadcasting Co. v. FCC*, 98 F.2d 282, 287 (D.C. Cir. 1938), cert. denied, 305 U.S. 625 (1938) ("A well-settled rule of statutory construction enjoins courts not to attribute to the Legislature a construction which leads to absurd results").

[50] *Further Notice*, ¶ 57. *See* 47 U.S.C. §534(b)(3).

[51] *Id.*, ¶ 122.

structure is unworkable and fails to provide the certainty necessary for local broadcasters and the Cable industry to implement their digital plans.

Instead, the Commission was correct in the *Further Notice* to inquire about the proper relationship between "program-related" and "ancillary or supplementary" in terms of statutory objectives,[52] for this offers the proper dichotomy for determining whether digital content is entitled to mandatory carriage. As NAB stated, the Commission has recognized that the flexibility granted to digital broadcasters to provide ancillary and supplementary services directly relates to the program-related inquiry.[53] Accordingly, PCC agrees with NAB that the Commission simply should adopt the already existing bright-line test for ancillary and supplemental services to determine whether content is program-related.[54]

While Congress in 1996 plainly was aware of the expanded capabilities DTV presented, it simply and explicitly chose to exclude ancillary and supplementary services from the mandatory carriage provisions.[55] The Act provides that the Commission shall allow DTV licensees "to offer . . . ancillary or supplementary services,"[56] and directs the Commission to establish a fee program if broadcasters charge subscription fees for such services.[57] If subscription fees or non-advertisement

---

[52] *Id*.

[53] NAB Comments at 40.

[54] *Id*.

[55] 47 U.S.C. § 336(b)(3).

[56] *Id*., § 336(a)(2).

[57] Which it did. *See* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast service, *Fifth Report and Order*, 12 FCC Rcd at 12809, 12823 (1997).

compensation are required by a licensee for customers to receive a digital service from the local broadcaster, then such services are necessarily ancillary or supplementary and do not warrant mandatory carriage.

Accordingly, all free, non-supplementary, over-the-air signals carried within broadcasters' 6 MHz signal – such as multicast signals – should be considered as program-related and therefore entitled to mandatory carriage. This approach will permit any free, over-the-air digital multi-channel broadcasting by the local station to be delivered by the cable system consistent with Congress's statements in the legislative history:

> Within each 6 megahertz (MHz) assignment, a variety of digitally transmitted services can be offered by a broadcast licensee. The characteristics of a digital transmission permit it to be used for an intermixed flow of data. Given the dynamic nature of the data flow, these services probably cannot be separated or segmented. Therefore, these different digital services are "*indivisible*" within the 6 MHz assignment, and these services are provided along with the signal that the licensee broadcasts [DTV] programming.[58]

As Congress recognized, the indivisible nature of DTV signals does not lend itself easily to partitioning and exclusion. Thus, the Commission should limit the definition of ancillary and supplementary services to those where customers are paying subscription fees or non-advertising third parties are providing compensation, thereby permitting the mandatory carriage of free, over-the-air, local multicast programs and increasing the number of voices and diversity. **The indivisible nature also indicates that Congress did not expect in the record of its proceedings that the "primary video" provision would serve as an impediment to the mandatory carriage of digital television, but**

---

[58] H.R. REP. NO. 104-204, at 83-84 (1996) (italics added).

that the entire signal would be primary unless excluded by other provisions in Section 614 of the Act.

Ensuring multicast must-carry also is consistent with the second half of the provision relating to primary video, which states that a cable operators "shall carry the entirety of the program schedule . . . unless carriage of specific programming is prohibited"[59] – as is ancillary and supplemental programming. Accordingly, the 1982 *WGN* test urged by the Cable industry to determine whether digital content is program related is inapplicable.[60] By prohibiting cable operators from chiseling the 6 MHz allotted to broadcasters, the Commission would remain faithful to Congress's language, promote innovation, ensure the maximum benefit of free, over-the-air television to the public, and guarantee the highest and best use of the digital spectrum allotted to broadcasters by multicasting additional program choices and increasing broadcast programming in the market. It is these objectives for which the FCC was created and which remains the rationale for the FCC's continuing existence: ensuring the highest and best use of the spectrum.

V. THE *PAX DTV MUST CARRY PROPOSAL* IS THE WAY TO A SUCCESSFUL DTV TRANSITION.

The widely-circulated *PAX DTV Must Carry Proposal* is based to a large extent on the channel capacity decisions made by Congress in the 1992 Cable Act and approved by the Supreme Court in *Turner*. Under existing law, cable operators are

---

[59] 47 U.S.C. §534(b)(3)(B).

[60] *See, e.g.*, AT&T Comments at 28, *citing WGN Continental Broadcasting v. United Video*, 693 F. 2d 622, 626 (7th Cir. 1982).

required to devote up to one-third of their channel capacity to must carry signals, and, in its *Further Notice*, the FCC ruled that in the digital world this capacity cap would be measured by a system's capacity in Hertz.[61]

Thus, in an upgraded cable system of 750 MHz, up to 250 MHz of capacity theoretically could be devoted to the carriage of local broadcast signals.[62] The *PAX DTV Must Carry Proposal* initially would require 9 MHz of capacity on a system per station – with 6 MHz on the analog portion and 3 MHz on the digital portion of the system. In most markets, where approximately 10 stations are carried, this would require 90 MHz of cable capacity, leaving 160 MHz of the capacity earmarked for must carry free for the cable operators' own uses.

Even in the television market with the greatest number of local stations (*i.e.*, 25), a cable system's capacity devoted to must carry signals would require only 225 MHz – still less than the one-third of capacity that the 1992 Cable Act requires to be devoted to local broadcast signals. And, under the proposal, when a cable system's digital set-top box penetration reaches 85%, then all of the broadcast signals would move to the digital tier, freeing up the 6 MHz of analog capacity previously devoted to each station, and requiring a cable system to devote only 30 MHz of digital capacity in a 10 station DMA to must carry signals – far below the 250 MHz required by law.

---

[61] *Further Notice*, ¶ 41.

[62] The amount of capacity available for must carry would probably be somewhat less given that the Commission only considers useable activated channel capacity. Even using the Commission's conservative estimates regarding available capacity, however, there would still be over 200 MHz available on a 750 MHz cable system. *See id*. The salient point, of course, is that cable operators are protected from excessive carriage of local broadcast signals by the one-third capacity cap and do not need, nor are they entitled to, the additional protection afforded them by the Commission's tentative conclusion in this proceeding.

To recap the PAX DTV Proposal:

1. **Television stations could elect to have their analog signals removed from the cable systems and replaced with their digital signals.** For the carriage of their digital signals, the main programming would be downconverted by the cable operator to analog and carried on the analog portion of the cable system. The remaining free multicast programming portion of the station's digital signal would be carried on the digital portion of the cable system served by the set-top digital boxes and would be used to deliver four or five additional channels for free programming services, compressed by cable operators into 3 MHz.

2. The station's primary digital signal when downconverted to the analog portion of the cable system will utilize 6 MHz of a cable analog channel. The remaining portion of the station's digital signal would be placed on the digital tier of the cable system and would require no more than 3 MHz of a cable digital channel. When a cable operator's digital set-top box penetration reaches 85% of its subscribers, the system could carry all of the broadcast stations' signals on the digital tier only. Thus, a DTV station only would require, in the future, 3 MHz of a cable operator's digital capacity.

3. The cable channel mapping protocol (PSIP) would permit the multicast channels to appear in sequence with the station's primary channel (i.e., if the primary channel is 20, then the multicast channels would be 201, 202, 203 and 204). A cable subscriber without a set-top box would simply surf the existing channel line-up from channel 19 to 20 and 21 and so on. A cable subscriber with a set-top box would go from channel 19 to channel 20 then to channels 201, 202, 23 and 204 before moving on to channel 21. The signals of all broadcast stations would be placed on contiguous channels on a basic tier available to all subscribers.

4. This digital must carry election would be applicable to cable systems with 750 MHz of capacity provided that the systems have installed digital head-ends and have digital set-top boxes. The downconverted digital signal (carried on the analog portion of the system) and the multicast digital signals (carried on the digital portion of the system) would be provided as part of the basic cable services provided to all analog cable subscribers and (for the multicast signals) to all subscribers with digital boxes. Thus, as digital set-top boxes are deployed by the cable operator, full digital must carry would occur.

5. This digital must carry option would be available on a first-come, first-served basis within the Communication Act's existing 33% cap on the use of cable systems activated channels for must carry purposes. A 750 MHz cable system is required by the 1992 Cable Act to devote 250 MHz to

local television signals. Under the PAX TV Proposal, such cable system operating in a market with 20 television stations would devote 120 MHz for the analog portion of the system and another 3 MHz per station on the digital tier for a total of 180 MHz – far below what the 1992 Cable Act requires be devoted to the carriage of such signals.

6. Cable systems with less than 300 subscribers or fewer than 36 activated channels would not be required to comply with these must carry requirements.

7. Cable systems would not be required to carry multicast signals duplicating the programming of the television station's main signal.

8. Television stations would have to provide a good quality signal to the cable head-end and there could be no perceptible signal degradation of either the primary or multicast signals by the cable system.

The prompt implementation of full digital must carry is the single most important component of a successful DTV transition. Without it, there is no transition – just a monumental waste of money and effort. With full digital must carry, there will be a prompt and unprecedented roll-out of digital services, digital receivers, multicasting, and a true digital revolution. The other issues surrounding the transition – construction deadlines, transmission standards, copyright, interoperability, receiver requirements, maximization, and so on – pale in comparison to must carry. This is why the FCC must ACT, and it must act NOW.

PCC submits that its DTV Must Carry Proposal is implicitly supported by the proposal submitted in the Public Broadcasters Comments.[63] Under the Public Television "Working Draft," dual must carry would be required on large cable systems in

[63] Public Broadcasters Comments at 7-18.

markets where two stations or more broadcast in digital.[64] PCC believes its must carry plan is more efficient because broadcasters **would elect either analog or digital carriage** (not dual carriage) and the digital signal would require only 3 MHz of capacity. Otherwise the plans share much in common. Significantly, both plans account for small and non-upgraded cable systems, and both accommodate carriage of digital multicast signals.

Most importantly, however, is that both plans comport with the 1992 Cable Act and offer a way out of the perpetual DTV transition created by the proposed regulatory scheme. Both plans promote the continued availability of free, over-the-air local broadcast television and ensure the widespread dissemination of information from a multiplicity of sources with increased programming choices. Both plans provide consumers with real incentives to purchase digital receivers and offer viewers the benefits of expanded digital capabilities. PCC urges the Commission to adopt and implement the *PAX DTV Must Carry Proposal* now as a reasonable and compliant means to a successful DTV transition.

CONCLUSION

The Commission's tentative conclusion to delay digital must carry until after analog broadcasting is terminated has no legal basis and is a recipe for perpetuating dual broadcasting and transforming the DTV "transition" into a new status quo. The Commission's proposed regulatory scheme would revive the Cable industry's incentive

---

[64] In the case of one- or two-station markets, a single DTV station in operation would trigger the requirement. *Id*. at 8.

and ability to harm those broadcasters which Congress chiefly intended to protect in the 1992 Cable Act. All of this further demonstrates the wisdom of PCC's often-repeated position: that Congress and the Supreme Court already have determined that the mandatory carriage provisions apply to all local broadcast signals all the time – including during the DTV transition.

The *PAX DTV Must Carry Proposal* offers instead a compliant path to a successful DTV transition. As demonstrated by the support for the similar Public Broadcasters' proposal, the industry most affected by the absence of must carry is now speaking with a largely united voice. PCC urges the Commission to abandon its ill-conceived conclusion, allow broadcasters to elect their cable carriage signal, and require cable operators to carry free multicast digital programming. By doing so, the Commission will establish the proper incentives for terminating the DTV transition while preserving the continued availability and multiplicity of local broadcast television. The *PAX DTV Must Carry Proposal* represents the highest and best use of the broadcast spectrum – the most important statutory objective of the FCC and the rationale for its continued existence.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

By: /s/ William L. Watson
Name: William L. Watson
Title: Vice President

Paxson Communications Corporation
601 Clearwater Park Road
West Palm Beach, FL 33401

Dated: August 16, 2001