

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of: )  
)  
Carriage of Digital Television Broadcast )  
Signals )  
)  
Amendments to Part 76 )  
of the Commission's Rules )  
)  
Implementation of the Satellite Home )  
View Improvement Act of 1999: )  
)  
Local Broadcast Signal Carriage Issues )  
)  
Application of Network Non-Duplication, )  
Syndicated Exclusivity and Sports Blackout )  
Rules to Satellite Retransmission of )  
Broadcast Signals )

CS Docket No. 98-120

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CS Docket No. 00-2

REPLY COMMENTS OF COMCAST CORPORATION

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**REPLY COMMENTS OF COMCAST CORPORATION**

Comcast Corporation ("Comcast") hereby replies to the comments submitted in response to the above-captioned First Report and Order and Further Notice of Proposed Rulemaking ("*Order and Further Notice*").<sup>1</sup> Taken as a whole, those comments demonstrate that the Commission was correct in its tentative decision not to impose a "dual must-carry" obligation on cable operators. Numerous cable operators and cable programmers have provided abundant facts and compelling reasons why the Commission cannot properly expand its role in dictating how cable operators choose to use their limited channel capacity.<sup>2</sup>

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<sup>1</sup> 16 FCC Rcd. 2598 (2001). Under separate cover, Comcast has responded to the survey questions and requests for information that the Bureau issued in conjunction with the FNPRM. See Letter from James R. Coltharp, Comcast Corporation, to Kenneth Ferree, FCC (May 29, 2001) ("*Survey Response*").

<sup>2</sup> See Comments of A&E Television Networks, Inc.; Comments of AT&T Corp.; Comments of Cablevision Systems Corporation; Comments of Court TV; Comments of the C-SPAN Networks; Comments of Discovery Communications, Inc.; Comments of The Filipino Channel, The Golf Channel, The Inspirational Network, Outdoor Life Network, Speedvision Network, and The Weather Channel, Inc.; Comments of Home Box Office; Comments

Comcast, as both a cable operator *and* a provider of cable programming content, joins in this chorus. Consistent with the views persuasively presented by other cable operators and programmers, we urge the Commission to abandon any further consideration of a dual must-carry requirement.

### **Introduction and Overview**

Comcast Corporation is principally involved in the development, management and operation of broadband cable networks, and in the provision of electronic commerce and programming content. Comcast Cable is currently the third largest cable company in the United States, serving more than 8.4 million subscribers. Comcast's commerce and content businesses include majority ownership of QVC, Comcast-Spectacor, Comcast SportsNet, and The Golf Channel, a controlling interest in E! Entertainment Television, and other programming investments.

Comcast firmly believes that the Communications Act does not authorize a dual must-carry requirement. Dual must-carry would be harmful to Comcast's cable operations, to its commerce and content operations, and to the consumers that Comcast competes to serve. Such a requirement would further complicate Comcast's efforts to allocate finite bandwidth to fashion what it believes to be the most attractive array of services and program packages to its customers and potential customers. It would also skew similar decisions by other cable operators, making it more difficult for Comcast to obtain carriage of its programming. Comcast further believes that a dual must-carry requirement would violate its rights under the First and Fifth Amendments to the Constitution.

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of Insight Communications Company, L.P., and Mediacom Communications Corporation; Comments of International Cable Channels Partnership, Ltd.; Comments of the National Cable & Telecommunications Association; Comments of Starz Encore Group; Comments of Time Warner Cable; Comments of TechTV.

Rather than reiterating the many detailed analyses presented in the first-round comments filed by the National Cable and Telecommunications Association and numerous NCTA members, we here wish to (1) highlight several of the most critical considerations pertaining to dual must-carry, (2) refute the notion that recent, pending, and future upgrades of cable plant somehow make imposition of a dual must-carry requirement any less burdensome or more justifiable, and (3) explain why there is no present need to define the elements of the digital signals that must be carried after the analog must-carry requirement sunsets.

**A Dual Must-Carry Requirement Would Be Unlawful.**

At the outset, it is important to distinguish between the analog must-carry requirement that has been the subject of earlier rulemakings and judicial proceedings and the dual must-carry requirement that is currently under consideration. The analog must-carry requirement was upheld by the Supreme Court by the narrowest possible margin.<sup>3</sup> (It is by no means clear that this case would be decided the same way today. The five justices who voted to sustain the must-carry regime relied heavily on Congress's 1992 findings regarding cable's status as a "monopoly,"<sup>4</sup> a characterization that no longer applies now that the vast majority of Americans have a choice of *at least three full-service facilities-based providers* of multichannel video programming services.<sup>5</sup>) But even assuming the continuing validity of analog must-carry, an *additional* requirement for carriage of digital broadcast signals cannot lawfully be imposed.

A dual must-carry requirement cannot be justified on the bases that led to the (narrow) affirmation of the analog must-carry requirement. Several factors are of critical importance:

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<sup>3</sup> *Turner Broadcasting Sys., Inc. v. United States*, 520 U.S. 180 (1997) ("*Turner I*").

<sup>4</sup> See, e.g., *Turner II*, 520 U.S. at 197; see also *Turner Broad. Sys., Inc. v. United States*, 512 U.S. 622, 656, 661 (1994) ("*Turner F*") ("bottleneck," "gatekeeper," "bottleneck monopoly").

<sup>5</sup> The transformation of the multichannel video marketplace is so substantial that one leading court has said that an assessment of the market power of cable MVPDs *as of 1999* is no longer relevant, due to the "substantial changes" that have occurred subsequently. *Time Warner Entm't Co. v. United States*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) ("*Time Warner II*"). Obviously, the changes that have occurred since 1992 are even more substantial.

- In the analog must-carry context, broadcasters were able to invoke an unambiguous statutory requirement. Here, they cannot do so.<sup>6</sup>
- There, broadcasters had the benefit of explicit Congressional findings to the effect that free, over-the-air television broadcasting would be jeopardized in the absence of the must-carry requirement.<sup>7</sup> Congress has made no such findings regarding dual must-carry.
- Analog must-carry was deemed to promote “the widespread dissemination of information from a *multiplicity of sources*.”<sup>8</sup> By contrast, a decision to grant preferential rights to each incumbent local broadcaster to occupy *two* channels on a given cable system would necessarily place the ability to disseminate ideas in *fewer* hands by precluding other independent voices.
- And here, to an even greater extent than in *Turner*, there is compelling evidence that the requirements under consideration would adversely affect other programmers. Indeed, the record is compelling that adoption of dual must-carry requirements may extinguish the chances for commercial success of many other programming services whose only “deficiency” is that they were developed by entities that were not awarded free rights to the use of the public’s airwaves.

### **Channel Capacity Remains Constrained**

Comcast has been -- and continues to be -- an industry leader in upgrading its facilities. Responding to ever-increasing competition for multichannel video programming services, as well as consumer demand for new video and broadband services, Comcast has invested heavily in fiber optics and system upgrades; aggregate expenditures for 1996 through 2001 will be

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<sup>6</sup> The Commission has already rejected claims that the statute requires dual must-carry and has determined that the statute’s application to dual must-carry is at best ambiguous. *Order and Further Notice* at ¶¶ 14, 113; *see also id.* at ¶ 3 (tentative conclusion that dual carriage requirement would burden cable operators more than necessary to further government interests) & 112 (same). In Comcast’s view, the statute strongly suggests that dual must-carry *cannot* be required. *See* 47 U.S.C. §§ 534(b)(3) (local commercial television stations entitled to carriage only of “primary” video signal); 534(b)(4)(B) (directing FCC to ensure cable carriage of local broadcast signals *after* they “have been changed” to reflect completion of transition from analog to digital); 534(b)(5) (forbidding carriage requirements for local broadcast signal that “substantially duplicates” the signal of another carried broadcast signal); 544(f)(1) (FCC “may not impose requirements regarding the provision or content of cable services except as expressly provided in this title”).

<sup>7</sup> As the Commission has acknowledged, the analog broadcast signal carriage requirements were sustained “principally because Congress and the broadcasting industry built a substantial record of the harm to television stations” in the absence of must-carry. *Order and Further Notice* at ¶ 113; *see Turner I*, 512 U.S. at 646 (“unusually detailed statutory findings”); *Turner II*, 520 U.S. at 196-208. By contrast, Congress has made no such findings regarding the necessity of dual must-carry, and any congressional (or judicial) review of the issue today would surely take account of the vastly greater competition that now exists for multichannel video services.

<sup>8</sup> *Turner I*, 512 U.S. at 662 (emphasis added); *Turner II*, 520 U.S. at 189.

approximately \$5 billion. As a result of these massive capital investments, more than 86 percent of Comcast customers are now served by systems of 550 MHz or greater, and 70 percent are served by systems of 750 MHz or greater.<sup>9</sup> By year end, we expect these numbers to climb to 94 percent (550 MHz or greater) and 85 percent (750 MHz or greater), respectively. Every month, Comcast upgrades plant serving nearly 250,000 homes.

All of these upgrades are financed with risk capital. Comcast enjoys no guaranteed rate of return and no assurance of commercial success. (Moreover, in contrast to local television broadcasters, Comcast does not receive free access to valuable public resources, but rather pays local governments for use of rights-of-way.)

Despite all this investment and capacity expansion, Comcast still faces significant capacity constraints. The increased channel capacity of Comcast's systems does not lie fallow. New channels and new services are using the capacity as fast as it can be built. It is critical to understand that cable companies like Comcast, providing facilities-based competition in video, data and voice services, must retain maximum flexibility to manage bandwidth in order to provision new services that consumers want.

In upgraded systems, our customers have the opportunity to obtain, in addition to traditional analog cable service, Comcast Digital Cable, with over 200 channels of programming and CD quality sound, as well as high-speed cable Internet service through Comcast@Home. Other broadband products are in development. Comcast has announced plans for initial Video-on-Demand ("VOD") launches in 2001,<sup>10</sup> and Interactive TV by year-end 2002.<sup>11</sup> We are also

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<sup>9</sup> This accomplishment is all the more noteworthy because, as part of the effort to build regional system clusters, Comcast has in many instances exchanged systems that it had already upgraded for systems that have not yet been upgraded.

<sup>10</sup> See Press Release, Comcast Corp., Comcast Reports Strong First Quarter Results, at [www.cmcsk.com/news/20010508-41501.cfm?release/D=41501](http://www.cmcsk.com/news/20010508-41501.cfm?release/D=41501) (May 8, 2001). Comcast is working on video-on-demand with SeaChange International in Northeastern New Jersey as well as with Concurrent in Philadelphia, Pennsylvania.

developing new services such as Internet Protocol telephony and home networking. Although these services differ in their technical and operational characteristics, each requires as an input the same precious commodity, bandwidth.<sup>12</sup>

Cable operators are, as the courts have said repeatedly, First Amendment speakers.<sup>13</sup> To the extent we choose to allocate additional capacity for video programming rather than VOD or IP telephony or cable Internet service, we also choose which programming will occupy those channels, subject to the substantial, yet narrowly delineated, exceptions established by Congress. Thus, except to the extent constrained by requirements for analog must-carry,<sup>14</sup> PEG channels,<sup>15</sup> and leased access,<sup>16</sup> each cable operator is -- and must remain -- free to decide whether to carry a broadcaster's digital signal or to carry instead an additional channel of C-SPAN, or a fledgling news, sports, children's, or entertainment channel. Even in those systems that have been upgraded to permit us to provide the largest quantity of analog and digital programming, we still must pick and choose from among literally hundreds of available program channels; there simply isn't room for all of them.<sup>17</sup>

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<sup>11</sup> Comcast is currently working on interactive television trials, including trials with WINK Interactive Television in Chesterfield and Prince William Counties, VA and with Liberate Interactive Television in undisclosed markets. See, e.g., Press Release, Wink, Comcast Launches Its First Wink-Enhanced TV Service to Digital Cable Customers in Virginia, at <http://biz.yahoo.com/prnews/010307/sfw064.html> (last visited Mar. 8, 2001).

<sup>12</sup> Currently, 12 MHz is used to provide Comcast's cable Internet service, and 24 6-MHz channels (an additional 144 MHz) are expected to be allocated to VOD. Consumer desires and other marketplace factors may, of course, cause Comcast to alter these plans.

<sup>13</sup> E.g., *Turner I*, 512 U.S. at 636 ("cable operators engage in and transmit speech, and they are entitled to the speech and press protections of the First Amendment"); *Turner II*; *Time Warner II*; *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000); *Charter Communications, Inc. v. County of Santa Cruz*, 133 F. Supp. 2d 1184 (N.D. Cal. 2001).

<sup>14</sup> 47 U.S.C. § 534; see also 47 U.S.C. § 535 (qualified noncommercial educational television stations).

<sup>15</sup> 47 U.S.C. § 531.

<sup>16</sup> 47 U.S.C. § 532.

<sup>17</sup> At the time of the Commission's most recent Video Competition Report, there were nearly 300 satellite-delivered national programming networks, with dozens more being readied for launch within the year. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005 (2001) ("7<sup>th</sup> Video Competition Report"), at ¶¶ 173, 176.

Accordingly, any government ruling that forces cable operators to allocate additional capacity for carriage of local broadcasters' digital signals inevitably will prevent us from choosing some other programming. That, in turn, would constrain our ability to fashion the packages of programming that we believe will best serve our customers and enable us to compete successfully against DirecTV, EchoStar, RCN, Knology, and others. This would be a serious abridgement of our rights under the First -- and Fifth -- Amendments to the Constitution. In this regard, the relevant inquiry is *not* whether a cable system may be theoretically *capable* of carrying both a broadcaster's analog signal and its digital signal,<sup>18</sup> but whether the statute imposes a constitutionally valid requirement on cable operators that they carry both the analog and digital signals of a single broadcaster. Comcast believes that it does not.<sup>19</sup>

### **Other Perspectives**

Comcast's commerce and content operations provide us an additional perspective, but from this different vantage point we nonetheless still see the same problem. E! Entertainment -- an established and successful service -- is currently available in 70 million homes, which is a significant fraction of homes subscribing to multichannel video programming services.<sup>20</sup> style. -- a much newer and not-yet-as-successful service -- is available in 15 million homes. The Golf Channel is currently available in 40 million homes.

Obviously, we would prefer that *all* MVPD households have ready access to *all* of these channels and the others we own or have invested in. Nonetheless, we recognize and accept our duty to compete on the merits, and we do not ask the government to coerce other MVPD

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<sup>18</sup> Cf. *Order and Further Notice* at ¶ 125 (asking "whether it is possible for 750 MHz systems to be channel-locked and *have no capacity to carry additional digital broadcast signals*") (emphasis added)

<sup>19</sup> See note 6 *supra*. This is so even if the programming the broadcasters would force us to carry would provide viewers with fresh (distinct) viewing choices. To the extent that the digital signals merely duplicate the same programming also delivered in the analog signals, the injury to cable operators and to viewers becomes even greater.

<sup>20</sup> As of July 2001, NCTA estimates the aggregate number of U.S. MVPD households to be nearly 88.8 million. Press Release, NCTA, Video Competition Has Fully Taken Hold, at <http://www.ncta.com/press/press.cfm?PRid=168&showArticles=ok> (last visited Aug. 14, 2001).

companies to carry these channels. We merely ask the government not to harm the prospects for commercial success of channels such as style. and The Golf Channel, which would be the inevitable result of coercing other MVPDs into allocating additional capacity for must-carry channels.

We also urge the Commission to consider the local and regional programming that Comcast and other cable operators are increasingly providing to our subscribers. At a time when many observers see a diminished commitment by local broadcasters to provide locally-originated programming and quality news programs, and when broadcasters are seeking still further relief from the few remaining public interest obligations that accompany their entitlement to free spectrum, Comcast has invested in its own locally and regionally focused channel, cn8. Today, cn8 is one of the nation's largest regional cable networks, serving 3.9 million homes in Pennsylvania, New Jersey, Delaware and Maryland. cn8 is also the region's most-honored 24-hour diversified network, with 31 Mid-Atlantic Emmy Award nominations in just four years.<sup>21</sup> Our ability to find room for such a channel, or for any of the many others that may interest our customers, should not be constrained by doubling the forced occupancy rights of incumbent broadcasters.

Comcast certainly is not unalterably opposed to carriage of broadcasters' digital channels. Indeed, we have negotiated digital retransmission consent agreements with several network owned-and-operated station groups (these agreements have strict conditions that limit disclosure of their terms and therefore we are barred from discussing them here). We also have agreements in place, or are currently in retransmission consent negotiations, with a number of stations that

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<sup>21</sup>cn8 offers live, interactive television, coverage of high school, college and professional sports, discussions of regional issues, family entertainment, and two nightly hours of news in prime time.

have sought digital carriage of their signals, including arrangements for contingent obligations for digital carriage.

We remain willing to evaluate and discuss proposals from other broadcasters, and public educational, noncommercial broadcasters in particular. One reason that more such agreements have not been reached is that few broadcasters have formulated clear business plans -- much less, compelling program line-ups -- for use of their digital channels.<sup>22</sup> A fundamental point that is widely ignored in the first-round comments filed by broadcasters and their representatives is that we cannot seriously negotiate carriage agreements with entities that have only the vaguest notions of what programming they will be offering.

#### **Content Subject to Must-Carry**

Given that broadcasters ought not be granted any additional must-carry rights, there is no apparent urgency to the task of refining the standard for what content must be carried *after* the digital transition is complete and the must-carry obligation applies to digital signals *instead of* analog ones. On this subject, Comcast agrees with the comments filed by the National Cable and Telecommunications Association, and with the comments filed by various individual cable companies as well.

We strongly oppose the efforts by broadcasters to expand the scope of the must-carry obligation to rewrite the statute by stretching the phrase "primary video" to encompass multiple video streams (e.g., multiple camera angles of a single event or even multiple independent channels of video programming). We likewise oppose efforts to expand the provision dealing

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<sup>22</sup> See *Order and Further Notice* at ¶ 120 (broadcasters are transmitting only "a limited amount of original digital programming").

with “program-related material”<sup>23</sup> to encompass anything that adds to, supplements, or relates to the program service of a television station<sup>24</sup> -- which, of course, is just about anything imaginable (including e-mails and chat features!). Such proposals are inconsistent with the statute and ignore prior rulings by the courts<sup>25</sup> and by the Commission.<sup>26</sup>

Again, it bears emphasis that such subjects are legitimate subjects for negotiation in the context of *retransmission consent*. But not compulsory carriage.

### **Conclusion**

This is a rare proceeding in which all relevant considerations are aligned. Sometimes, a statutory command is in tension with a constitutional right, and sometimes strict application of a statute produces a questionable public policy result. Here, however, the constitutional considerations, the statute, and sound public policy all dictate the same outcome. All are consistent with the Commission’s tentative conclusion *not* to impose a dual must-carry requirement on cable operators.

Comcast therefore respectfully requests that the Commission rule, finally and decisively, that local broadcasters are currently entitled by statute to carriage of a single channel of analog

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<sup>23</sup> Broadcasters appear to have forgotten that the requirement to carry “program-related” content in addition to the “primary video” only applies to “program-related material *carried in the vertical blanking interval or on subcarriers.*” 47 U.S.C. § 534(b)(3) (emphasis added). Digital signals, of course, have no VBI or subcarriers.

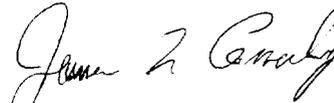
<sup>24</sup> Disney (at 3-4) appears to go the furthest, proposing to require carriage of “all content, including enhanced advertising content, that is . . . transmitted for the purpose of attracting and maintaining viewership . . . .” A few pages later (at 14 & n.28), Disney seeks compulsory carriage for all “content, material or information that serves to enhance the viewer’s experience of the broadcaster’s advertising content, and the utility of the ad spot for the advertiser.” Under this strained analysis, Disney (at 14) seeks compulsory, uncompensated carriage even for a data stream containing information about “the price, color, and availability of a sweater,” “store hours and location of a merchant,” and “geographically-targeted information on sales or special offers.”

<sup>25</sup> *WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 629 (7<sup>th</sup> Cir. 1982) (“[m]ore than ‘relatedness’ is required”). See also *id.* at 626 (assuming that broadcaster “cannot in the long run force cable systems to take more of its output than they want” because competition with other stations seeking carriage “will prevent that”).

<sup>26</sup> *E.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 6723, 6734 (¶ 50) (1994) (information must be “intrinsically related to the particular program received by the viewer”). As the Commission recognizes, “[i]n the analog context it is clear that a cable operator subject to a mandatory carriage obligation is *not* required to carry *all* of the communications output of a television station.” *Order and Further Notice* at ¶ 50 (emphasis added). There is nothing in the statute to suggest that a different result was intended when digital signals replace analog ones. *Accord id.* at ¶¶ 54, 55.

video programming, and that local broadcasters are entitled, at most, to have that analog carriage replaced by carriage of a single channel of digital video programming when (if ever) the DTV transition concludes. Beyond the currently established exceptions for analog must-carry, leased access, and PEG channels, decisions regarding the channels to be carried on cable systems -- and the allocation of cable bandwidth for a range of advanced services -- should be at the unfettered discretion of the cable operator. Broadcasters, of course, are free to use their considerable skill and resources to develop digital programming that is sufficiently compelling that it can secure carriage on its own merits in competition with other programmers, and not pursuant to government edict.

Respectfully submitted,



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