of the DTV transition, the Commission certainly has.[66] As the Commission said in the *Reports and Orders* launching the new DTV service, "[w]e reaffirm in this proceeding our intention to preserve and promote universal, free, over-the-air television"[67] and "[o]nly if DTV achieves broad acceptance can we be assured of the preservation of

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[66] "Broadcasters have long recognized that they must make the switch to digital technology. The viability of digital broadcast television will require millions of Americans to purchase digital television equipment. Because of the advantages to the American public of digital technology -- both in terms of services and in terms of efficient spectrum management -- our rules must strengthen, not hamper, the possibilities for broadcast DTV's success. ...Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television's unique benefit: free, widely accessible programming that serves the public interest. ...Digital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital. In addition, broadcasters' ability to adapt their services to meet consumer demand will be critical to a successful initiation of DTV." *Fifth Report and Order*, MM Docket No.87-268, 12 FCC Rcd 12809, 12811-12 (1997). "First, we conclude that the DTV Standard will serve our goal of ensuring that all affected parties have sufficient confidence and certainty in order to promote the smooth introduction of a free and universally available digital broadcast television service. As we have recognized before, broadcast television is unique. It is free, available to nearly every American, and many Americans rely on broadcast television programming as a primary source of information and entertainment. Because of these characteristics, we stated that the goals of certainty and reliability take on special significance and strengthen the case for our adoption of a DTV standard. The DTV Standard we adopt today will help ensure that broadcast television remains available to all Americans in the digital era." *Fourth Report & Order*, MM Docket No. 87-268, 11 FCC Rcd 17771, 17787-88 (1996). "[W]e will pursue and balance the following goals in this proceeding: 1) preserving a free, universal broadcasting service; *Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry*, MM Docket No. 87-268, 10 FCC Rcd 10540, 10541 (1995). "As we have previously stated, our objective in this proceeding is to effect a major technological improvement in television transmission by allowing broadcasters to implement ATV. (*Second Inquiry* at 6537) Our goal is 'not to launch a new and separate video service.' (*Second Inquiry* at 6537) Thus, in order 'to preserve and improve existing broadcast service and the benefits that this service delivers to the public,' we have generally proposed restricting initial eligibility for ATV frequencies to existing broadcasters." (*Second Inquiry* at 6537-38) *Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 6 FCC Rcd 7024, 7025 (1991).

[67] *Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry,* MM Docket No. 87-268, 10 FCC Rcd 10540, 10543 (1995).

broadcast television's unique benefit: free, widely accessible programming that serves the public interest."[68] So, too, does the FCC tie together broadcasters' DTV transition with the *Turner*-endorsed Congressional goal of promoting fair competition in the market for television programming.[69] Free over-the-air broadcasting must transition to digital technology to remain competitive in the new digital age.

Other commenters also connect the broadcasters' digital transition with preserving local broadcast service and with the other goals of must carry as identified in *Turner I* and *II*.[70] As Spanish-language broadcaster Univision and smaller/medium market broadcaster STC Broadcasting make clear, digital must carry promotes the very governmental interests approved in the *Turner* cases, as well as the additional (but connected) interest of a swift, successful DTV transition and reclamation of spectrum for other worthy public uses.[71]

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[68] *Fifth Report and Order*, MM Docket No.87-268, 12 FCC Rcd 12809, 12811-12 (1997).

[69] "By permitting the broadcast industry to make the transition to ATV, we ensure that all competitors in the local video services market can compete on this new technological level and, hence, that the public continues to enjoy the benefits that flow from such competition." *Second Order/Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 7 FCC Rcd 3340, 3342 (1992). "Digital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital." *Fifth Report and Order*, MM Docket No.87-268, 12 FCC Rcd 12809 (1997).

[70] *See* Comments of Univision at 16 ("The intent of transitioning broadcast service to DTV was to augment broadcasters' ability to provide these local services [local news, weather, and entertainment] to the public, and the Commission should not allow the DTV transition to have the opposition effect.") *See also* Comments of Public Broadcasters at 5 ("The transmission of digital signals and the ability of all consumers to receive them are necessary . . . to ensure that there will be a broadcast television service in the years to come.")

[71] Comments of Univsion at 19; Comments of STC Broadcasting at 6-9.

The Consumer Electronic Association likewise points to the FCC's recognition of the critical nature of the digital transition to broadcasting's preservation and to the fact that "allowing cable operators to exercise their bottleneck control to deny consumer access to digital broadcasting during its infancy will undeniably thwart the public acceptance of DTV." Comments of CEA at 3.

Cable parties, however, assert that digital must carry will not serve the interest of preserving free, over-the-air broadcasting because broadcasters will retain their analog carriage on cable systems and those revenues will suffice to maintain the broadcasting system.[72] Broadcasters vehemently disagree, finding great and even ultimate harm from the lack of additional DTV revenues (without DTV access to the entire audience) and a long drawn out DTV transition (inevitable without digital carriage),[73] accompanied as it would be by dual operating costs over a twenty year plus period (particularly dual electric bills), all on top of enormous DTV build-out costs.[74] This scenario would be particularly threatening for stations in smaller markets, many of which operate on the thinnest (if that) margins and cannot see survival under such circumstances.[75] STC makes the point that, without digital must carry, smaller market stations will have no possibility of recovering the substantial investment in digital facilities, an expense, it says, that can outstrip a

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[72] Comments of NCTA at 8; Comments of A&E at 9; Comments of AT&T at 18; Comments of TWC at 11.

[73] *See* NAB/MSTV/ALTV Comments, CS Docket Nos. 98-120, 00-96, 00-2, June 11, 2001 at 7-19, 40 of Appendix A.

[74] Comments of Univision at 13, 14, 16; Comments of STC Broadcasting at 3-7;

[75] Comments of STC at 16; *See* Comments of Public Broadcasters at 5, 21; Comments of KSLS at 3.

station's annual revenues. Comments of STC at 1-6. It says that these harsh cost and revenue realities can even result in the loss of local television ownership diversity and reduced competition. Comments of STC at 6.

As the Kraemer/Levine Report attached to NAB/MSTV/ALTV's initial comments at Appendix A makes clear, a prolonged DTV transition (which no digital must carry will inevitably cause) would leave broadcasters anchored simultaneously in both the analog and digital worlds, hemorrhaging capital with no near-term return on their digital investment. Kraemer/Levine Report at 23. Small market stations, particularly those in the lowest percentile of their markets in terms of profitability, will find it impossible to support dual operations in a long drawn-out transition.

To present the financial picture of these smaller stations, NAB/MSTV/ALTV prepared charts representing station profitability both in markets 75 and above and in markets 100 and above, which are attached as Appendix D. The data for these charts is from the 2000 NAB/BCFM Television Financial Survey, and references financial data from year 1999. As is readily apparent, even before shouldering the brunt of DTV capital costs and without the drain of expensive dual operations over many years, many of these stations were not making a profit in 1999, a "good" year. Dual operations over a particularly prolonged period will be a burden for smaller market stations, and devastating for those in already strained financial condition. Electricity costs alone will be many thousands of dollars a month for each operation.[76] At some point, analog equipment will require substantial repair or replacement. While these costs may be managed for a time without cutting too far into other necessary operational expenditures,

[76] *See* Statement of James Babb attached hereto in Appendix E.

prolonged dual operations will become problematic for many, and a serious threat for the marginal operations.

NAB/MSTV/ALTV asked two broadcasters with experience operating smaller market stations to review these financial charts and comment on the impact dual digital and analog operations for twenty plus years would have on local service. Their statements are contained in Appendix E. They both conclude that prolonged dual operations for small market stations, with no DTV must carry, will drain scarce resources, mandate reductions in service to the public and, for many, be fatal to continued operation. In fact, they predict doom for the future of small market television in general without digital must carry to speed the transition along.

The trade press reported that a top FCC policy official recently underscored that free, over-the-air broadcasting must convert to digital or "consumers will go elsewhere" and that the digital transition must be quick for the sake of the industry's survival.[77] Dr. Robert Pepper, Chief of the FCC's Office of Plans and Policy, was quoted as saying to an industry conference on digital television "What's the rush for broadcasters? The rush is the survival of your business." *Id.*

And as Univision noted in its comments, the Congressional Budget Office (with a self-described mandate to provide objective, impartial analysis to Congress) has concluded that "[w]ithout digital must-carry rules for cable systems during the transition, . . . the likelihood of reaching the 85 percent penetration rate that marks the transition's end in a market appears small"[78] and "a strong must-carry requirement for cable systems

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[77] Communications Daily, Vol. 21, No. 143, Wednesday, July 25, 2001.
[78] Comments of Univision at 6-7. *See, CBO* Report at Chapter II at 7.

to carry DTV signals—a digital version of the analog rules—will be necessary to achieve the mandated market penetration level by 2006 and end the transition."[79] The CBO Report found that a "fundamental element of the timely introduction of digital TV is the availability of digital programming on cable systems. Indeed, cable carriage of such broadcasters is perhaps the most important factor affecting how quickly digital TV reaches the largest number of households." *Id.*

Thus, cable comments notwithstanding, cable carriage of DTV signals is necessary for a timely end to the transition and a timely end to the transition is necessary for the preservation of the vibrancy of the entire system of free, over-the-air broadcasting, found by the *Turner II* Court to be the primary goal of Congress' adoption of must carry.

IV. A Digital Must Carry Requirement Would Be Upheld.

In asking parties to supplement the record on constitutional issues, the Commission requested "that commenters that have previously submitted legal arguments on these points in response to the *Notice*, not repeat those arguments." *Further Notice* ¶ 114. Ignoring this admonition, the cable opponents of a digital must carry requirement submitted extensive arguments that, for all practical purposes, repeat the arguments they previously made in this proceeding. To avoid further unnecessary burden on the Commission, NAB/MSTV/ALTV will not repeat our answers to those arguments and instead refer the Commission to the constitutional arguments we submitted in response to the *Notice*.[80]

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[79] CBO Report at Summary at 4.

[80] For the Commission's convenience, the portion of NAB's Reply Comments addressing the cable constitutional arguments is attached as **Appendix F**, which also deals with the

Almost all of the cable comments that addressed constitutional issues argued that digital must carry would not advance the interests that were identified by Congress as supporting mandatory carriage. In previous comments, we have shown that DTV carriage would indeed advance the same interests, perhaps to an even greater extent than analog carriage. DTV carriage, as we have also demonstrated, also will advance other strong governmental and public interests relating to the transition to digital television.[81]

To the limited extent that the arguments raised in the cable comments differ from earlier arguments, a few responses are in order. First, all of the constitutional arguments against a digital must carry rule rest on one assumption: that digital must carry would substantially foreclose cable operators' ability to provide other programming that they deem more desirable to cable consumers. That assumption is indeed central to any constitutional attack on a DTV carriage requirement for, as NAB/MSTV/ALTV have previously pointed out, if no cable programming were displaced by a must carry rule, no First Amendment question would be presented.[82]

As we have demonstrated, the rapid and widespread deployment of large-capacity digital cable systems requires a conclusion that – for the cable systems serving the vast majority of cable subscribers – a DTV carriage requirement would not displace any cable programming at all. This simple fact forecloses a constitutional argument about a digital

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Fifth Amendment arguments raised earlier by NCTA and repeated in its comments on the *Further Notice*. Time Warner is thus incorrect (Comments of TWC at 4 n.4) when it states that no one contested its takings analysis.

[81] *See* Comments of NAB (filed June 11, 2001) at 15; Reply Comments of NAB (filed Dec. 22, 1998) at 35-39; Comments of NAB (filed Oct. 13, 1998) at 35-42.

[82] *See* Comments of NAB/MSTV/ALTV (filed June 11, 2001) at 35-36.

must carry requirement. That there might be some cable system which – as a result of having to carry local stations' digital signals – might not be able to carry some cable program for some period does not raise a question about the constitutionality of digital must carry generally.

The conclusion that requiring cable systems to carry digital signals in addition to analog signals does not alter the result the Supreme Court reached in *Turner II* is compelled by the fact that the Court was fully aware that a digital must carry requirement would be imposed on cable. The brief submitted in *Turner II* by cable programming interests, referring to the advanced television carriage provisions of § 614(b)(4)(b), advised the Court that "the Cable Act's must-carry provisions authorize the FCC to grant must-carry status to additional spectrum," as part of their unsuccessful argument that must carry would result in an unconstitutional burden.[83] The Court, however, did not regard this prospect as significant, recognizing that the one-third capacity cap fully protected the interests of cable operators and programmers. There is no basis on which the Commission could reexamine that conclusion.

The fact that the *Turner II* Court was cognizant of the prospect of a DTV carriage requirement also requires rejection of AT&T's argument that a DTV carriage rule would be subjected to strict scrutiny. Comments of AT&T at 14-16. AT&T's argument that the development of DBS as a competitor to cable would now justify a different level of First Amendment review misunderstands the nature of the constitutional inquiry. The Court

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[83] Brief for Appellants Turner Broadcasting System, *et al.*, at 18, *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997)(No. 95-992). Having argued to the Supreme Court that the 1992 Act mandated carriage of digital signals, cable should now be estopped arguing that "Congress never proposed any dual-carriage regime." Comments of TWC at 5.

applied intermediate scrutiny in *Turner I*, not because of any assessment of cable systems' monopoly characteristics, but instead because it determined that the must carry rules are not content based.[84] In exactly the same way as analog must carry requirements, digital carriage requirements would apply to all local signals without regard to their content. Thus, there would be no basis for the application of strict scrutiny to a DTV carriage rule.[85]

Some cable commenters, while conceding that the growth in cable capacity has far outstripped any additional burdens that would be created by carriage of local digital signals, argue that part of that increased capacity is not employed for carriage of television signals, but instead for other services, such as telephony or internet access.[86] We have shown above that these services require only minimal bandwidth. *See* p. 10 *supra*. The remaining capacity of the average cable system is so large that carriage of

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[84] The *Turner II* Court also rejected arguments similar to AT&T's: "The dissent proceeds on the assumption that must-carry is designed solely to (and can only be justified as) a measure to protect broadcasters from cable's anticompetitive behavior . . . Federal policy, however, has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation. . . Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable." 520 U.S. at 194 (citations and quotes omitted).

[85] The arguments of programmers such as Courtroom Television Network (Comments at 9-11) that the Commission should reject a digital carriage requirement because of the claimed value of the public interest programming they provide similarly misapprehends the appropriate constitutional inquiry. As the Court recognized in *Turner I*, must carry does not rest on any evaluation of the value of particular broadcast programming, but instead on the importance of the system of local television broadcasting generally. Cable programmers without doubt provide excellent and worthwhile programs, but the Commission may not base regulatory decisions on any comparison between the worth of those programs and the programs on local television stations.

[86] *See, e.g.*, Comments of NCTA at 18-19; Comments of TWC at 21-24; Comments of HBO at 6.

both analog and digital local signals would still occupy far less capacity than that used for carrying analog signals in 1993 when the must carry rules went into effect, a fact which forecloses any argument that a digital carriage rule would burden cable to a greater extent than did the must carry rules upheld in *Turner II*.

To the extent that cable operators now argue that their choice to devote additional capacity to other businesses – rather than to different programming – is protected by the First Amendment, they go far beyond the constitutional interests the Court recognized in *Turner II*. Carriage of telephone or Internet traffic by its nature does not require, or indeed allow, the choice of specific content by a cable operator. Instead, the content of a telephone or e-mail message or the choice of which web sites to visit is determined by the customer. Cable is simply wrong in assuming that the relevant baseline for assessing the effects of a digital carriage requirement is the amount of capacity they choose to devote to the speech purpose of transmitting programming. If they choose to devote capacity to telephone or internet services, that is simply a business decision on their part. In that situation, if a capacity constraint results, it is a capacity constraint of the individual cable operator's own making. It is the cable operator's business choice – not the digital must carry requirement – which results in any displacement of programming. A cable operator in this position is thus no different, from a First Amendment perspective, from a cable operator with sufficient capacity to meet all must carry requirements while still carrying all cable programming the operator wishes – in other words, a cable operator with no First Amendment claim at all.[87]

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[87] Further, the arguments of cable *operators* that capacity is limited due to its being allocated to carriage of non-programming services detract from the constitutional arguments of cable *programmers*. If a cable operator chooses to allocate capacity to

Second, the cable arguments are self-contradictory. On the one hand, the cable comments contend that digital carriage will impose a particularly high burden on cable because few digital signals are carried under retransmission agreements, in contrast to analog carriage where a large number of signals were carried voluntarily before the must carry rules were adopted. *See, e.g.*, Comments of Starz Encore Group at 13-14. On the other hand, they suggest that a must carry rule is not needed because cable systems will voluntarily carry digital programming that cable customers demand. *See, e.g.,* Comments of AT&T at 8-9.

Of course, cable cannot have it both ways. Either cable systems generally will begin to carry local DTV signals voluntarily – in which case the burden imposed by a mandate to carry the rest would be small; or they will continue their current stance of refusing to carry digital signals – in which case the burden of a rule mandating their carriage would be, as the Court concluded in *Turner II*, "congruent to the benefit it affords." 520 U.S. at 216. Surely, there can be no argument that, had cable systems' refusal to carry local analog signals been even more widespread in 1992, the resulting burden on cable programming discretion would have required the Court to strike down must carry. In essence, the cable argument appears to be that, the more determined its pattern of disadvantaging competitors, the less the government can do to counteract it.

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telephony and other new ventures, it is that choice – as much or far more than any requirement to carry local digital signals – that may prevent the operator from carrying more cable networks. The cable programmers' arguments thus fail because they cannot claim that, *but for* digital must carry, any network would have gained carriage. Indeed, support for this argument is provided by C-SPAN which concedes that C-SPAN3 is not distributed by AT&T not due to any regulatory problem, but instead because AT&T prefers other programming. Comments of C-SPAN at 4-5. The Constitution provides no protection for cable programmers from the marketplace choices of cable operators, and efforts by programmers to assert that must carry rules, and not marketplace decisions, are responsible for carriage decisions are unavailing.

AT&T Comments at 19-20 makes the extraordinary argument that the Commission should deny must carry status to broadcasters' DTV signals to create "a *greater* incentive to develop high-quality digital programming" (emphasis in original). The AT&T argument is merely a rehash of contentions cable interests raised against analog must carry requirements, where they also argued that stations' inability to attract an audience was due to programming and not the lack of cable carriage, and that if they had better programming, their signals would be carried. Congress and the Supreme Court properly rejected those arguments, understanding that without access to the majority of the audience, it is difficult to support attractive programming and that, "cable carriage would be of increasing importance to ensuring a station's viability." *Turner II*, 520 U.S. at 210.[88] The oft-repeated argument that stations would be carried if their programming were more popular also is belied by the finding of the House Report on the Cable Act that, generally, "the least popular local television signal is watched on cable systems by as many people who watch the most popular cable network."[89]

Similarly, Time Warner Comments at 9-10 contends that the growth of DBS as a competitor to cable makes it "implausible that cable operators could profitably act on any supposedly anticompetitive incentive." Identical arguments were raised in *Turner II* and rejected. The Court concluded that: "if viewers are faced with the choice of sacrificing a handful of broadcast stations to gain access to dozens of cable channels (plus network affiliates), it is likely they would still subscribe to cable even if they would prefer the dropped television stations to the cable programming that replaced them." 520 U.S. at

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[88] Moreover, just as the Commission could not rest a decision *for* DTV carriage on a content-based rationale, it cannot rest a decision *against* digital must carry on a desire to influence the content of broadcasters' digital signals.
[89] H. REP. NO. 628, 102d Cong., 2d Sess. 53 n.59 (1992).

202. Certainly, the advent of digital television, which allows broadcaster to offer more and different services that may compete with cable, creates an even stronger incentive for cable systems to disadvantage local DTV signals than existed in the analog world. Thus, the rationale for must carry rules is, contrary to cable arguments, greater now than it was in 1992.

Moreover, because there is no mandatory carriage requirement for DBS systems (only the market-by-market license requirement of carry one/carry all), it is far from clear that DBS could be relied on to constrain the ability of cable operators to deny carriage, particularly in smaller markets where local-to-local carriage is less prevalent. Of course, were DBS operators wholly free of carriage obligations as cable wishes to be, they would doubtless make the same calculation the Supreme Court posited for cable. In other words, they would carry enough local signals to entice subscribers, but would not carry the full range of local stations.

The constitutional arguments submitted by cable interests not only ignore the Commission's request that they not repeat maerial submitted earlier in this proceeding, they also largely rest on contentions that were presented by the same parties to Congress in opposing passage of the Cable Act, and to the Supreme Court in the *Turner* litigation. As NAB/MSTV/ALTV have demonstrated, the reasons for rejecting those contentions are even stronger now than they were before, and there are additional strong governmental interests in completing the transition to digital television, which favor a DTV carriage requirement. Further, the dramatic growth in cable capacity weakens – or indeed eliminates – any basis for a First Amendment concern at all. The Commission

should conclude, therefore, that a rule requiring cable systems to carry local digital television signals would easily pass constitutional muster.

V. DTV Requires a Broad Definition of "Program Related"

The must carry provisions of the Cable Act require that, in addition to video, audio, and closed captioning, program-related material carried in the VBI or on subcarriers of local broadcast signals be carried by cable. Eight years ago, the Commission determined that, for purposes of analog must carry, what will be considered "program-related" will be guided by the three-part *WGN* test.[90] On reconsideration, the Commission declined to further define "program-related," noting that carriage of information in the VBI was rapidly evolving.[91] It did, however, include as "program-related" "information intrinsically related to the particular program received by the viewer," whether or not such information met the *WGN* test. Now, the Commission is asking how it should apply the statutory term "program-related" to the content to be carried on digital television signals.[92]

Broadcasters and other commenters argued that the transition to digital transmission requires the Commission to expand the narrow and analog-defined concept

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[90] *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd 2965 (1993)("*Must Carry Order*"); *WGN Continental Broadcasting v. United Video,* 693 F.2d 622, 626 (7th Cir. 1982).

[91] In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues in MM Docket No. 92-259, *Memorandum Opinion and Order*, 9 FCC Rcd 6723, 6734 (1994)("*Reconsideration Order*").

[92] *Further Notice* at ¶ 122.

of what material is program-related and how that material relates to the primary video.[93] The Commission has already found that "the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness."[94] Nor should they, particularly for DTV. Under the *WGN* test, a cable operator could take the position that a digital broadcaster could not time-shift programming on a second or third channel, produce zone-specific or community specific newscasting, or provide in-depth coverage of breaking news or emergency weather information on a second channel and have 68% of its audience receive these DTV broadcasts. Taking advantage in these ways of the new digital technology should not be precluded by rigid application of concepts inherently rooted in analog technology.

NAB/MSTV/ALTV thus urge the Commission to avoid the inflexible use of a copyright definition of program-relatedness in the digital environment. CEA and Walt Disney agreed with NAB/MSTV/ALTV that the Commission should abandon the *WGN* test for DTV. Comments of CEA at 10, Comments of Walt Disney at 5. While information that is wholly unrelated to a broadcaster's program service should not be subject to must carry, the Commission should define "program-related" material that *is* entitled to carriage as all non-subscription material that adds to, supplements, or relates to the program service of the broadcasting station.[95] As the Walt Disney Company stated, "Congress included the 'program-related' carriage requirement in the Cable Act to

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[93] Comments of CEA at 9-10; Comments of Walt Disney at 3-6; Comments of Gemstar at 9-10.

[94] *Reconsideration Order* at 6734.

[95] Comments of NAB/MSTV/ALTV at 41; *see also* NAB Comments, MM Docket No. 98-120 (filed Oct. 13, 1998) at 39.

preclude cable operators from using their market power to undermine the viability of free over-the-air programming by refusing to pass through enhanced content which is part of the broadcast station's programming service." Comments of Walt Disney at 5. Congress' intent in opening the cable gate should not be contravened and that gate slammed shut by a narrow definition of "program-related" at the beginning of the digital transition.[96]

Continued reliance on the factors enumerated in *WGN* simply will not yield a workable definition of program-related material for digital television. And to be workable, there must be a bright line test that does not leave basic carriage decisions up to the cable industry, or to an endless series of individual content-based decisions about particular programs. Comments of the cable industry here reveal the desire of cable operators to effectively eliminate carriage *of any and all* multicast programming streams as well as other enhancements to the digital broadcast programming service.

AT&T quite transparently reads what it wants into the program-related provision of Section 614(b)(3) by asserting that program-related should not include "advertiser-supported" material. Comments of AT&T at 28-29. It ignores the plain words and sentence construction of that provision. Plainly, the provision relegates to cable's

[96] Further, by narrowly construing the term "primary video" to *exclude* from carriage all but one free, video programming stream, the Commission created a powerful disincentive for broadcasters to develop multiple streams of locally-oriented programming or innovative video services and ensured that cable subscribers and non-subscribers alike would be deprived of the full benefits that digital technology enables. We agree with the Public Broadcasters that the *Report and Order*'s narrow reading of the term "primary video" coupled with the application of an analog definition of what is program-related undermines the future of free over-the-air broadcasting both during and after the transition. Comments of Public Broadcasters at 23-24.

discretion carriage of only "*non*-program-related" advertiser supported information services.

AT&T also attempts to add its gloss to the concept of "program-related" by suggesting that the *WGN* test is appropriate because it captures only material that is "an essential part" of the broadcaster's primary video programming. *Id.* at 28. But nowhere in FCC decisions is there an "essential part" test. Rather than narrowing the definition of program-related as cable suggests, digital television needs a broader definition for 68% of consumers to receive content related to the broadcasters' programming service.

AT&T, NCTA and Time Warner also have concluded that cable is not required to carry *any* program-related content unless it is *in* the primary video feed.[97] Thus, cable operators boldly states that they should be allowed to limit "program-related" carriage obligations to closed captioning, V-chip program ratings data, Nielson ratings data, and PSIP channel mapping data,[98] thus eliminating all advanced digital capabilities, including zoned newscasts and "intrinsically" related interactive content. These cable comments speak volumes as to why cable operators cannot be left with making determinations as to what constitutes "program-related" for must carry purposes.

Further, TWC contends that Section 614's reference to "program-related material in the VBI and subcarriers" is an explicit statutory limitation to only material "in a VBI." Comments of TWC at 29-30. Since in digital, there is no VBI, TWC asserts that the FCC should find that no material outside the primary video feed is entitled to carriage. TWC, ironically, asks the Commission to ignore the plain language of Section 614 that a cable

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[97] Comments of AT&T 29; Comments of NCTA at 27; Comments of TWC at 10.

[98] Comments of AT&T at 29-30; Comments of NCTA at 27; Comments of TWC at 30.

operator shall carry the primary video *and* program-related material.

Nor is the cable industry willing to accept advanced sports programming as program-related.[99] But contrary to NCTA's statement, [100] enhancements of sports programming with statistics, multiple camera angles, playing along with a game, etc. are not "speculative examples" of digital technology. Participation of the National Hockey League ("NHL"), the PGA Tour, Inc. ("PGA") and the National Football League ("NFL") in this proceeding contradicts this. Indeed, professional sports have asserted their active interest in "preserv[ing] and increase[ing] the value of their proprietary sports event programming" through advanced digital television services. Comments of NHL at 6, Comments of NFL at 3. NAB/MSTV/ALTV agree with the Commission that "[w]ith the advent of digital television, broadcast stations now have the opportunity to include in their video services a panoply of program-related content" and that "[t]he statute contemplates and our rules require that cable operators provide mandatory carriage for this program-related content." *Report and Order* at ¶ 57. Advanced sports programming enhancements even clearly fit within the four corners of the *WGN* test for program-relatedness.

But ICCP claims that over-the-air enhanced sports programming is beyond the "appropriate definition" of program-relatedness and that its introduction would come at the expense of "other, less constitutionally suspect uses that subscribers may prefer, such as additional cable program networks." Comments of ICCP at 16-17. Of course, what ICCP and other cable providers would rather see is sports programmers choosing to

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[99] *See* Comments of NCTA at 27; Comments of ICCP at 15; Comments of Starz at 16; Comments of TWC at 29.

[100] Comments of NCTA at 26.

distribute their intellectual property over cable networks, which of course is what sports programmers would have to do if free over-the-air advanced programming services are denied carriage to over two-thirds of the audience. *See* Comments of NFL at 6-7.

Further, NCTA's claims that carrying program-related material such as multiple camera angles of sporting events would consume "one additional channel for each camera angle" wildly overstates the carrying capacity required. Comments of NCTA at 30. As NCTA well knows, a DTV signal uses no more than 19.4 megabits, regardless of whether it includes one program, multiple programs, data, or any other services. In fact, cable operators can carry the entire 6 MHz broadcast signal (including all multicasts and/or multiple camera angles) in 3 MHz of digitized cable spectrum. *See* MWG Report at 12-13.

Moreover, NCTA's point that allowing such material to be considered program-related might "come at the expense of" additional cable programming[101] overstates cable's ability to utilize "extra" spectrum and still be at the ready to carry all program-related material and the next feed of HDTV that will require carrying the entire 19.4 Mbps of the broadcast signal.[102]

Notably absent from the cable industry's comments is any indication they will carry Electronic Program Guides (EPGs). We agree with Gemstar that, as viewers choices expand in a digital and interactive environment, EPGs will become "indispensable to viewers attempting to enjoy and manage the full range of services and content." Comments of Gemstar at 10. We also concur with the CEA that PSIP *and*

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[101] Comments of NCTA at 34.

[102] *See* NAB/MSTV/ALTV Petition for Reconsideration and Clarification, CS Docket No. 98-120, April 25, 2001 at 20.

other information delivered in the video stream, must be considered "program-related." PSIP includes a mass of information pertaining to tuning, V-chip, closed captioning, program guides, emergency information alerts. Without that information, many features of digital television receivers will not be usable, and PSIP information is directly analogous to captioning and stereo information that the Act directs to be carried. Comments of CEA at 9.

Finally, NAB/MSTV/ALTV is confident that broadcasters' deployment of advanced television services will be "technically feasible" as defined in the *Must Carry Order*.[103] Since more than 68% of American households access broadcast programming through their cable systems, it makes little sense for the broadcast industry to develop program-related content that cannot be transported easily over a cable system.[104]

VI. Carriage of Digital Signals By Satellite Carriers

In its Comments, NAB/MSTV/ATLV suggested a sensible middle course for the Commission on the issue of carriage of digital signals by Direct Broadcast Satellite ("DBS") firms: that the Commission should comply with the Act by requiring carriage of "all" local television stations, whether analog or digital, but should phase in the obligation by DBS firms to carry digital as well as analog stations. NAB/MSTV/ALTV Comments at 41-43.

The comments filed by the satellite industry and its allies in this proceeding provide no basis for the Commission to reject the prudent course proposed by NAB/MSTV/ALTV. EchoStar's Comments, for example, are largely based on the

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[103] *Must Carry Order* at 2986

[104] *See* Comments of NCTA at 39.

supposed unconstitutionality of the carry-one-carry-all principle adopted by Congress in the Satellite Home Viewer Improvement Act ("SHVIA").[105] Comments of EchoStar Satellite Corporation at 1-4. But only a few days after EchoStar filed its Comments, the United States District Court for the Eastern District of Virginia, in a comprehensive 64-page opinion, squarely rejected the satellite industry's constitutional attack on the SHVIA, ruling that "the SHVIA is constitutional and does not in any way violate the First and Fifth Amendment rights of satellite carriers." *SBCA v. FCC*, Civ. No. 00-1571-A, slip op. at 3 (E.D. Va. July 19, 2001). The Court thus reaffirmed the Commission's correct conclusion in this proceeding -- which the Commission has now reiterated many times in court -- that SHVIA easily satisfies all relevant constitutional standards. *See Report & Order,* CS Docket No. 00-96 at ¶¶ 10-13 (Nov. 29, 2000).

Under the SHVIA, of course, satellite carriers are not required to carry any television stations whatsoever, whether in analog or digital format. Rather, satellite companies are obliged to carry the full range of local stations *only if they make use of the new local-to-local compulsory license* to carry at least one station. For that reason, the channel capacity of EchoStar and other satellite carriers is irrelevant to the satellite industry's constitutional claim. EchoStar nevertheless continues to belittle its capacity to carry television programming, *see* EchoStar Comments at 2, 4-5, even as it prepares to launch spot-beam satellites (which will enormously increase the efficiency of its delivery of local stations) and even as it works to expand its already vast Ka-band capacity (which can be used to deliver enormous numbers of TV channels, including digital channels).

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[105] Rather than filing new Comments, DirecTV's June 11, 2001 Comments simply incorporate by reference its prior filings. NAB likewise incorporates by reference its prior filings in CS Docket No. 00-96, including its responses to DirecTV's prior submissions.

The truth is that EchoStar and DirecTV are perfectly capable of delivering both analog and digital signals in all of the markets they would otherwise choose to serve. Any supposed capacity constraints can be easily overcome, as illustrated by the plans of Local TV on Satellite, Inc. ("LTVS") -- which, using only two Ka-band satellites, proposes to deliver a full 19.4 Mbps digital signal in 65 markets, or some 25 more markets than either DirecTV or EchoStar serves today. *See* LTVS web page, www.localtv-satellite.com. Whether or not EchoStar and DirecTV eventually enter into a business partnership with LTVS, the DBS firms could individually -- or, even more efficiently, jointly -- do the same thing that LTVS has proposed. Prospects for Ka-band local-to-local service are now brighter than ever, since the Commission has just issued second-round Ka-band license to 11 companies, including DBS distributor Pegasus Development Corporation and DirecTV corporate affiliate Hughes Communications, Inc. (These second-round authorizations are on top of the slots already allocated to DirecTV and EchoStar (or their affiliates) in the first round.) As the Commission observed on in approving the second-round licenses, "[t]hese advanced [Ka-band] satellite systems will enhance competition among service providers in the marketplace and provide new service options to the American public." News Release, *FCC International Bureau Authorizes Second-Round Ka-Band Satellite Systems* (Aug. 2, 2001). In the wake of the Commission's second-round award, one of the new Ka-band licensees, Pegasus Development Corporation, announced that the new licenses will enable Pegasus to provide a variety of services, including "*re-transmission of local broadcast signals . . . to communities throughout North America.*" Pegasus web site, www.pgtv.com (visited Aug. 13, 2001) (emphasis added).

Alternatively, if they preferred, the DBS firms could double their capacity to carry local stations using Ku-band frequencies by creating a local-to-local cooperative (either through LTVS or otherwise) that would deliver local stations to both EchoStar and DirecTV subscribers, rather than having EchoStar and DirecTV wastefully duplicate the uplinking and downlinking of the identical signals. Alternatively, the DBS firms could exploit the vast amount of Ku-band capacity available at "wing slots" (such as 61.5° W.L. and 148° W.L.) or expand their capacity at both Ku-band and Ka-band slots by exploiting the power of available techniques such as 8PSK modulation. By setting a medium-range deadline for the effective date of the requirement to carry both analog and digital signals, the Commission can create the necessary incentive to encourage satellite carriers to take the technical steps (such as launch of additional satellites) that will enable them to carry both the analog and digital signals of all stations during the digital transition period.

The comments filed by other parties add little to EchoStar's filing. The Satellite Broadcasting & Communications Association, for example, asserts that there is "no statutory authority" for the Commission to impose a dual-carriage requirement on satellite carriers under the SHVIA. SBCA Comments at 3 (filed June 11, 2001). That claim, however, is readily rebutted by a glance at the Act, which calls for carriage of "*all* television broadcast stations" -- not merely analog TV stations -- by carriers that rely on the local-to-local compulsory license. 47 U.S.C. § 338(a)(1).

Two commenters (Starz Encore Group LLC and International Cable Channels Partnership, Ltd.) make the same puzzling assertion: that "in general, any local broadcast station carried by . . . a DBS operator must be carried nationally." Starz Encore Group

LLC Comments at 21 (filed June 11, 2001); International Cable Channels Partnership, Ltd. Comments at 19. That assertion is wrong: both DirecTV and EchoStar have recognized that using CONUS satellites to deliver local channels is not a sensible proposition as a general matter, and have therefore made plans to launch spot beam satellites to deliver most, if not all, of the local channels they carry.

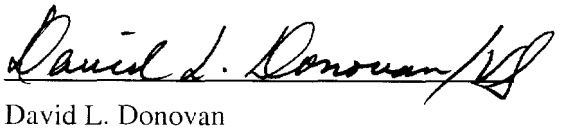
In short, the Comments filed by the satellite industry and its allies do nothing to undercut the sound, compromise solution proposed by NAB/MSTV/ALTV in their initial Comments.

Conclusion

Try as they might, cable commenters proffering in the main a re-hash of previous arguments cannot escape certain obvious conclusions in this proceeding. They are: cable operators, in nearly all markets, are nearing completion of a massive extension of cable system carrying capacity which will accommodate the temporary addition of DTV signals with minimal burden, mandatory must carry of DTV signals is necessary to a swift, successful transition of free, over-the-air broadcasting to digital technology and, absent an expeditious and successful DTV transition, Congress' goal of preserving the vitality of the free, over-the-air broadcasting system for all viewers will be endangered. The FCC's choice in this regard should be clear: the prompt adoption of a digital must carry rule.

Respectfully submitted,

ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.



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