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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals	)	CS Docket No. 98-120
	)	

To: The Commission

JOINT REPLY COMMENTS OF ADELPHIA COMMUNICATIONS CORPORATION, INSIGHT COMMUNICATIONS COMPANY, INC. AND MEDIACOM COMMUNICATIONS CORPORATION

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SUMMARY

Adelphia Communications Corporation, Insight Communications Company, Inc. and Mediacom Communications Corporation (collectively "Joint Commentors") file these joint reply comments to address critically important issues raised by this proceeding and to respond to erroneous arguments and conclusions raised by certain other commenting parties. In addition to being beyond the Commission's authority and constitutionally infirm, a dual carriage requirement would be fundamentally unfair to, and adversely impact, the Joint Commentors and their customers.

The Joint Commentors are multiple system operators ("MSOs") whose efforts have largely focused on developing state-of-the-art systems that provide customers a complement of advanced services in addition to traditional multichannel video programming. Like the rest of the cable industry, they have invested, and continue to invest, tremendous amounts of capital into their cable systems to ensure that they can provide their customers the most advanced and desirable services for many, many years to come. A dual carriage requirement would compromise the cable industry's short and long-term ability to meet its customers' needs.

The Commission must regard the broadcaster's arguments and conclusions for what they are – repetition of their previous rhetoric that fails to justify the need for dual carriage. Their tales of woe about the financially debilitating costs associated with the digital transition do not justify confiscating valuable cable system capacity for broadcasters' benefit. Cable, unlike the broadcast industry, has built its business without the benefit of government subsidies (the value of the digital spectrum Congress "lent" to broadcasters has been valued at about $70 billion). In the past five years, cable operators have poured well over $40 billion dollars into infrastructure upgrades. It

would unfairly penalize cable operators to make them further subsidize the digital transition by involuntarily relinquishing the fruit of their labor – cable system capacity.

The marketplace, not artificial deadlines, must set the pace of the digital transition. Just as the marketplace drives, and has driven, the rate of consumer acceptance of other new technologies – for example, color television, VCRs, digital television and high-speed Internet access – the Commission should similarly allow the marketplace to determine when and how the digital transition will occur.

Broadcasters' concerns regarding program diversity equally do not hold up upon closer scrutiny. They suggest that without a dual carriage requirement, "no incentive exists whatsoever for broadcasters to offer different programming on their digital channels." This is entirely illogical. It has become largely accepted among various industry players that content will drive the digital transition. The broadcasters, however, have fallen short in that regard, at most upconverting their analog fare into a digital format, thus contributing nothing to program diversity. Cable programming networks are responding to consumer demand by offering increasing amounts of HDTV programming, and evidence is growing that a pure marketplace approach is beginning to drive sales of digital television sets. The only logical way to approach the digital transition is for broadcasters to first offer compelling (original and HDTV) digital programming, which cable operators then will carry voluntarily (because it will appeal to, and be demanded by, cable customers). As marketplace forces cause the availability of more quality digital programming (whether offered by cable, DBS, DVD or broadcast), digital television set sales will increase and the digital transition will move forward.

It is also fundamentally important to recognize the harm to cable operators and their customers that would result from a dual carriage requirement. The cable industry has long been innovators of new services. In addition to responding to consumer desires, *e.g.*, providing diverse programming beyond that offered by broadcast television, cable has taken a pro-active approach towards improving existing services and driving the development of tomorrow's services. Cable's ability to respond to consumer demand and introduce innovative services necessarily is central to justifying the huge investment made in system rebuilds. As noted above, cable operators are spending billions of dollars to rebuild cable systems with the expectation that they could develop and offer new services and return a profit. To meet those expectations, cable needs discretion to determine the most efficient uses of its capacity, as well as the flexibility to respond to changing market conditions and competition posed by other MVPDs. Only then can cable be assured that it can provide its customers with the most desirable products and services.

The Joint Commentors therefore respectfully request that the Commission reject a dual carriage requirement.

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TO: The Commission

JOINT REPLY COMMENTS

Adelphia Communications Corporation ("Adelphia"), Insight Communications Company, Inc. ("Insight") and Mediacom Communications Corporation ("Mediacom") (collectively "Joint Commentors"), through their attorneys, file these joint reply comments to address critically important issues raised by this proceeding and to respond to erroneous arguments and conclusions raised by certain other commenting parties.[1] The Joint Commentors believe that dual must-carry, in addition to being beyond the Commission's authority and constitutionally infirm, would be fundamentally unfair to, and adversely impact, the Joint Commentors and their customers.[2]

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[1]*In the Matter of Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking in CS Docket No. 98-120, FCC 01-22, 16 FCC Rcd 2598 (rel. January 23, 2001) ("*Digital Must-Carry Order and FNPRM*").

[2]The Joint Commentors have specifically refrained from addressing constitutionality and similar legal issues in order to focus on the adverse effect dual must-carry would have on the Joint Commentors and their customers. *See Digital Must-Carry Order and FNPRM* at ¶ 114.

I. INTRODUCTION

The Joint Commentors are multiple system operators ("MSOs") whose efforts have largely focused on developing state-of-the-art systems that provide customers a complement of advanced services in addition to traditional multichannel video programming.

Adelphia, one of the largest cable MSOs, owns and manages systems in 32 states and Puerto Rico that serve more than 5.7 million basic customers. Adelphia "has made a substantial commitment to the technological development of [its cable] [s]ystems and is aggressively investing in the upgrade of the technical capabilities of its cable plant in a cost efficient manner."[3] In addition to offering traditional multichannel analog video programming, Adelphia has begun to roll-out high-speed Internet access and digital video services, including multiplexed premium channels, enhanced pay-per-view and an interactive program guide to navigate those digital choices, video-on-demand and interactive programming, and e-commerce.[4] Adelphia also has allocated a portion of its systems' bandwidth for service offerings such as two-way data and telephony.[5]

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[3] *See* Adelphia Communications Corporation, Form 10-K, Securities and Exchange Commission (for year ending December 31, 2000) ("Adelphia 10-K").

[4] *See* Adelphia 10-K; *see also* Letter dated June 6, 2001, to Ron Parver, Cable Services Bureau, Federal Communications Commission, from Leslie J. Brown, Assistant General Counsel, Adelphia Communications Corporation ("Adelphia Survey").

[5] *See* Adelphia 10-K.

Another of the ten largest cable operators, Insight serves approximately 1.4 million customers in 5 states.[6] Using state-of-the-art technology, Insight offers its customers a variety of advanced services, including interactive digital video, high-speed Internet access and telephone service.[7] For example, Insight offers a video-on-demand service in selected markets, providing its customers significantly more viewing options, in addition to interactive digital services that allow Insight to offer its customers customized information rich in local content and targeted to a specific system or community.[8] Insight also has launched a digital mall.

Mediacom is another of the ten largest MSOs in the United States. With its recent acquisition of cable systems from AT&T Broadband, Mediacom has more than doubled in size, now serving close to 1.6 million customers in 23 states.[9] Mediacom continues to upgrade and rebuild its systems to offer advanced services, including digital video programming and high-speed Internet access, and is positioning itself to offer telephony and interactive services.[10]

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[6]*See* Insight Communications Company, Inc., Form 10-K, Securities and Exchange Commission (for year ending December 31, 2000).

[7]*See id.*

[8]*See* Letter dated June 4, 2001, to Ron Parver, Cable Services Bureau, Federal Communications Commission, from Elizabeth M. Grier, Vice President, Administration, Insight Communications ("Insight Survey").

[9]*See* Mediacom Communications Completes Acquisitions of Georgia, Illinois and Iowa Cable Systems from AT&T Broadband, Press Release (July 18, 2001), located at www.mediacomcc.com (last visited August 14, 2001).

[10]*See* Mediacom Communications Corporation, Form 10-K, Securities and Exchange Commission (for year ending December 31, 2000).

Mediacom is also currently exploring other services, *e.g.*, virtual private networking for educational, governmental, commercial and industrial applications.[11]

The Joint Commentors, like the rest of the cable industry, have invested, and continue to invest, tremendous amounts of capital into their cable systems to ensure that they can provide their customers the most advanced and desirable services for many, many years to come. A dual carriage requirement, in addition to being unconstitutional and poor public policy, would compromise the cable industry's short and long-term ability to serve its customers' needs.

II. DUAL CARRIAGE DOES NOT PROVIDE THE SOLUTION FOR COMPLETING THE DIGITAL TRANSITION.

A. The Broadcasters' Comments Repeat Their Previous Rhetoric, Again Failing to Justify the Need for Dual Carriage.

1. Broadcasters' Concerns About the Cost of the Digital Transition Do Not Justify Taking Cable System Capacity.

Broadcasters complain of the financially debilitating costs associated with the digital transition.[12] They erroneously conclude, however, that those costs somehow justify taking cable system capacity.

Broadcasters, at their own volition, sought to take advantage of advanced television services, petitioning the Commission in 1987 to conduct an inquiry on this issue -- before the

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[11] *See* Letter dated August 6, 2001, to Ron Parver, Cable Services Bureau, Federal Communications Commission, from Bruce J. Gluckman, Vice President of Legal and Regulatory Affairs, Mediacom Communications Corporation ("Mediacom Survey").

[12] *See* Comments of Univision Communications, Inc., CS Docket No. 98-120 (June 11, 2001) at 16 ("Univision Comments"); Comments of STC Broadcasting, Inc., CS Docket No. 98-120 (June 11, 2001) at 1, 3-6 ("STC Comments").

current analog must-carry requirement even existed. In their view, "the potential impact of the HDTV transition on the local broadcast system of this country ha[d] sufficiently serious spectrum allocation implications to warrant an immediate and thorough Commission investigation."[13] Broadcasters were concerned that without the ability to adapt to new advanced technologies and offer HDTV like other home video delivery services, they "could be shut out of the HDTV marketplace [and] . . . relegated to the provision of a second-class service."[14] Ironically, if broadcasters now prevail in securing dual carriage rights, cable will face a similar fate of second-class status to broadcasters.[15]

Broadcasters already enjoy a substantial government subsidy by way of the 12 MHz of valuable spectrum they have received at no cost.[16] Unlike broadcast television, cable operators have had to rely on private capital, not government subsidies, to build their businesses. The cost to cable operators to rebuild and upgrade their systems to ensure that they can offer the most advanced services has been immense. In the past five years, the cable industry has invested

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[13]*Impact of Advanced Television Technologies on Local Television Broadcasting*, Petition for Notice of Inquiry, RM-5811 (February 13, 1987) at 7 ("Broadcasters ATV Petition"); *see also Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, Notice of Inquiry in MM Docket No. 87-268, 2 FCC Rcd 5125 (1987).

[14]*See* Broadcasters ATV Petition at 6.

[15]*See Comments of the National Cable & Telecommunications Association*, CS Docket No. 98-120 (June 11, 2001) at 16 ("NCTA Comments")(Commenting on how a dual carriage requirement would relegate cable programmers to second-class status to broadcasters). A dual carriage requirement would also relegate cable operators and their customers to second-class status because it would appropriate cable investment and labor as a means to subsidize the efforts of broadcasters to offer digital services.

[16]*See* NCTA Comments at 10 (noting that broadcasters were lent their additional digital spectrum (worth $70 billion) on the promise of offering HDTV).

approximately $42 billion dollars on infrastructure upgrades.[17] It would unfairly penalize cable operators to make them further subsidize the digital transition by involuntarily relinquishing cable system capacity.

Marketplace forces, not artificial deadlines, must determine the pace of the digital transition. Just as the marketplace drives the rate of consumer acceptance of digital cable, high-speed Internet or any other new technology, the Commission should similarly allow the marketplace to determine when and how the digital transition will occur.

There has been growing sentiment that the marketplace must guide the digital transition. The National Association of Broadcasters recently met with Commission officials to request a streamlined waiver process regarding the buildout deadlines for smaller market broadcasters.[18] The fact remains that for many smaller market broadcasters, the approaching deadline is impracticable.[19] A deadline suspension for some smaller market broadcasters has even garnered Congressional support.[20] The set-backs smaller market broadcasters are experiencing provide

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[17]*See* Testimony of Michael S. Willner, President and CEO, Insight Communications, before the Senate Commerce Committee Hearing on the Transition to Digital Televison (March 1, 2001) ("Willner Testimony").

[18]*See NAB Says Many Stations May Not Make DTV Transition Deadline*, COMMUNICATIONS DAILY (July 6, 2001) at 3.

[19]NAB now reports that as many as 400 broadcasters may not meet the May 2002 deadline. *See* Ted Hearn, *NAB: 400 Stations to Miss Deadline*, MULTICHANNEL NEWS ONLINE (August 14, 2001), located at www.tvinsite.com (last visited August 14, 2001).

[20]*See* Ted Hearn, *Sens. Urge FCC to Suspend Deadline*, MULTICHANNEL NEWS ONLINE (July 27, 2001), located at www.tvinsite.com (last visited August 14, 2001) (noting that Senators Burns and Baucus have asked the Commission to suspend the buildout deadline for certain smaller market stations "until such time that the marketplace and sound business models allow for the successful adoption of digital television."). Senator Burns has also suggested that "the

strong evidence that the marketplace, not artificial deadlines, dictates how quickly the digital transition actually will occur.

A dual must-carry requirement coupled with the simulcasting requirement would actually impede the digital transition. So long as broadcasters provide identical programming on their analog and digital channels, consumers can continue to rely on broadcasters' analog signals, obviating the need to purchase digital receivers and thereby further delaying the digital transition.[21] Instead, if broadcasters offer compelling digital programming, cable operators would have incentive to carry them, consumers would have incentive to purchase digital receivers, and the digital transition would make progress toward completion.

2. Broadcasters' Concerns for Program Diversity Simply Do Not Hold Up.

Broadcasters also attempt to justify a dual carriage requirement on program diversity grounds. They argue that without dual carriage, program diversity will diminish and hence that dual carriage is necessary to promote program diversity. For example, broadcaster and equipment

marketplace [will] set the pace of transition on conversion: 'The marketplace probably will have more to do with that. . . than any other factor.'" *FCC's Pepper Says Quick DTV Transition is Critical To Broadcaster Survival*, COMMUNICATIONS DAILY (July 25, 2001) at 3.

[21] The *WHDT* matter is telling in this regard. Armed with a decision empowering a digital-only television station to seek analog carriage (a matter which Adelphia believes the Commission wrongly decided), *see WHDT-DT, Stuart, Florida,* 16 FCC Rcd 2692 (2001), Adelphia's attempts to arrange for carriage of Station WHDT-DT's digital signal have been rebuffed. Even where the option for digital carriage exists, the *WHDT* situation provides a prime example of how broadcasters prefer analog carriage, thus providing little or no incentive for consumers to purchase digital television sets and slowing down the digital transition. *See 700 MHz Third Report and Order*, FCC 01-25, 16 FCC Rcd 2703 (2001) (Separate Statement of Commissioner Gloria Tristani, dissenting in part) (noting that with the option for analog carriage "consumers who subscribe to cable services will have one less reason to buy a digital set").

manufacturers alike claim that "without a dual must-carry requirement, there will be no incentive whatsoever for broadcasters to offer different programming on their digital channels."[22] The broadcasters, however, have put the cart before the horse.

Despite a growing consensus among many industry players that content must drive the digital transition,[23] broadcasters presently offer very little original digital programming. Notwithstanding the Commission's specific request for data regarding the amount of simulcast, HDTV and original digital programming,[24] broadcasters' comments provide virtually no information regarding their original and HDTV programming. Instead, as NCTA notes, broadcasters appear to be simply upconverting standard definition analog signals.[25] Duplicative broadcast television programming, however, does not contribute to program diversity.

It is indeed twisted logic to suggest that a dual carriage requirement would provide incentive to offer different programming on digital channels, which would enhance program diversity. As noted above, if broadcasters offer original digital programming that appeals to

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[22]*See* STC Comments at 8; *see also* Comments of the Consumer Electronics Association, CS Docket No. 98-120 (June 11, 2001) at 4 ("CEA Comments"); Comments of KSLS, Inc. and KHLS, Inc., CS Docket No. 98-120 (June 11, 2001) at 2-3.

[23]*See DTV Guide*, Consumer Electronics Association (May 2001), located at www.ce.org (last visited August 14, 2001) (Commenting how the "biggest disappointment [to digital television set owners has been] the relative dearth of HDTV programming."). Fritz Attaway, MPAA Executive Vice President, similarly observed the need for compelling content. "DTV broadcasting is not going to mature and the DTV transition is not going to take place until there is compelling content on DTV stations." *FCC's Pepper Says Quick DTV Transition is Critical To Broadcasters Survival*, COMMUNICATIONS DAILY (July 25, 2001) at 3.

[24]*See Digital Must-Carry Order and FNPRM* at ¶ 120.

[25]*See* NCTA Comments at 11.

consumers, cable operators will carry it,[26] digital television set sales will increase and the digital transition will move forward in response to marketplace forces.[27] In declining to impose a simulcasting requirement during the beginning of the digital transition, even the Commission recognized the importance of offering original digital programming as a primary means to facilitate the digital transition.[28]

Broadcasters' program diversity claims also disregard the practical reality that dual carriage would often displace other programming and services and would always foreclose

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[26]*See* Jenna Greene, *Digital TV a Remote Possibility*, LEGAL TIMES, located at www.legaltimes.com (last visited August 6, 2001) (Quoting Neal Goldberg, General Counsel, National Cable & Telecommunications Association, "We've said time and again that if there is compelling [digital] programming out there, we'll air it[.] . . . Clearly, we want to carry the programming our customers want." (Addition in original)).

[27]It is noteworthy that digital television set sales have begun to rapidly increase. According to the Consumer Electronics Association, "CEA is projecting sales of more than $2 billion and over one million units [in 2001], a milestone that historically has marked the beginnings of a true mass market." *See DTV Guide*, Consumer Electronics Association (May 2001), located at www.ce.org (last visited August 14, 2001). In light of the absence of appreciable amounts of digital broadcast programming, increasing digital television sets sales must then be attributable in a large part to the efforts of DBS and cable to provide digital and HDTV programming. *See* Michael Grotticelli, *Something to Watch: It'll Take More Than a CEA/NAB Push for Consumers to Buy DTV*, BROADCASTING & CABLE (May 7, 2001) (noting that, to date, most digital television sets sold have not included tuners).

[28] *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶ 55 (1997) ("[M]any consumers' decisions to invest in DTV receivers will depend on the programs, enhanced features, and services that are not available on the NTSC service. . . ."); *see also* NCTA Comments at 11; *see also In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order and Further Notice of Proposed Rule Making in MM Docket 00-39, FCC 01-24, 22 CR 1170 (2001) at ¶ 11 (urging broadcasters to offer digital and high-definition programming based on its belief that widespread availability of such programming will speed the digital transition).

marketplace decisions as to what new services to add. The simple fact remains that no compelling reason exists to take such drastic measures at this time.

Existing programming and services already place considerable demand on limited cable system capacity. This is evidenced by the channel capacity surveys filed in this docket by each of the Joint Commentors. For example, "[d]ue to the market demand for digital, Adelphia has had to utilize any available digital video capacity to meet programming requirements on a national level."[29] Insight similarly notes that "although [the Louisville, Kentucky system] has been rebuilt to 750 MegaHertz, we are utilizing approximately 93% of the available bandwidth for our current service offerings, including interactive digital video, with the remaining balance reserved for increased penetration of our new and enhanced products such as video-on-demand and telephony."[30] As both the Commission and commenting parties acknowledge, "there is a risk that if carriage were mandated, cable subscribers would lose existing cable programming services that would be replaced on the channel line-up by digital television signals with less programming."[31]

Notwithstanding possible unused capacity today, a dual carriage requirement will interfere with the introduction of new programming and services. Efficient capacity usage requires careful spectrum allocation and planning. It is significant that the exact capacity requirements necessary for particular services often depend on a number of variables, *e.g.*, system design, penetration,

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[29]*See* Adelphia Survey.

[30]*See* Insight Survey.

[31]*See Digital Must-Carry Order and FNPRM* at ¶¶ 9,120; *see also* CEA Comments at note 8.

system traffic/concurrent usage. This means that future capacity needs cannot be predicted precisely. While some cable systems may have capacity that exceeds present and near-term usage, it is critically important to remember that these systems are designed to have adequate capacity to accommodate future products and services. The demands of a dual carriage requirement would unfairly interfere with, and compromise, cable's ability to plan for and introduce new programming and services.

B. A Dual Must-Carry Requirement Would Stymie Innovation and the Ability to Justify the Investment Made in System Rebuilds.

1. The Cable Industry Has Long Driven the Development of New Services.

Cable operators have long been innovators of new services. Cable not only has responded to consumer desires, providing diverse programming beyond that offered by broadcast television, but also has taken a pro-active approach towards improving existing services, *e.g.*, introducing high-speed Internet and IP telephony, and driving the development of the services of tomorrow, like interactive television.

In addition to more mainstream advanced services (*e.g.*, digital television, high-speed Internet access and telephony), listed below are several examples of the Joint Commentors' other digital efforts:

- Adelphia has signed a long-term agreement with Gemstar-TV Guide International to offer Gemstar's interactive program guide, which contemplates T-commerce.[32]

[32]*See Gemstar-TV Guides International and Adelphia Communications Corporation Announce 20-Year IPG Agreement*, BUSINESS WIRE (June 11, 2001), located at http://www.findarticles.com/cf_0/m0EIN/2001_June_11/75425433/p1/article.jhtml?term=adelphia+%2B+gemstar (last visited August 14, 2001) (noting a variety of offerings contemplated by the deal, including T-commerce and VOD).

- Insight is offering a digital mall.
- Mediacom is exploring virtual private networking for educational, governmental, industrial and commercial applications.[33]

Cable's ability to respond to consumer demand and introduce innovative services necessarily is central to justifying the huge investment made in system rebuilds. As noted above, cable operators are spending billions of dollars to rebuild cable systems with the expectation that they could develop and offer new services and return a profit. To meet those expectations, cable needs discretion to determine the most efficient uses of its capacity, the flexibility to accommodate changes in the demands for such bandwidth, and the ability to respond to competition posed by other MVPDs. It is also important to recognize that cable operators must, in part, anticipate consumer trends and reserve adequate bandwidth to accommodate growing consumer demand for any one product or service. Only then can the cable industry meet its goal of providing its customers with the most desirable products and services.

2. Existing Regulations Already Limit Cable's Ability to Serve Its Customers' Needs and Desires.

Existing regulations already burden cable's ability to best serve its customers' needs and desires. For example, public access, leased access and must-carry requirements limit cable operators' discretion regarding the best uses of their system capacity. PEG and leased access, however, were designed to promote program diversity, and analog must-carry was intended to preserve existing free, over-the-air broadcasting.

[33] *See* Mediacom Survey.

Dual carriage, on the other hand, would represent a significant further incursion into cable's ability to manage its bandwidth in such a way to allow for innovation. Unlike PEG and leased access and analog must-carry, dual carriage is not necessary to preserve existing free, over-the-air broadcasting, nor would it promote program diversity, but it instead would represent an attempt to use cable to create a new business for digital broadcasting and, as noted above, it would actually diminish program diversity. It would also significantly diminish the ability to make innovative services available and would substitute a use of capacity that has no economic justification other than to grant broadcasters a further subsidy at cable's expense.

III. CONCLUSION

The digital transition represents a complex, multi-faceted matter for which no easy solutions exist. Marketplace forces, however, not government fiat, should dictate the pace of the digital transition. Based on the foregoing, the Joint Commentors therefore urge the Commission to reject a dual carriage requirement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kyle Baker, a secretary with the law firm of Fleischman and Walsh, L.L.P. hereby certify that on this 16th day of August 2001, I have caused the foregoing JOINT REPLY COMMENTS to be sent via hand delivery or first class mail to each of the following:

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