

Sample Digital Channel Line Ups from Major MSOs

Cox ⁵	San Diego, California San Diego, CA DMA (#25)	7 (in addition to analog offerings)	<ul style="list-style-type: none"> • 11 channels in a Movie Package • 7 channels in a Sports and Information Package • 10 channels in a Variety Package 	28 premium channels <ul style="list-style-type: none"> • 9 HBO (2 time-staggered feeds) • 6 Cinemax (2 time-staggered feeds) • 4 Showtime • 2 Movie Channel • 6 Starz! (1 time-staggered feed) (Note: The Filipino Channel is available as a Special Premium service.)	94 <ul style="list-style-type: none"> • ESPN also offers a 10 channel pay per view package. • WNBA also offers an 11 channel pay per view package. • NHL also offers a 10 channel pay per view package.
Adelphia ⁶	Greeneville, Tennessee Nashville, TN DMA (#30)	16 (in addition to analog offerings)	N/A	22 premium channels <ul style="list-style-type: none"> • 4 Showtime • 2 Movie Channel • 1 Flix • 1 Sundance • 4 HBO • 2 Cinemax • 2 Starz! • 6 Encore 	17 <ul style="list-style-type: none"> • including 2 adult pay per view
Insight ⁷	Bloomington, Indiana Indianapolis, IN DMA (#26)	Customers receive analog line-up and can purchase digital packages	<ul style="list-style-type: none"> • 14 channels in a Family Pak • 15 channels in a Movie Pak (including a premium Encore channel) • 15 channels in a Sports & Lifestyle Pak 	25 premium channels <ul style="list-style-type: none"> • 6 HBOs • 4 Cinemax • 5 Showtime • 2 Movie Channel • 1 Sundance • 1 Flix • 4 Starz! • 1 BET Movies • 1 Encore (as a premium service) 	6 <ul style="list-style-type: none"> • including 1 adult pay per view
MediaCom ⁸	Jacksonville, Indiana Louisville, KY DMA (#48)	62	N/A	40 premium channels <ul style="list-style-type: none"> • 8 HBOs (4 time-staggered feeds) • 4 Cinemax (2 time-staggered feeds) • 8 Showtime (4 time-staggered feeds) • 4 Movie Channel (2 time-staggered feeds) • 4 Starz! (2 time-staggered feeds) • 12 Encore (6 time-staggered feeds) 	15 <ul style="list-style-type: none"> • including 5 adult pay per view
CableOne ⁹	Texarkana, Texas Shreveport, LA DMA (#75)	Customers receive analog line-up and can purchase digital premium services	N/A	38 premium channels <ul style="list-style-type: none"> • 11 HBOs (4 time-staggered feeds) • 9 Cinemax (1 time-staggered feed) • 10 Showtime (5 time-staggered feeds) • 4 Movie Channels (2 time-staggered feeds) • 2 Flix (1 time-staggered feed) • 2 Sundance (1 time-staggered feed) 	40 <ul style="list-style-type: none"> • including 6 adult pay per view

⁵ Cox Digital Cable Channel Lineup, <http://www.cox.com/SANDIEGO/DigitalCable/digital lineup.asp>

⁶ Cable TV Lineup, Adelphia Cable, <http://www.greeneville.com/community/frontiervision.htm>

⁷ Insight Communications – Bloomington, IN District – Channel Guide, http://www.insight-com.com/about/bloomington_channels.html

⁸ Jacksonville Digital Channel Lineup, http://www.mediacomcc.com/images/products_digital_jacksonville.jpg

⁹ Cable One Digital Lineup, <http://www.cableone.net/images/animate/digibrd.pdf>

Sample Digital Channel Line Ups from Major MSOs

MSO	System Location and Market	# Digital Basic	# Digital Plus	# Digital Premium	# Digital Pay Per View
AT&T ¹	Des Moines, Washington Seattle, Washington DMA (#12)	49	N/A	21 premium channels <ul style="list-style-type: none"> • 4 HBO services (1 duplicative of analog) • 4 Showtime (1 duplicative of analog) • 2 Cinemax (1 duplicative of analog) • 2 Movie Channel (1 duplicative of analog) • 6 Encore (1 duplicative of analog) • 3 Starz! (1 duplicative of analog) 	43 <ul style="list-style-type: none"> • including 4 adult pay per view
Time Warner Cable ²	Syracuse, New York Syracuse, NY DMA (#76)	69	23 Total <ul style="list-style-type: none"> • a 10 channel digital movie pack is also available 	44 premium channels (18 time-staggered feeds) <ul style="list-style-type: none"> • 8 Encore (1 time-staggered feed) • 15 HBO (7 time-staggered feeds and 1 HDTV feed) • 8 Cinemax (4 time-staggered feeds) • 9 Showtime (1 HDTV feed) • 2 Movie Channel • 10 Starz! (5 time-staggered feeds) • 2 Disney Channel (1 time-staggered feed) 	38 <ul style="list-style-type: none"> • including 4 adult pay per view
Comcast ³	Montgomery County, Maryland Washington, DC DMA (#8)	34 (including 6 time-staggered Encore feeds, 1 time-staggered Sundance feed, and 1 time-staggered Flix feed)	N/A	45 premium channels (22 time-staggered feeds) <ul style="list-style-type: none"> • 14 HBOs (7 time-staggered feeds) • 8 Cinemax (4 time-staggered feeds) • 10 Showtime (5 time-staggered feeds) • 4 Movie Channels (2 time-staggered feeds) • 7 Starz! (3 time-staggered feeds) • 2 Encore (1 time-staggered feed and 2 duplicative feeds) 	60 <ul style="list-style-type: none"> • including 4 adult pay per view • includes 5 ESPN pay per view channels • includes 10 NBA/WNBA pay per view channels • includes 7 NHL/MLB pay per view channels
Charter ⁴	Suffolk, Virginia Norfolk-Portsmouth-Newport News DMA (#42)	41	N/A	41 premium channels <ul style="list-style-type: none"> • 8 HBOs (4 time-staggered feeds) • 4 Cinemax (2 time-staggered feeds) • 8 Showtime (4 time-staggered feeds) • 4 Movie Channel (2 time-staggered feeds) • 5 Starz! (2 time-staggered feeds) • 12 Encore (6 time-staggered feeds) 	19 <ul style="list-style-type: none"> • including 3 adult pay per view

¹ AT&T Broadband Channel Lineup, <http://www.ci.des-moines.wa.us/media-cable.html>

² Digital Cable Channel Lineup for City of Syracuse, http://www.twny.com/customer_care/channel_lineup/digital.cfm

³ Channel Lineup: Comcast Digital Cable, <http://www.comcast.com/cablesys/channel...0910&SystemID=99&iLineUpID=198&iTownID=>

⁴ Channel Lineup, <http://www.chartercom.com/service/channel/channel.asp?ID=229&LID=159>

APPENDIX C

Updated C-SPAN "Typical" Channel Line-up with 262-295 Programming Services, As of 2003¹

C-SPAN's "Typical" Line-up 59 Programming Services		Additional Channels Carried on a Digital Cable System in 2003 ²				
ABC	CBS	ABC DTV	CBS DTV	170 Additional Program Services (and 10 DTVs) Available on 64 QAM Sys- tem - 205 Add. Program Services (and 10 DTVs) Available on 256 QAM Program System (Darker Gray)		
NBC	FOX	NBC DTV	FOX DTV			
PBS	WB	PBS DTV	WB DTV			
PBS	UPN	PBS DTV	UPN DTV			
Independent	Independent [PAX]	Independent DTV	Independent [PAX] DT			
Public Access	Government Access					
Educational Access						
HBO		HBO Family	Encore MOVIEplex	_____	_____	_____
Showtime		HBO Latino	Starz!	_____	_____	_____
Cinemax		HBO Comedy	Starz! Theater	_____	_____	_____
HBO 2 [HBO Plus]		HBO Zone	Black Starz!	_____	_____	_____
HBO 3 [HBO Signature]		Showtime Too	Starz! Family	_____	_____	_____
		Showtime Beyond	Starz! Cinema	_____	_____	_____
		Showtime Extreme	Starz! Kidz	_____	_____	_____
		Showtime Women	Independent Film	_____	_____	_____
		Showtime FamilyZone	Actionmax	_____	_____	_____
		Showtime Next	Thrillermax	_____	_____	_____
		Showtime Showcase	5 Starmax	_____	_____	_____
		The Movie Channel	Outermix	_____	_____	_____
		TMC Xtra	Moremax	_____	_____	_____
		Encore Love Stories	@max	_____	_____	_____
		Encore Westerns	Wmax	_____	_____	_____
		Encore Mystery	Flix	_____	_____	_____
		Encore Action	Sundance	_____	_____	_____
		Encore WAM!		_____	_____	_____
		Encore True Stories		_____	_____	_____
PPV1		PPV 4	PPV 12			_____
PPV2		PPV 5	PPV 13			_____
PPV3		PPV 6	PPV 14			_____
		PPV 7	PPV 15			_____
		PPV 8	_____			_____
		PPV 9	_____			_____
		PPV 10	_____			_____
		PPV 11	_____			_____
Black Entertainment Television	Discovery Channel	C-SPAN 3	Nickelodeon GAS	TV Land	_____	_____
The Learning Channel	ESPN	Goodlife TV	TV Guide Channel	MTV 2	_____	_____
MSNBC	USA Network	Filipino Channel	Lifetime Movie	MTV S	_____	_____
TBS	[Fox] Family	Sarimanok News	Fox News Channel	MTV X	_____	_____
TNT	A&E Network	Pinoy Blockbuster	Discovery Health	E!	_____	_____
Court TV	Nickelodeon	Channel	Discovery Civilization	Style.	_____	_____
Encore	VH1	Outdoor Life Network	Discovery Home &	Bravo	_____	_____
Country Music	MTV	WeatherScan Local	Leisure	Tech TV	_____	_____
Television	EWTN	El Canal de Tempo	Discovery En Espanol	Ovation	_____	_____
The Disney Channel	Cartoon Channel	Comedy Central	Discovery Kids	TNN	_____	_____
Sci-Fi Channel	Preview Guide	BBC America	Discovery Wings	Noggin	_____	_____
Animal Planet	C-SPAN	CNNfn	Discovery Science		_____	_____
Odyssey [Hallmark]	C-SPAN 2	CNNNSI	The Golf Channel		_____	_____
FX	ESPN 2	Oxygen	Game Show Network		_____	_____
QVC	CNBC	Inspirational Network	Biography Channel		_____	_____
American Movie Classics	TV Food Network	Inspirational Life	History Channel		_____	_____
Univision	Home & Garden TV	Speedvision	International		_____	_____
The Weather Channel	History Channel	The Travel Channel	VH1 Country		_____	_____
Headline News	Lifetime Network	Discovery Science	VH1 Classic		_____	_____
	CNN	Turner Classic	VH1 Soul		_____	_____
		Movies	ESPN Classic		_____	_____
		Soapnet	ESPNews		_____	_____
		BET on Jazz	Home Shopping		_____	_____
		Toon Disney	International Channel		_____	_____

¹ As it did in 1998, the C-SPAN (www.c-span.org) web site shows this typical cable system with 59 channels and a line-up similar to the one shown. C-SPAN does not indicate for which year this 59 channel system was "typical." They rhetorically ask "If you were the cable operator which 10 channels would you take away from your customers" to make room for DTV must-carried channels.

² This revised chart shows the likely actual "non-impact" on the "average" cable subscriber as of 2003, with the greatly expanded capacity forecast from the cable survey data for that year, adjusted to account for inclusion of 10 DTV signals rather than the average 6.2 DTV signals used in MGW Report calculations, yielding 239 program services using 64 QAM and with 272 program services using 256 QAM. Most program services of all commenters are listed, as are other cable networks.

APPENDIX D

FINANCIAL PERSPECTIVE ON SMALL MARKET STATIONS

Table 1	DMA	Financial	Average	Lowest
All Network Affiliates and Independent Stations	Market Rank	Category	Station	25th Percentile
	100+	(1999 Data)	(Dollars in Millions)	
		Net Revenues	5.41	3.21
		Capital Expenditures	0.51	0.07
		Total Expenses	3.71	2.56
	Profitability	Cash Flow	1.70	0.49
		Pre-Tax Profits	0.41	(0.50)

Source: 2000 NAB/BCFM Television Financial Survey

Table 2	DMA	Financial	Average	Lowest
All Network Affiliates and Independent Stations	Market Rank	Category	Station	25th Percentile
	75+	(1999 Data)	(Dollars in Millions)	
		Net Revenues	6.45	3.46
		Capital Expenditures	5.32	0.07
		Total Expenses	4.36	2.69
	Profitability	Cash Flow	2.09	0.57
		Pre-Tax Profits	0.52	(0.55)

Source: 2000 NAB/BCFM Television Financial Survey

APPENDIX E

Revised Draft 7/30/01

**Statement By
James G. Babb
Babb Communications, Inc**

July 31, 2001

I am writing as a former Chairman of the Television Board of the National Association of Broadcasters and a broadcaster for more than 45 years. It is my belief that the television industry, especially small market television stations, is faced with the most threatening economic environment in television's history.

Television station owners of all sizes, in every section of the country are in an economic recession, but many, if not most, small market operators might even describe the current business climate as a depression. That would not be an overstatement. Sadly, business conditions will not likely improve significantly in the near term.

Facing such a disturbing economic probability, it is imperative that the Commission takes immediate action regarding digital "must carry" or face the possibility that local service to small markets, as we now know it, will disappear forever.

As a board member of a company with operations in eight small markets, and as a consultant to another privately owned company with operations in seven small markets, I can assure you that they will not be able to survive as full service broadcasters with a drawn out digital transition which will drain scarce resources and reduce our service to the public.

They, in my opinion, will be harmed beyond repair from the necessity of managing dual operations of NTSC and DTV over an extended period of 20 to 25 years. No responsible broadcaster can forecast any near term revenue as a result of its DTV operation, thus no cash flow to build a DTV business. Furthermore, no banker would buy such a business plan, even if the most optimistic broadcaster would dare devise such a plan.

The 2000 NAB/BCFM Financial Survey gives you a glimpse of the profitability, or lack of it, in 1999 of smaller market television stations, especially those in the lowest 25 percentile in markets 100 - 210. They actually show negative pre-tax profitability. The same can be said of stations in even larger markets, 75 +, who fall into the same bottom 25 percentile. If you believe the P & L's for this group of stations was disheartening, if you were an owner, in 1999, then think of the state of shock they will be in when they view their 2001 statements.

Setting aside the initial cost of investing in a pass-through DTV facility for the time being, which is not insignificant to small market owners, the real hardship will be the excessive operational costs, especially electricity which most estimates indicate could be as much as \$10,000 a month. Given the current cost for power in California, stations operating out west, will probably find this estimate hard to believe.

A quiet, but menacing cost of doing business, which is soaring, as interest rates fall, is the cost of money. Bankers, and other creditors, are not reducing the interest rates that they charge small market operators who need credit for capital and/or operating needs. Quite to the contrary, small market television operators faced with refinancing are finding new and bigger fees, higher interest rates and tighter covenants.

Thus, broadcasters' with marginal balance sheets, and that, in my judgment, would cover a majority of them now, with more certainty to come, would face the likelihood that their primary analog public service to their communities, and their very viability would be threatened.

Even the healthiest owners, with manageable debt, would find the challenge of operating dual transmission stations over an extended period a very difficult, if not totally impossible task to meet and maintain any semblance of their current levels of public service, particularly given the growing competitive challenges local broadcasters face.

Invariably, the snowball syndrome would start. First, they would have to institute major cost reductions i.e., elimination or reduced quality of their news product, cheaper programming, less local public service, less marketing, all of which would lead to lower ratings, less revenue and ultimately to a failing or failed business and a failing industry in the smaller, marginal markets.

This is not a Chicken Little, the "sky is falling scenario." This is reality! Talk to any small market broadcaster. Check the quarterly financial reports of any public company with small market stations.

The future of small market television cannot be sustained in a dual transmission world without dual must carry to speed the transition and the end of analog broadcasting. The future of hometown television news and public service is in your and your colleagues' hands. It is imperative that you act, and act favorably and, act now to preserve free over the air, local television service for small market America.

I will be happy to respond to any questions that you might have. Please feel free to call me at 704 632-6725, fax me at 704 375-4441 or via e-mail at

Respectfully submitted

James G. Babb

August 16, 2001

Statement Of: Gunther Meisse
 WMFD Television
 Mansfield, Ohio

I am the president of Mid State Television in Mansfield, Ohio, operators of full power TV Station WMFD and WMFD-DT and low power Class A designate WOHz all in Mansfield, Ohio. We also operate radio stations WVNO-FM and WRGM-AM in Mansfield. It is only through the economies of scale that we can provide the public service this community deserves. We took the full power TV station from a black bankrupt operation to a viable provider of over four hours per day of local News, Sports, and Weather as well as large amounts of special play-by-play sports and public affairs programming.

The delay in providing dual Must carry on the nations Cable & Satellite systems for the American Over the Air broadcasters will pose massive erosion of the local news, sports, weather and public affairs service provided to the American people by what was known as the best free over the air broadcast system in the world. The build out timetable for DTV has itself caused much concern among those of us in smaller markets who must make payroll each week. The prospect of having to wait decades to achieve satisfactory set penetration and the return of our old analogue assignments, could spell massive economic stress on broadcasters who have been focused on community service for these many decades. In small markets like mine, this delay could be fatal. As so correctly shown in the recent NAB study of the issue, markets 75+ and 100+ tables show the thin line we walk to survive. I can tell you that these numbers do not support prolonged dual operation. Operating simulcast dual facilities will be a substantial drain on tight cash. A few years, we can tolerate, a couple decades will require massive cuts in personnel and services to our communities. Just what is NOT in the public interest! Bigness is becoming king in this country, with less and less interest in the LOCAL service we provide in such a unique way. The Commission and/or Congress must act now or watch the deterioration in a truly unique institution.

First, lets understand that the Cable industry loves this whole thing. They would relish the day all over the air broadcasters went away. The saliva is dripping out of their mouths to be the monster provider. They are the GATE KEEPERS OF THE AMERICAN TELEVISION SET. If a station doesn't arrive at the TV set via their cable, the station doesn't arrive. Satellite is gaining ground, but again the only way the local broadcaster arrives at the TV set is by the satellite receiver. Not on the satellite, not in the home. For years, as cable companies sold new subscribers they gladly tore down TV rooftop and tower antennas, making it most unlikely that the homeowner would ever cancel their cable service. If you think that over-the-air DTV will ever succeed without must carry, just ask your spouse if it would be all right to build a seventy foot tower over there by the corner of the house. You know, over by the roses.

Cable operators say they don't have the space. Interesting, they do have the space to add high speed data services, they do have space to add additional cable network channels not to mention premium channels like HBO-east, HBO-west, Starz!, and Encore, many times the very channels they own. Hmmmm. The positive thing about dual carriage is that in a few years they in fact would get the space back to resell to subscribers with even more "channels for dollars".

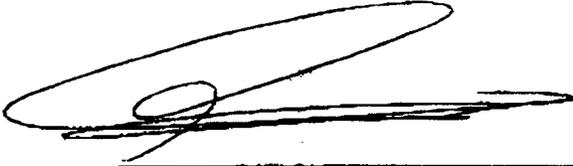
In our small market of Mansfield, Ohio, located mid way between the Cleveland TV DMA (Market 15) and Columbus, Ohio (Market 34) we have to compete with the highly professional air product the big boys in Cleveland and Columbus, Ohio while surviving on the local advertising dollars of a small town. Understand, we like what we do, and do a pretty good job of it. The bottom line however is another matter. Our bottom line is easily described as a joke. Our cash flow keeps us alive. What we lack in profit we make up in the satisfaction of the service we provide to some 200,000 people. The service is loved by our community and is well supported. Then comes DTV. We will have to support two transmitter plants, pay double electric bills, double the maintenance expense and if this drags on, we will have to look at the need to replace our aging analogue plant, while trying to implement more and more local digital production. A few years, we can handle, a couple decades, we cannot. This would be a formula for disaster.

We love new technology and the opportunity it brings to provide a better quality product. The new technology of DTV however has a very dark side to it. It is a wonderful concept promoted by the government, not the free market. There was zero demand for DTV. Congress felt that they could show the way. A standard was created, a timetable was mandated for the Over-the-air broadcaster, and then Government lost interest and moved on to another projects. GENTLEMEN!! The job is not done. Set manufacturers, Cable operators, Satellite companies have not heard from you. You have created this fantasy nationwide conversion dream, but not supported it with your power and enthusiasm. We need must carry and we need it now. If not, your dream for FREE TV is dead on arrival.

We viewed the concept of DTV with enthusiasm. As a matter of fact we were the first independent TV station in the country to put DTV on the air. Now reality sets in. We have done our part, and the FCC and Congress appears unwilling to do theirs. If people can't receive us with the same user-friendly simplicity that they use to select a channel on cable or satellite your 85 % set penetration will not happen in 20 to 30 years. As a matter of fact the technology will be long outdated when that time comes. Technology moves at the speed of light, the FCC and/or congress needs to do the same.

Conclusion: Relating DTV to a military action: Congress and the FCC created the attack plan, outlined the mission objectives and set out to win the conversion of the American Over-the-Air television industry to a bright new future in an all digital world. The soldiers, the American Over-the-air broadcasters, followed your marching orders and will soon have the build out completed. Now you are leaving the troops in the battlefield to be slaughtered, with no air support or artillery follow-through. If you want this mission to be accomplished, you must provide the support, the support only you can provide, and finish

the plan. Provide the temporary dual clearance on cable and satellite, see to it that a compatible distribution standard is adopted for distribution on Cable and Satellite, the only things we need to win this victory for you. You will never make General by leaving the troops in the field to be massacred.

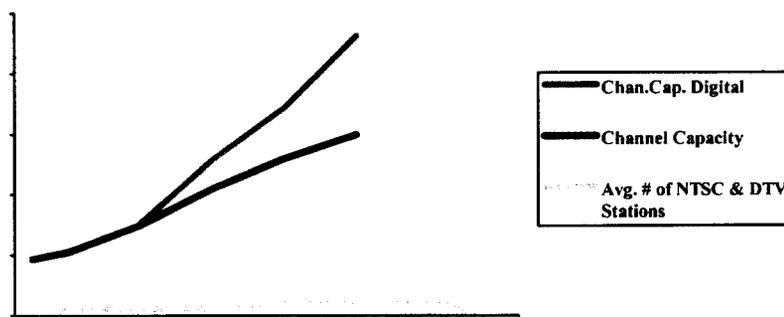
A handwritten signature in black ink, appearing to read 'Gunther Meisse', with a large, sweeping flourish at the end.

Gunther Meisse
President
WMFD Television
Mansfield, Ohio

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Carriage of the Transmissions of Digital Television)	
Broadcast Stations)	CS Docket No. 98-120
)	
Amendments to Part 76 of the Commission's Rules)	

**Reply Comments of the
National Association Of Broadcasters**



Lynn D. Claudy
Arthur W. Allison III
NAB Science & Technology

Henry L. Baumann
Jack N. Goodman
Valerie Schulte

Mark R. Fratrick, Ph.D.
Gregory J. Guy
NAB Research & Planning

NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Joan Sutton
NAB Legal Research Assistant

Bruce J. Ennis, Jr.
Donald B. Verrilli, Jr.
Ian Heath Gershengorn
JENNER & BLOCK

December 22, 1998

B. The First Amendment Concerns Articulated By the Cable Companies Provide No Justification for Ignoring the Clear Statutory Command.

The cable companies seek to bolster their miscellaneous statutory arguments with the suggestion that imposition of mandatory carriage of digital and analog signals during the transition would violate the First Amendment. As we show, however, mandatory carriage during the transition is constitutional under the Supreme Court's decisions in the *Turner* cases, and thus the Commission may not rely on First Amendment concerns to justify a refusal to require carriage of digital signals during the transition.

1. Mandatory Carriage Of Both Digital And Analog Signals During the Transition Serves Precisely the Same Interests Identified by the Court in the *Turner* Cases in Precisely the Same Way.

The cable companies' primary argument is that the important government interests that the Supreme Court found sufficient to sustain the must carry obligations in *Turner II* are somehow inapposite to digital must carry, particularly during the transition. In particular, they focus on the government's interest in "provid[ing] over-the-air viewers who lack cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate,"¹⁷⁷ and argue that must carry during

¹⁷⁷ NCTA Comments at 25 (quoting *Turner II*, 117 S. Ct. 1174, 1204 (1997) (Breyer, J., concurring) (emphasis in original)).

the transition will not advance that interest because “[t]he continued presence of the analog must carry rule means that not a single broadcaster will lose its voice over the air from lack of cable carriage.”¹⁷⁸

That argument is meritless. In fact, the government’s interest in ensuring the availability of free over-the-air television -- an important government interest identified and accepted by the Court as sufficient to uphold the constitutionality of the must carry rules in *Turner II* -- is served directly by the requirement that cable operators carry both digital and analog signals during the transition.

The mechanism is straightforward. There is no dispute that the expenses involved for broadcasters in making the transition to digital broadcasting are substantial. Broadcasters are being required to expend \$16 billion to invest in new equipment,¹⁷⁹ with additional millions of dollars expected to be spent to develop digital programming. The problem that broadcasters face is that, in the absence of dual mandatory carriage, there is little if any prospect of recovering this initial investment during the transition because they will be denied access to the vast majority of digital viewers, *i.e.*, cable viewers. This problem will be particularly acute in the early years of the transition because, as the cable companies themselves concede, the initial purchasers of digital television sets are likely to be

¹⁷⁸ NCTA Comments at 25; *see also* TCI Comments at 9; Time Warner Comments at 20-21; MediaOne Comments at 38.

consumers who receive their television signals through cable.¹⁸⁰ In the absence of must carry, therefore, broadcasters will have virtually *no* audience for their digital signals. Consequently, advertisers will have little incentive to advertise on the new digital broadcast channels, and broadcast stations will receive little or no revenue from their digital broadcast signals. Broadcasters will thus find themselves in financial trouble, jeopardizing the free over-the-air programming that Congress sought to preserve.

Moreover, as more and more consumers purchase digital televisions, advertising dollars will increasingly shift to the new digital channels, particularly since the initial owners of digital receivers will be wealthier consumers that advertisers covet. Because these wealthier consumers will be disproportionately cable viewers, as the transition to digital proceeds, advertisers will pour an increasing proportion of their limited advertising dollars into digital programs and cable viewers. Broadcasters whose digital signals are excluded from cable carriage, with their resulting small share of the digital audience, will see a sharp reduction in their overall advertising revenues.

As this process develops, some broadcasters will find themselves in an increasingly precarious position. With decreasing advertising revenues and little prospect of obtaining carriage on cable systems in the absence of

¹⁷⁹ This works out to approximately \$8-10 million per station, excluding the substantial costs of operating two broadcast facilities.

¹⁸⁰ See NCTA Comments at 26; Time Warner Comments at 7.

mandatory carriage, many broadcasters will be unable to recover their enormous investments in digital facilities, and the financial health of some broadcasters will undoubtedly suffer. Congress' fear, which the Court found reasonable in *Turner II*, will come to pass: "significant numbers of broadcast stations will be refused carriage on cable systems, and those broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether."¹⁸¹ The absence of must carry thus "will result in a weakening of the over-the-air television industry and a reduction in competition,"¹⁸² and "the role of local television broadcasting in our system of communications will steadily decline."¹⁸³

In light of this, it is simply implausible to suggest (as the cable companies do) that "[t]here is no reason to believe that . . . the absence of [mandatory carriage during transition] will have any effect on the quality of the analog channels available to non-cable subscribers."¹⁸⁴ In fact, the absence of must carry will have the same impact in the same way that Congress described in 1992 and that the Court in the *Turner* cases upheld: Without mandatory carriage, many cable operators will be unwilling to carry the digital signals of many broadcast stations; the broadcasters whose digital signals are not carried will be unable to reach broad sections of the audience desired by advertisers; and the lack of audience and the accompanying

¹⁸¹ *Turner II*, 117 S. Ct. at 1187 (internal quotations and citation omitted).

¹⁸² H. R. Rep. No. 102-628, at 51 (1992), *cited in Turner II*, 117 S. Ct. at 1187.

¹⁸³ S. Rep. No. 102-92, at 62 (1991), *cited in Turner II*, 117 S. Ct. at 1187.

decline in advertising revenues will result in financial distress for some broadcasters with a corresponding reduction in the availability of free over-the-air television for all viewers.¹⁸⁵ It is the *Turner* cases all over again.¹⁸⁶

For this reason, there is no merit to the suggestion that digital must carry during the transition fails to advance the interests that Congress and the Court identified in the *Turner* cases because digital must carry will benefit only the strongest broadcast stations¹⁸⁷ and the “very richest

¹⁸⁴ NCTA Comments at 25.

¹⁸⁵ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 647 (1994) (“*Turner I*”) (“By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue . . . to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation’s communication system, and to ensure that every individual with a television set can obtain access to free television programming.”).

¹⁸⁶ If broadcasters have the option to return their analog spectrum early, the absence of must carry may well harm the interests of viewers who receive free over-the-air television in yet another way. Under the scheme proposed by cable operators, broadcasters would receive mandatory carriage for their digital signals only after the broadcaster had “exchanged” its analog signal for its digital signal. But if that were correct, once the size of the digital cable audience became sufficiently large, a broadcaster with a digital and an analog signal would face a difficult dilemma. The broadcaster could continue to broadcast two signals, foregoing the possibility of receiving a substantial portion of the lucrative digital advertising revenues. Or, it could return its analog signal, take advantage of its digital must carry rights to make itself eligible for digital advertising dollars, and abandon its free over-the-air viewers who cannot receive digital signals. It seems certain that the economics will drive at least some broadcast stations to elect the latter option long before the vast bulk of the “cableless” viewers have purchased digital television sets, thereby frustrating the principal goals of Congress: the preservation of free over-the-air television for all viewers.

¹⁸⁷ See A&E Comments at 23.

viewers.”¹⁸⁸ First, it is the broadcast stations in the smaller markets and the stations who are the weakest financially that are likely to benefit the most from must carry during the transition, in part because the stronger stations are more likely to use retransmission consent, and in part because the weaker stations are the ones who will feel most strongly the bottom-line impact of adding substantial digital expenses without corresponding digital revenues. Second, although it is the wealthiest consumers that will be able to see the digital broadcast signals on their cable packages as a result of must carry, it is the poorest customers who will benefit the most because of the preservation of free over-the-air television. Indeed, it is exactly the same mechanism that Congress and the Court understood in the *Turner* cases. That is, it was only the wealthier customers -- those who could afford cable -- who could see the stations carried as a result of must carry. Nonetheless, the Court and Congress recognized that by ensuring carriage of broadcasters on cable, must carry helped to maintain the financial health of broadcasters and thus preserved the benefits of free over-the-air television for those who could not afford cable.¹⁸⁹ In the same way, digital must carry during the transition, by ensuring broadcasters’ access to the vast cable audience, ensures the financial health of broadcasters and enables them to maintain the free over-the-air service for those that need it.

¹⁸⁸ A& E Comments at 22. *See also* Time Warner Comments at 7.

¹⁸⁹ *See Turner I*, 512 U.S. at 647.

2. The Congressional Findings Made in Connection with the 1992 Act Are Binding on the FCC And Are Sufficient to Uphold the Must Carry Legislation.

The cable companies next suggest that mandatory carriage in the transition cannot be sustained under the First Amendment because:

[T]here are no congressional findings and scant materials in the legislative record with respect to digital must carry. By contrast, the analog must carry rules were adopted by Congress along with extensive factual findings made in the text of the statute itself.¹⁹⁰

But the cable companies' arguments overlook two critical and related facts: first, contrary to the impression created by the cable companies' comments, including the excerpt quoted above, none of the key factual findings made by Congress and included in the text of the statute are limited to analog signals; and second, as noted above, the facts found by Congress fully support the imposition of mandatory carriage for both digital and analog signals during the transition.

The clearest way to demonstrate each of these points is simply to refer back to the key findings made by Congress to support must carry. Key congressional findings include:

-- There is a substantial governmental interest in promoting the continued availability of . . . free television programming, especially for viewers who are unable to afford other means of receiving programming;¹⁹¹

-- Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases,

¹⁹⁰ NCTA Comments at 22; *see also* TCI Comments at 11-12.

¹⁹¹ § 2(12) of the 1992 Cable Act.

proportionately more advertising revenues will be reallocated from broadcast to cable television systems;¹⁹²

-- Cable systems have an economic incentive to “terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position;¹⁹³

-- There is a substantial likelihood that absent the reimposition of [must carry requirements], additional local broadcast signals will be deleted, repositioned, or not carried;¹⁹⁴

-- As a result of that incentive and in the absence of a must carry requirement, “the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized;¹⁹⁵ and

-- Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services.¹⁹⁶

None of these findings was in any way limited by Congress to analog signals or to television stations that broadcast only analog stations. Nor are these findings limited to those signals or stations as a factual or logical matter. All of the findings are as applicable to digital signals as to analog signals.¹⁹⁷

¹⁹² § 2(14) of the 1992 Cable Act.

¹⁹³ § 2(15) of the 1992 Cable Act.

¹⁹⁴ § 2(15) of the 1992 Cable Act.

¹⁹⁵ § 2(16) of the 1992 Cable Act.

¹⁹⁶ § 2(17) of the 1992 Cable Act.

¹⁹⁷ In light of the obligation to defer to the explicit predictive judgments of Congress, neither the FCC nor any court has the authority to revisit Congress’ predictions to determine whether they have come to pass. *See* Jenner Statement at 11-15. Indeed, to the extent that the cable companies believe that Congress’ judgments and findings are no longer valid, *see, e.g.,* A&E Comments at 39-40, those arguments must be made to Congress, not to the Commission.

In sum, in the 1992 Act, Congress made unusually detailed findings regarding the need for mandatory carriage of broadcast signals. Those findings were not limited as a factual or logical matter to analog signals. In *Turner II*, the Supreme Court endorsed a significant number of those findings, including all of those listed above, as reasonable. Those findings are binding on the FCC as it implements the statute's mandatory carriage obligations. And those findings, as described above, are fully sufficient to justify the conclusion that mandatory carriage during the transition will serve government's important interest in preserving the benefits of free over-the-air television.

3. The Mandatory Carriage Provisions Are Narrowly Tailored.

Finally, the cable companies assert that the burden of must carry during the transition will be significant. This argument should sound familiar. Regarding the burdens of analog must carry, the cable companies argued vociferously that the burdens imposed by must carry would be overwhelming. Nevertheless, the Supreme Court concluded that "the actual effects [of must carry] are modest."¹⁹⁸

Indeed, in their haste to overstate the burdens imposed by the imposition of must carry during the transition, the cable companies adopt a measure of the burden that the Supreme Court explicitly rejected in *Turner II*. Relying on the theoretical maximum burden imposed by mandatory

¹⁹⁸ *Turner II*, 117 S. Ct. at 1198.

carriage, cable companies suggest that the burden of must carry would be over 70,000 channels.¹⁹⁹ But, of course, if these signals would be carried by operation of market forces, they are not logically part of the expected burden of must carry. Indeed, this is exactly what the Supreme Court determined in *Turner II*. Despite the fact that the theoretical burden of must carry exceeded 35,000 channels, the Court determined the extent of the burden by looking not at that theoretical maximum, but rather at the actual number of stations that received cable carriage solely as a result of the statutory carriage requirement.²⁰⁰ With respect to the digital signals, the cable companies themselves argue that a substantial proportion of the digital channels would receive carriage even without the mandatory obligations in the 1992 Act.²⁰¹ There is thus no basis to adopt the cable companies' exaggerated figures as the proper starting point for the burden analysis.

¹⁹⁹ See, e.g., NCTA Comments at 30; see also A&E Comments at 24-25.

²⁰⁰ *Turner II*, 117 S. Ct. at 1198-99; see also *Turner I*, 512 U.S. at 673 n.6 (Stevens, J., concurring in part and concurring in the judgment) (“to the extent that §§ 4 and 5 obligate cable operators to carry broadcasters they would have carried even in the absence of a statutory obligation, any impairment of operators’ freedom of choice, or on cable programmers’ ability to secure carriage, would be negligible”), cited in *Turner II*, 117 S. Ct. at 1198. Nor is there any merit to the suggestion that the analysis is different “because operators are not currently carrying *any* of the new digital channels.” NCTA at 30 (emphasis in original); see also Time Warner Comments at 23; TCI Comments at 18-19. As the Supreme Court recognized, the key fact is not whether or not the stations are carried today, but rather whether the stations would be carried “in the absence of any legal obligation to do so.” *Turner II*, 117 S. Ct. at 1198.

²⁰¹ See, e.g., MediaOne Comments at 7 (“Cable operators and broadcasters *already* are successfully negotiating carriage of digital broadcast signals”)

In any event, the cable companies' burden arguments are meritless for a number of reasons. First, the Supreme Court has already upheld analog must carry up to the statutory one-third cap. That holding should end the "burden" argument because the must carry requirement for digital and analog signals combined will be subject to the same one-third cap the Court has already ruled is not an undue burden on cable companies.

Second, the burdens imposed by mandatory carriage during the transition are temporary. *Unlike* the burdens upheld in *Turner II*, the additional burden of dual carriage will disappear at the end of the transition.

Third, and more important, the capacity of cable systems is expanding exponentially. Thus, the burden of must-carry as a percent of channel capacity will continue to decrease rapidly.²⁰² This expanded capacity ensures that, as was true in *Turner II*, most cable systems will not have to "drop any programming in order to fulfill their must-carry obligations."²⁰³ And it ensures that, as was true in *Turner II*, the overall burden imposed by must carry will be minimal.²⁰⁴

Finally, virtually all of the arguments the cable companies have raised to suggest that the burden of must carry will be substantial were considered

(emphasis in original); *id.* at 8 n.2 (discussing progress on negotiations regarding voluntary carriage).

²⁰² See *Turner II*, 117 S. Ct. at 1205 (Breyer, J., concurring) ("I agree further that the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers, is limited and will diminish as typical cable system capacity grows over time.").

²⁰³ *Turner II*, 117 S. Ct. at 1198.

and rejected by the Court in *Turner II*. Thus, for example, the Court explicitly noted that cable companies argued that “half of all cable systems, serving two-thirds of all cable subscribers, have no available capacity,”²⁰⁵ that “the rate of growth in cable programming outstrips cable operators’ creation of new channel space,”²⁰⁶ that the “rate of cable growth is lower than claimed,”²⁰⁷ and that “must-carry infringes First Amendment rights now irrespective of future growth.”²⁰⁸ Moreover, as noted above,²⁰⁹ the Court also had before it the assertions of cable companies that the burden of must carry was “exacerbated” by the FCC’s authority to extend must-carry status to digital signals. Nevertheless, in the face of these arguments, the Court upheld the must carry provisions.

C. The Cable Companies’ Concerns Relating to a Fifth Amendment Takings Challenge Do Not Provide Any Justification for Refusing to Require Mandatory Carriage.

Unable to escape either the plain language of the statute or the unambiguous holding of *Turner II*, the cable companies urge the FCC to disregard the clear congressional mandate for mandatory carriage of analog and digital signals by raising the specter of a takings challenge. According to cable companies, the FCC should construe the statute so as not to permit --

²⁰⁴ See *supra* Section I.

²⁰⁵ *Turner II*, 117 S. Ct. at 1198.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See *supra* Section II.A.2.a.

much less require -- mandatory carriage in order to avoid an arguable takings claim.²¹⁰ This line of argument is unpersuasive.

First, the cable companies' takings argument cannot be used to characterize or qualify what Congress *intended* by the statutory language at issue because Congress expressly *rejected* the takings argument.²¹¹ This fact alone is sufficient to remove the takings concerns from the Commission's analysis.

Second, the rule of construction the cable companies propose is not the law. As the Supreme Court has made clear, construing a statute to avoid a possible takings challenge "does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible applications of a statute or regulation."²¹² The Court thus recognized the argument that the cable companies urge would hamstring federal agencies in their legitimate efforts to regulate economic activity. For that reason, the Court has limited the need to construe a statute to avoid a takings challenge to situations in which

²¹⁰ See, e.g., NCTA Comments at 36 & n.81 (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring) and arguing that "the operative rule is that the statute be construed where possible to avoid constitutional questions").

²¹¹ See H. Rep. 102-628 at 67 (discussing and rejecting the takings argument and concluding that "[t]he reestablishment of signal carriage requirements will not, therefore, result in any unconstitutional taking of cable operators' property without compensation.").

²¹² *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) (internal citation omitted).

“there is an identifiable class of cases in which application of a statute will necessarily constitute a taking.”²¹³

Third, and more important, not only have the cable companies failed to show that mandatory carriage will necessarily constitute a taking, they have failed to raise a substantial takings challenge to the mandatory carriage rules at all. In making their comments, the cable companies place exclusive reliance on the line of case law beginning with the Supreme Court’s decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

²¹³ *Id.* at 128 n.5 (emphasis added); see also *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (same). The cable companies also rely on *Bell Atlantic* to support the proposition that when Commission action will effect a taking, agency discretion must be limited lest “agencies . . . use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen.” 24 F.3d at 1445. But there is no plausible argument that the mandatory carriage of digital signals during the transition under the 1992 Cable Act was “unforeseen.” Indeed, as we have argued, the statute *requires* such carriage. But even if such carriage were not required, there is no doubt that Congress required analog must carry before the transition and digital must carry after it, and was aware that the Commission was contemplating the possibility of some dual carriage in the interim. In such circumstances, it strains credulity to maintain that mandatory carriage during the transition was unforeseen. Moreover, as noted above, such solicitude for congressional power is particularly misplaced in light of Congress’ explicit consideration of the Fifth Amendment issues involved in must carry, and Congress’ rejection of any constitutional concerns. In the House Report, for example, the Committee thoroughly discussed the takings argument and concluded that “[t]he reestablishment of signal carriage requirements will not, therefore, result in any unconstitutional taking of cable operators’ property without compensation.” H. Rep. 102-628 at 67. In light of Congress’ rejection of the precise takings argument the cable companies are pressing once again, it would be entirely inappropriate for the Commission to override Congress’ constitutional determination and change the clear course that Congress set.

In *Loretto*, the Court made clear that “a permanent physical occupation of property is a taking.”²¹⁴

The cable companies’ arguments are fundamentally flawed because the mandatory carriage requirements do not resemble a physical occupation of the property of the cable operator. No equipment of the broadcaster need be installed on the property of the cable operator, and the cable company need not cede control over any particular piece of property. This fact alone is sufficient to distinguish the mandatory carriage obligations from the permanent physical occupation at issue in *Loretto*. Indeed, the *Loretto* Court recognized as much when it recognized as critical the very difference that the cable companies seek to have the Commission ignore: the Court carefully distinguished the permanent physical occupation from “even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.”²¹⁵

Against this backdrop, the cable companies’ reliance on *Bell Atlantic* is particularly ironic, because the D.C. Circuit recognized that obligations such as those created by mandatory carriage are not physical occupations in the *Loretto* sense. *Bell Atlantic* involved a challenge to FCC rules that permitted both “physical collocation” -- in which the equipment of a Competing Access Provider (CAP) is placed in the central office of a Local Exchange Carrier

²¹⁴ *Loretto* 458 U.S. at 441.

(LEC), and “virtual collocation” -- in which “the LEC owns and maintains the circuit terminating equipment, but the CAP designates the type of equipment that the LEC must use and strings its own cable to a point of interconnection.”²¹⁶ The D.C. Circuit found a *Loretto*-type takings concern only with respect to *physical* collocation; the Commission’s authority to promulgate virtual collocation rules -- *i.e.*, rules requiring that portions of the LECs’ network be used by third parties while remaining under LEC control -- was not affected. Virtual collocation makes use of the existing telephone network in much the same way that a must-carry requirement makes use of the existing cable network.²¹⁷

Nor is there any merit to the suggestion that the must carry provisions effect a *Loretto*-type taking because they require cable operators to purchase and install equipment to retransmit digital broadcast signals.²¹⁸ Such a

²¹⁵ *Loretto*, 458 U.S. at 436; *see also id.* at 440 n.19 (distinguishing the situation in *Loretto* from one that “required a landlord to provide cable installation if a tenant so desires”).

²¹⁶ *Bell Atlantic*, 24 F.3d at 1444.

²¹⁷ The D.C. Circuit remanded the case to the FCC for a determination whether the virtual collocation rules were severable. *Bell Atlantic*, 24 F.3d at 1447. In the 1996 Telecommunications Act, Congress, in reaction to the *Bell Atlantic* decision, made clear its intent to authorize physical collocation. *See* 47 U.S.C. § 251(c)(6) (explicitly creating a duty to provide physical collocation when practical); *see also* H.R. Rep. No. 104-204 at 73 (1995) (noting the need to undo the effects of the D.C. Circuit’s decision in *Bell Atlantic*).

²¹⁸ *See* Time Warner Comments at 28 n.28.

requirement cannot properly be viewed as a *Loretto*-type taking, but rather as a permissible regulation of property.²¹⁹

What the cable companies seek is not the application of *Loretto*, but its expansion. But the Court explicitly emphasized in *Loretto* that “[o]ur holding today is very narrow.”²²⁰ For that reason, the Supreme Court and the Courts of Appeals have consistently rejected attempts to expand the *Loretto* notion of a permanent physical occupation of property.²²¹

Such an expansion would be particularly inappropriate here for at least two reasons. First, the must carry requirements violate none of the reasonable expectations of the property owner that the Court found critical in *Loretto*.²²² Instead, these requirements simply constitute duties that a

²¹⁹ See *Loretto*, 458 U.S. at 440 (“our holding today in no way alters the analysis governing the State’s power to require landlords to . . . provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like”). Moreover, in light of the cable companies’ assertions that substantial carriage is occurring voluntarily, there is no reason expect that any additional expenses required to comply by must carry will be significant.

²²⁰ *Loretto* 458 U.S. at 441; see also *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987) (“We characterized our holding in *Loretto* as ‘very narrow.’”).

²²¹ See, e.g., *United States v. Sperry*, 493 U.S. 52, 62 n.9 (1989) (deduction from monetary award); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1497 (9th Cir. 1997) (refusing to extend *Loretto* to occupation by electromagnetic fields generated by power lines); *Samaad v. City of Dallas*, 940 F.2d 925, 938 (5th Cir. 1991) (noise from adjacent property is not a *Loretto* taking).

²²² See, e.g., *Loretto*, 458 U.S. at 435-36 (explaining *Loretto*’s per se rule as relying in large part on the protection of “an owner’s expectation”); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (noting the existence in takings cases of “the logically antecedent inquiry into the nature of the owner’s estate”).

reasonable property owner would expect in a regulated industry.²²³ Indeed, carriage obligations of the sort at issue in the 1992 Cable Act have been a part of cable regulation from the beginning.²²⁴ The reasonable expectations of the property owner that drove the Court in *Loretto* to conclude that a taking had occurred thus counsel precisely the opposite result for must carry.

Second, a decision that the imposition of must carry would constitute a taking opens for constitutional attack a wide range of congressional and Commission regulatory requirements. On the cable front, for example, the leased access provisions and the PEG provisions would be immediately subject to attack, as would the analog must-carry provisions the Supreme

²²³ See *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846, 864 (5th Cir. 1971) (“The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests.”); *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027-28 (“in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless”); *United States v. Branch*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (noting that principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability “[b]ecause of the ‘State’s traditionally high degree of control of commercial dealings’”) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027).

²²⁴ See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 166-67 (1968) (mandatory carriage of certain broadcast signals); *United States v. Midwest Video Corp.*, 406 U.S. 649, 653-55 (1972) (mandatory origination provisions); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 67 (8th Cir. 1968) (must carry rules); 47 U.S.C. § 531(b) (PEG provisions); 47 U.S.C. § 532(b)(1) (leased access provisions). See also H. Rep. No. 102-628, at 67 (“since signal carriage rules were central to regulation of cable television for many years, and most cable systems have continued to carry a number of local over-the-

Court upheld in *Turner II*.²²⁵ But perhaps even greater damage would be inflicted in industries outside of cable. For example, many of the requirements imposed on telecommunications carriers by the Telecommunications Act of 1996, including the duties to interconnect, 47 U.S.C. § 251(c)(2), to provide access to unbundled network elements, 47 U.S.C. § 251(c)(3), and to make their telecommunications services available for resale, 47 U.S.C. § 251(c)(4) would face attacks with renewed vigor.²²⁶ There is simply nothing in *Loretto* or the Court's subsequent cases that would require or even permit such a vast expansion of the Court's fundamental but "narrow" holding.

IV. Comments In This Proceeding Demonstrate That the Commission Must Continue To Provide Strong Oversight To Insure Interoperability Among DTV Receivers and Cable Systems.

The CEMA standard for the basic protocols over the 1394 interface were approved by its R4.8 subcommittee on November 12, 1998.²²⁷ That standard is now known as EIA-775. This is laudable progress, but comments

air signals, imposition of the signal carriage regulations would not disturb any reasonable expectations of investors in cable systems.”).

²²⁵ Although the cable companies initially raised a takings challenge to the analog must carry provisions, they declined to pursue it in the Court of Claims or elsewhere. Their lack of enthusiasm for pursuing the takings claim while vigorously pursuing nearly every other challenge to analog must carry speaks volumes about the merits of the takings claim.

²²⁶ If *Loretto* were expanded as the cable companies desire, the mere fact that the 1996 Act requires compensation from the “interconnecting” parties would not insulate entirely the interconnection requirements from a takings attack. See *Bell Atlantic*, 24 F.3d at 1445 n.3.