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

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

REPLY COMMENTS OF A&E TELEVISION NETWORKS

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Summary

Comments on the *Further Notice* confirm that the proponents of dual must carry seek nothing more than regulatory subsidies unrelated to the original purposes underlying must carry. Though broadcasters recite the statutory policy goals Congress articulated for analog must carry, they offer only general assertions that skewing the video programming market for their benefit will "preserve local television." These claims are far too amorphous – and indistinguishable from any other subsidy – to provide the necessary legal or constitutional support for dual must carry.

Instead of showing a connection between dual must carry demands and the statutory purposes of the Cable Act, broadcasters propose a different set of goals to support dual carriage. These asserted interests – expediting the DTV transition, avoiding prolonged dual analog and digital broadcast operations, reclaiming spectrum for "3G" wireless, and garnering spectrum auction revenues for the federal government – are not relevant to the reasons Congress adopted analog must carry rules. This lack of connection between dual carriage and the Cable Act's statutory purposes is both the key to this proceeding, and the chief reason why the FCC must conclude that dual must carry can neither serve the public interest nor withstand constitutional scrutiny.

Broadcasters' demand for dual must carry reveals that such rules would disserve the goals of the 1992 Cable Act. First, dual carriage will not serve must carry's primary purpose under the 1992 Act of helping marginal broadcasters, because the one-third channel capacity cap will preclude carriage of weaker stations' signals. Broadcasters' suggestion that the FCC "adapt" – *i.e.*, "rewrite" – the Act to alter the

priority of stations' must carry rights only demonstrates that the Act does not support dual must carry rights. Second, dual carriage would not increase diversity, but rather would lead to a loss of cable programming in exchange for duplicative analog and DTV broadcast signals. Third, by elevating broadcasters generally at the expense of cable programmers, dual carriage would undermine the statutory interest in fair competition by determining marketplace winners by regulatory fiat rather than through viewer preferences or the merits of a programmer's offerings.

A dual must carry rule cannot withstand constitutional scrutiny. Broadcasters have provided the FCC no help in meeting the significant burden of building a record to clearly articulate and justify the interest in dual must carry as regulation of speech. They rely upon congressional findings nearly a decade old that relate to matters very different from introducing new technology. There is also a complete mismatch between the interests to be furthered by dual must carry and the likely effectiveness of such rules in furthering them. Nor does the record support broadcasters' claims that increasing cable capacity will eliminate the burden dual must carry would impose on cable operators and programmers. Even with increasing capacity, the number of channels competing for carriage exceeds the supply.

The carriage proposal offered by public broadcasters, though well-intentioned, would not solve the above First Amendment deficiencies inherent in mandatory dual carriage. The proposal seeks to rework the entire digital conversion with must carry as only a small part. Accordingly, the plan is not directly relevant to this inquiry, it creates rather than solves First Amendment problems, and it provides no

reason for singling out cable operators for intensive regulation to spur the DTV conversion. The public broadcasters' proposal ignores such possible non-speech-burdening alternatives as spectrum fees, DTV programming obligations, and DTV tuner requirements. Accordingly, it stands on no surer constitutional footing, as it provides only ineffective support for the government's purposes and it does not solve the channel capacity problem.

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A&E Television Networks ("AETN") hereby submits reply comments to those filed in this proceeding. 1/ The comments submitted by proponents of dual must carry reinforce AETN's position that broadcasters seek "regulation for thee but not me." 2/ Broadcasters blame everyone but themselves for their lack of progress in producing digital programming and demand that the Commission conscript other industries to ensure their success. Their demand for regulatory "leverage" is grossly discriminatory to programmers, such as AETN, who receive no such governmental favors.

Preliminary Statement

After three rounds of comments in response to the original *Notice of Proposed Rulemaking* and now the *Further Notice*, it is clear as never before that dual

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1/ *Carriage of Digital Television Broadcast Stations*, FCC 01-22, CS Docket No. 98-120 (rel. January 23, 2001) ("*Further Notice*").

2/ *See* Reply Comments of A&E Television Networks, filed December 22, 1998 ("AETN NPRM Reply") at 8-18, in *Carriage of the Transmissions of Digital Television Broadcast Stations*, Notice of Proposed Rule Making, 13 FCC Rcd 15092 (1998) ("*NPRM*").

must carry proponents are seeking nothing but a regulatory subsidy and that their demand is unrelated to the original purposes of analog must carry. As articulated in the 1992 Cable Act, must carry requirements were adopted to: (1) preserve free over-the-air television; (2) promote the widespread dissemination of information from diverse sources; and (3) promote fair competition. *See Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"). Although the broadcast commenters claim that they seek to serve these goals in order to "preserve local television" their generalized assertion that they will benefit financially from dual must carry is far too amorphous – and indistinguishable from any other subsidy – to provide the necessary legal or constitutional support for a dual carriage requirement. 3/

Dual must carry advocates assert that rules are needed to serve the following more specific objectives:

- Expedite the transition to digital television;
- Avoid a prolonged period of dual analog and digital operations;
- Reclaim spectrum for the next generation of wireless services; and
- Obtain revenue for the federal government from spectrum auctions. 4/

3/ *See* Comments of Discovery Communications, Inc. ("Discovery Comments") at 4 ("Dual carriage might financially benefit broadcasters, but it is hardly necessary for their collective survival.") (footnote omitted).

4/ *See, e.g.*, Comments of NAB/MSTV/ALTV ("NAB Comments") at 8-28; Dr. Joseph S. Kraemer & Richard O. Levine, *Implications of the Adoption of Digital Must-Carry on the Speed of the Broadcast DTV Transition: A Scenario Analysis* ("Kraemer/Levine Paper") at 19 (June 11, 2001) (attached to NAB Comments as Appendix A); Comments of Association of America's Public Television Stations, the Public Broadcasting Service and the Corporation for Public Broadcasting ("Public Broadcaster Comments") at 4-15; Comments of Maranatha Broadcasting Company, Inc. ("Maranatha Comments"), at 4-7.

These asserted interests have nothing at all to do with the reasons Congress adopted must carry requirements in the first place. Broadcasters' failure to show any connection between their dual must carry demands and the statutory purposes of the Cable Act is the key to understanding this proceeding. In the absence of such a connection, it is impossible for the Commission to conclude that dual must carry would serve the public interest or withstand constitutional scrutiny.

I. BROADCASTERS HAVE ABANDONED ANY SERIOUS CLAIM THAT DUAL MUST CARRY REQUIREMENTS WOULD SERVE THE STATUTORY GOALS OF THE 1992 CABLE ACT

In our comments submitted in response to the *Further Notice*, AETN demonstrated the complete mismatch between DTV dual carriage proposals and the statutory goals underlying the Cable Act's must carry provisions. AETN Comments at 6-14. In particular, we showed that dual carriage would not preserve broadcast television for viewers who cannot afford cable TV, *id.* at 9-10; that it would not promote programming diversity, but would have the opposite effect, *id.* at 10-12; that dual carriage would not assist in making marginal TV stations more competitive, *id.* at 12-14; and that DTV must carry would not promote fair competition. *Id.* at 14. Importantly, we showed that broadcasters could not concoct new policy objectives, such as "maximizing incentives for inter-industry negotiation," "promoting efficiency and innovation in new technologies and services," and "maximizing the introduction of digital broadcast television" in an attempt to justify new must carry rules. *Id.* at 7. The latest round of comments offered no answer to our concerns, but only resulted in a further proliferation of rationalizations for dual must carry.

A. Broadcaster Comments Confirm That Dual Must Carry Would Disserve the Goals of the 1992 Cable Act

Broadcasters' discussion of the history of the DTV proceeding and references to Section 614(b)(4)(B) of the Act do not establish a dual must carry mandate. 5/ Their *post hoc* rationalizations cannot make up for the fact that there is no significant discussion of DTV must carry in the legislative history of the Act or the FCC proceedings on digital TV. The Commission acknowledged that Congress was not expansive in discussing the meaning of Section 614(b)(4)(B), the only part of the Cable Act that mentions digital television. *See* NPRM, 13 FCC Rcd at 15094 n.1 ("There is little discussion of this provision in the Act's legislative history."). The limited discussion that did take place suggests that the proceeding described in Section 614 relates to technical standards, not new must carry mandates. 6/ If Congress had intended for the FCC to greatly expand cable industry's must carry burden during the DTV transition, it would have done so much more explicitly and plainly. 7/ Subsequent legislative actions

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5/ NAB 1-3 (citing *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 5 FCC Rcd 5627 (1990); *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 7 FCC Rcd 3340 (1992); *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 7 FCC Rcd 6924 (1992); Cable Television Consumer & Competition Act of 1992, Pub. L. No. 102-385 (Oct. 5, 1992) ("1992 Cable Act" or "Cable Act")). *See also* Public Broadcasters Comments at 19.

6/ *See* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 94 (1992) ("The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.").

7/ *See MCI Telecom. Corp. v. AT&T*, 512 U.S. 218, 230 (1994) (Congress does not adopt significant requirements by "subtle" mandates); *FDA v. Brown & Williamson*

also undermine the broadcasters' position, since Congress avoided taking a position on digital must carry requirements, or building any record of findings to support such rules. 8/

If anything, comments submitted by broadcasters highlight the inconsistency between the 1992 Act and their dual carriage proposals. For example, commercial broadcasters argue that the only way to meet the objectives of the 1992 Act is to change it. *See* NAB Comments at 8 ("the Commission [has] discretion to fashion must carry rules that would achieve Congress' objectives, but perhaps *in a manner somewhat different than Congress decreed* with respect to carriage of analog signals") (emphasis added). 9/ This use of the term "somewhat different" demonstrates broadcasters' gift for understatement – the dual must carry proposals would require Congress to amend the law. With or without such changes, however, dual must carry will not serve the purposes of the Cable Act.

Tobacco Co., 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

8/ For example, in the Telecommunications Act of 1996, Congress declined to mandate must carry status for advanced television or other video services offered on an ancillary or supplementary basis. *See* 47 U.S.C. § 336(b)(3). Similarly, Congress avoided adopting any must carry mandates in the Balanced Budget Act of 1997. H.R. Conf. Rep., 105th Cong., 2d Sess. 577 (1997).

9/ *See also* NAB Petition for Reconsideration of *Further Notice*, filed April 25, 2001 at 12 ("the literal words of [Section 614] cannot apply directly to the digital situation") ("*NAB Reconsideration Petition*").

1. No Help for Marginal Broadcasters

The primary purpose of must carry in the 1992 Act was to assist marginal stations that risked being dropped by cable operators. *See Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 673 (1994) ("*Turner I*") (Stevens, J., concurring). However, as the Commission noted in the *Further Notice*, such stations are least likely to benefit from dual must carry. *See Further Notice*, ¶ 119 (dual carriage "may result in on-air digital signals being carried, at the expense of . . . yet-to-air digital signals [not] carried because the operator's one-third cap has been met"); *see also* 47 U.S.C. § 534(b)(1)-(2). Strangely, broadcasters offer no response to the argument that dual must carry may actually harm weaker stations other than to propose inconsistent changes in the law.

Commercial broadcasters are seeking a change in the Cable Act to alter the priority of broadcast stations to be granted must carry rights. NAB is advocating a rule that would require carriage for one signal of every local broadcaster before a second digital signal may be carried. This change would void Section 614(b)(2) of the Cable Act which allows cable operators to select which stations to carry when the number of local commercial television stations exceeds the one-third channel cap set by the law. *See* 47 U.S.C. § 614(b)(2). Broadcasters acknowledge that "[i]f it is literally applied [Section 614(b)(2)] could defeat the purpose of the must carry statute to preserve a vibrant local broadcast service to the public by allowing carriage of two signals of one broadcaster first and none of another, more vulnerable station, leading ultimately to a reduction in the diversity of stations carried." *NAB Reconsideration Petition* at 17.

Public broadcasters are also seeking to change the one-third channel cap, but not in a way that is likely to help marginal broadcasters. As part of a complicated proposal, they suggest that cable systems which have been upgraded to 750 MHz should have a reduced channel cap, below the one-third capacity established by statute. Public Broadcaster Comments at 9-10. Again displaying remarkable under-statement, public broadcasters acknowledge that "[b]ecause the one-third analog commercial channel cap is statutory, Congress may need to amend the statute in order to lower the cap." *Id.* at 9 n.10. Of course with a lower channel cap, the chance increases that marginal stations will be excluded from must carry benefits. 10/ Public broadcasters also suggest extending the digital transition indefinitely, particularly in smaller markets, *id.* at 11-15, a plan that conflicts with commercial broadcasters' call to expedite the transition. 11/

Whether or not the conflicting must carry proposals can be reconciled, they both highlight an important and ironic fact: broadcast commenters acknowledge that the central purpose of must carry would be undermined by dual must carry rules unless the Cable Act itself is changed.

10/ Although broadcasters suggest that the overall increase in capacity should preclude such a result, they underestimate the demand for available channels. *See infra* at 20.

11/ *See* NAB Comments at 13 ("a prolonged DTV transition leaves broadcasters anchored simultaneously in both the analog and digital worlds hemorrhaging capital with no clear return on their digital investment"). *See also* Kraemer/Levine Paper at 23.

2. No Increase in Diversity

None of the broadcast commenters address the Commission's concern regarding dual must carry that "[c]able subscribers would not immediately benefit from a dual carriage rule if there is little to view but duplicative material." *Further Notice*, ¶ 120. Indeed, unlike analog must carry, a dual carriage requirement necessarily leads to a reduction in diversity. 12/ As the Consumer Electronics Association pointed out, "simulcasting is wastefully duplicative and adds little additional quality or value to the viewer experience." Comments of the Consumer Electronics Association at 8 ("CEA Comments"). Nevertheless, broadcasters steadfastly oppose any rule changes that would address this problem. *See* Public Broadcaster Comments at 15 (proposing to sunset dual carriage requirements only after certain penetration criteria are met *and* where the cable operator confirms that "the broadcaster's digital signal substantially duplicates the content carried on the station's analog signal"). Once again, the proposed dual must carry rule is diametrically opposed to the purposes set forth in the Cable Act.

3. No Increase in Fair Competition

AETN has consistently taken the position that dual must carry is inherently unfair because it favors one class of programmers over another. *See* AETN Comments at 2-3. We seek no regulatory advantage over any other network, and compete in the marketplace by working to provide superior programming. After initial comments were

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12/ *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd. 12809, 12832 (1997) (requiring DTV stations to simulcast 50 percent of the programming of their analog channel by April 21, 2003; 75 percent by April 21, 2004; and 100 percent by April, 1 2005).

filed in this proceeding, for example, A&E Network received 14 Emmy Award nominations, the most received by any basic cable network. 13/ Advocates of dual carriage, by contrast, take the opposite approach. Although they agree that providing compelling programming is the key to the digital transition, 14/ they are refusing to bring the necessary programming to the marketplace until they are guaranteed a large audience and a return on their investments. *See* NAB Comments at 18 (stating that broadcasters will not develop digital programming "unless there is some leverage, such as access to the mass market, to unlock the vicious circle preventing the spread of DTV"). 15/ This further demand fails to account for the substantial regulatory benefits broadcasters already receive. 16/

13/ *See* Linda Haugsted, *A&E's Emmy Tack: Tapes and Serendipity*, MULTICHANNEL NEWS, August 6, 2001 at 12.

14/ *E.g.*, NAB Comments at 12 ("From a consumer's perspective, the critical factor in determining value is content, *i.e.*, programming."). *See also* CEA Comments at 6 (a lack of original digital programming is the "major impediment" to the transition).

15/ *See* NAB Comments at 13 ("If broadcasters are left to be the sole driving force of the transition, they estimate it may take 20 or more years for the 85% penetration target set by Congress to be achieved."); *id.* at 5 (questioning whether the DTV transition should "be allowed to meander down the current path taking far longer, likely more than 20 years more?"); *id.* at 16-17 ("the business calculus as to investment in programming . . . is dependent upon program producers' perceptions about when digital programming will generate advertising revenue [which] in turn . . . is dependent on the likely viewing audience in mass market business of free OTA broadcasting").

16/ The Commission has granted broadcasters: (1) free spectrum for their analog operations, (2) free spectrum for the DTV transition, (3) guaranteed cable carriage of their choice of analog or digital signals, (4) protection from having to pay for carriage, (5) guaranteed access to the basic cable tier, (6) preferred channel placement, (7) retransmission consent rights that can be leveraged into carriage of additional channels, and (8) the right to use DTV allotments for revenue-producing non-broadcast services.

Such a naked demand for an additional subsidy has nothing to do with "fair competition" but rather is an exercise in industrial policy that reduces competition in two ways. First it represents an effort to determine marketplace winners by using regulatory leverage to create a mass audience for a medium without regard to viewer preferences. *See* NAB Comments at 16-18. Second, it threatens to create marketplace losers by diverting channel capacity away from programming services, including AETN, that compete for viewers without the benefit of government favors.

B. The Goals Sought by Broadcasters Are Unrelated to the Cable Act and Cannot Support Must Carry

Unable to espouse governmental interests related to the core statutory purposes set forth in the Cable Act of 1992, proponents of dual must carry now list various other interests that purportedly would be served by a new rule. These asserted interests include expediting the transition to digital television, avoiding a prolonged period of dual analog and digital operations, reclaiming spectrum for the next generation of wireless services and obtaining revenue for the federal government from auctions. Whatever may be the merits of these policy goals, none were contemplated by Congress in the 1992 Act, and they provide no support now for a dual must carry rule.

1. Expediting the DTV Transition

As AETN pointed out in our initial Comments, expediting the digital transition (or the identical goal of avoiding a prolonged period of dual analog and digital operations) is not an interest addressed by the Cable Act. AETN Comments at 6-9. Broadcasters' current claim, that the Commission in the DTV proceeding found a

"competitive urgency" for a quick transition, 17/ is both false and beside the point. The Commission found no such "urgency" but only reasoned that the transition should be faster than first believed because broadcasters could be expected to feel the spur of competition from other digital media. 18/ Unfortunately, the fact that other players are investing in digital technology was not embraced as a call to competition, but instead was seized by broadcasters as an opportunity to lobby for more special favors.

In any event, any FCC conclusions about the need to hasten digital conversion cannot support must carry rules where Congress did not articulate a corresponding goal. The Supreme Court in *Turner II* refused to consider rationales that it believed to be "inconsistent with Congress' stated interests in enacting must carry." 520 U.S. at 190-191. Other courts have made clear that it is impermissible to "supplant the precise interests put forward by the State with other suppositions." *See Utah Licensed Beverage Ass'n v. Leavitt*, 2001 WL 830304 at *4 (10th Cir. July 24, 2001) (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)). As noted above, Congress did not mention the digital transition in the legislative history of the Cable Act. *See supra* at 4. To the extent Congress has spoken at all on the issue, it has been to *extend* the

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17/ NAB at 4 (citing *DTV Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd. 12809, 12850 (1997) ("*DTV Fifth Report and Order*")).

18/ The FCC reduced its estimate of the time needed for the transition because "[c]ompetitors in the video programming market, such as DBS, cable, and wireless cable, have aggressively pursued the potential of digital technology. This competitive pressure has lent urgency to the need for broadcasters to convert rapidly." *DTV Fifth Report and Order*, 12 FCC Rcd at 12848-51. It also found that advances in converter-box technology, particularly their facilitation of inexpensive future use of existing equipment, would lower the consumer costs of DTV's introduction. *Id.* at 12850.

digital transition by making its termination contingent upon public acceptance of the technology. Pursuant to the Balanced Budget Act of 1997, the date for returning analog broadcast frequencies was put off indefinitely in any market in which less than 85 percent of television households are able to receive DTV signals. *See* Pub. L. 105-33 (Aug. 5, 1997) (codified at 47 U.S.C. § 309(j)(14)(B)).

Finally, even if speeding up the transition to digital broadcasting were a recognized goal of the statute, broadcasters provide no assurance whatsoever that dual must carry would achieve its objective. 19/ The Congressional Budget Office has noted that the 85 percent test set forth by Congress applies market by market, and that cable penetration rates vary widely, ranging from 52 percent in Dallas/Ft. Worth to nearly 77 percent in Boston. CBO Report at 25-26. Even if all cable subscribers in the United States (a little less than 70 percent of television households) were to receive DTV signals as a result of must carry, the transition threshold of the law still would not be met. *Id.* at 43. Accordingly, the CBO Report concluded that getting non-cable households to adopt digital TV "is likely to pose the greatest challenge to completing the transition." *Id.* To the extent broadcasters claim that they will delay investing in programming until *after* they are provided a mass audience, it is unclear how they plan to entice viewers to invest in new equipment and thus complete the transition. *Id.* at 40

19/ AETN at 7-8 (citing *Completing the Transition to Digital Television*, Congressional Budget Office, at ix-xi (Sept. 1999) ("CBO Report") (noting variety of factors that will affect the DTV transition, including the "largest obstacle" of obtaining tower space for second antennas needed to broadcast new digital signals; consumer adoption of DTV equipment, particularly by those who do not pay for television programming; and lack of broadcaster incentives for transitioning from analog to digital, such as spectrum fees that could "create an incentive, now absent, . . . to work for the transition's timely end")).

(the speed of consumer adoption of DTV technology "is the so-called wild card in the transition").

2. Other Services

The next newly discovered goal – the return of spectrum for third-generation or "3G" wireless operations – cannot justify dual must carry requirements. There is no possible connection between the purposes of must carry set forth in the 1992 Cable Act and other potential communication services. Regardless of the possible connection, must carry will not help facilitate their introduction where "many analysts and industry players believe that the widespread deployment of 3G networks and other advanced technologies is still several years away, given certain technological and economic obstacles yet to be overcome." *See Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Systems*, FCC 01-192, at 48 (rel. July 17, 2001); Letter from Michael K. Powell, Chairman, FCC, to Donald L. Evans, Secretary of Commerce (June 26, 2001) (informing Commerce Department that "it is apparent additional time is necessary . . . to complete a careful and complete evaluation of the various possible options for making additional spectrum available for advanced wireless" in view of "a challenging set of issues [the entire federal government faces] in addressing how . . . to make available sufficient . . . spectrum").

In any event, even if the introduction of 3G wireless were not on hold, the conflicting proposals put forth by broadcasters for the digital transition do not seem well calculated to be much help. The timetable advocated by commercial broadcasters

would not return broadcast spectrum for other uses until 2010-2012, *see* NAB Comments at 17, which most likely would be too late to assist in the evolution of 3G wireless. The public broadcasting proposal is even less helpful. It would extend the digital transition indefinitely to a point when "market stimuli were thought sufficient to propel the DTV transition forward to completion." Public Broadcaster Comments at 14. It is difficult to see how any form of must carry would contribute to predictability for subsequent users of the spectrum.

3. Auction Revenues

Broadcasters' argument that a lengthy digital transition would thwart the "public policy goal of making spectrum available while generating revenue for the Treasury," *see* Kraemer/Levine Paper at 26, cannot provide a policy basis for dual must carry. As an initial matter, this goal would be met only if the rules led to a faster transition, and, as described above, there is no guarantee that this could be accomplished. Even if the commercial broadcasters are correct – that must carry rules could prompt "an accelerated transition that could result in analog turn off in [the] 2010-2012 period," NAB Comments at 17 – they provide no analysis suggesting that the government's expected return from spectrum auctions would be preserved on such a timetable.

More significantly, the possibility of higher auction revenues is not the type of public policy goal that Congress contemplated in the Cable Act. Spectrum auctions had not yet been adopted in 1992, and when Congress later enacted auction legislation it made clear that the prospect of financial gain is not a public policy end in itself.

Section 309(j)(7)(A) of the Communications Act prohibits the FCC from basing a finding of public interest, convenience and necessity "on the expectation of Federal revenues from the use of a system of competitive bidding." 47 U.S.C. § 309(j)(7)(A). 20/ In addition, Section 309(j)(7)(B) prohibits the FCC from employing auctions "solely or predominantly on the expectation of . . . revenues from the use of . . . competitive bidding." *Id.* § 309(j)(B)(7); *see also* H.R. Rep. No. 111, at 258-259 (1993) ("the licensing process, like the allocation process, should not be influenced by the expectation of federal revenues").

Finally, if obtaining federal revenues from the use of spectrum is a significant governmental interest, broadcasters overlooked a policy option that is far more relevant to this proceeding. The objective of obtaining funds for the Treasury for the use of radio spectrum would be achieved more directly simply by charging broadcasters for the spectrum they "borrowed" for the duration of the digital transition. Not only would this provide a more certain source of funds than the possibility of future returns from auctions, but it would speed up the digital transition as well. As the Congressional Budget Office pointed out, spectrum fees could "create an incentive, now absent" for broadcasters "to work for the transition's timely end." CBO Report at xii.

20/ *See also Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 2348, 2361 (1994) ("While Congress has charged us to recover a portion of the value of the public spectrum made available via competitive bidding, this does not amount to maximizing revenue, nor is it our sole objective.").

II. A DUAL MUST CARRY RULE WOULD VIOLATE THE FIRST AMENDMENT

As AETN pointed out in our initial Comments, any constitutional analysis of potential dual must carry rules is incomplete if it focuses only on the question of channel capacity as set forth in the *Further Notice*. *See* AETN Comments at 4-6. The Commission has an obligation to do more than find that must carry rules would do no harm; it must first find that an affirmative case has been made to support the adoption of rules. Moreover, the affirmative case must be based on governmental purposes established by Congress as sufficient to support the rules. The comments filed by must carry proponents fail in both respects.

A. Broadcaster Comments Fail to Justify Dual Must Carry

The reason that the original analog must carry rules underwent several years of arduous litigation was because the Supreme Court had to be satisfied that both the need for the rules and the lack of adverse impact was fully supported by congressional findings and the record before the FCC. *See Turner I*, 512 U.S. at 668. Here, however, broadcasters have provided the Commission no help in meeting the significant burden it faces in "bear[ing] the responsibility of building a record to clearly articulate *and justify*" the government's interest in dual must carry as a regulation on speech. *See, e.g.*, *U S West v. FCC*, 182 F.3d 1224, 1234 (10th Cir. 1999) (emphasis added).

Must carry proponents primarily seek to rely on the factual record developed for analog must carry, and assert that "[d]igital carriage will ensure access by all local stations to the audience for digital programming." NAB Comments at 27. They further assert that "[c]arriage of only selected stations would disadvantage those

stations not carried." *Id.* However, such generalized claims and reliance on dated evidence that was collected in support of a different set of rules fall far short of the substantial proof required here, as the District of Columbia Circuit stressed most recently in *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). There, the court held that the First Amendment precluded the adoption of cable ownership rules where neither congressional findings nor the record before the Commission provided adequate support for the specific rules at issue. In particular, in assessing market power, the court noted the substantial changes in the cable industry since 1999 undermined the Commission's position. *Id.* at 1134. It also found that the Commission's authority to restrict cable operators' speech "solely on the basis of the 'diversity' precept" was limited. *Id.* at 1135.

The *Time Warner* court's holding is particularly germane here, where broadcast commenters are invoking congressional findings that are almost a decade old and an FCC record that is eight years old. Even more important than the age of the previous findings is their lack of relevance. As explained throughout these reply comments, the issues addressed by Congress in the 1992 Act, and the Commission's findings when it implemented analog must carry rules, related to very different matters than the introduction of a new technology. Indeed, several commenters, including AETN, have shown that mandatory dual carriage would not advance – and would actually disserve – the three core statutory policy goals the Supreme Court relied upon in narrowly upholding analog must carry. 21/ Accordingly, broadcasters' efforts to

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21/ AETN Comments at 9-13; Court TV Comments at 7-17; Discovery Comments at 5-6; ICCP Comments at 6-8.

develop a record relating to other policy goals are irrelevant to the constitutional justification for must carry. *See Turner II*, 520 U.S. at 190-191 (declining to consider rationales that are "inconsistent with Congress' stated interests in enacting must carry"). *See also Utah Licensed Beverage Ass'n v. Leavitt*, 2001 WL 830304 at *4.

B. Dual Must Carry Rules Would Create Unconstitutional Burdens

There is no question but that a dual carriage requirement would impose burdens on cable operators and programmers; broadcasters acknowledge this inevitable effect. 22/ However, they argue that the adverse impact will be minimized by cable system capacity increases and that the benefits of digital carriage justify the burdens. Because broadcasters focus almost exclusively on the issue of cable channel capacity, they fail to come to grips with the central First Amendment issues presented by a dual must carry rule. *See* NAB Comments at 35-36; *see also* Public Broadcaster Comments at 20.

The record fully demonstrates the harmful effects of broadcast must carry rules. Various cable programmers indicated that they already find it difficult to obtain cable carriage, and some even state that they have had to forestall or abandon the introduction of new programming services as a result. *E.g.*, Comments of TechTV LLC at 5 ("In many markets, particularly the most important large markets . . . TechTV either

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22/ NAB at 36 ("the Court did not suggest that must carry had not affected any cable programming" but instead analyzed "'the burden imposed by must-carry" in the context of "the benefits it accords") (citing *Turner II*, 520 U.S. at 215-216); *see also Turner I*, 512 U.S. at 637 (must carry rules "render it more difficult for cable programmers to compete for carriage on the limited channels remaining"); *id.* at 645 (must carry favors "broadcasters, which transmit over the airwaves, . . . while cable programmers, which do not, are disfavored").

has been unable to obtain carriage at all on area cable systems or has been denied carriage on . . . analog cable tiers because of the large numbers of analog must-carry stations."); C-SPAN at 4 (reporting having to "shelve" C-SPAN3, C-SPAN4 and C-SPAN5 due to "triple whammy of analog must carry, retransmission consent and rate reregulation" and the fear that "[h]istory would be repeating itself were dual carriage to become effective"). Contrary to broadcasters' claims, increases in channel capacity will not preclude such effects, and the purported benefits of dual must carry do not justify the sacrifice.

First, broadcasters' selection of 750 MHz as a magic number regarding cable system size does not resolve the constitutional issue. Broadcasters argue that the impact of must carry would be minimal because over half of all cable households will be served by 750 MHz systems by the end of 2001, with that number growing to 67.78% by the end of 2002. NAB Comments at 32. They claim that, measured by percentage of capacity, the impact of digital must carry would be less than it was for analog must carry. *Id.* at 35-36. However, the broadcast commenters both overestimate the number of systems with such capacity and underestimate the impact of must carry on large capacity systems. The Commission has noted that just over 1 percent of all cable systems offer 91 channels or more. 23/ Additionally, NCTA pointed out that 80 percent of cable customers subscribe to systems with three or fewer available channels, while more than half subscribe to systems with no available channels. *See*

23/ *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-1, Table B-3 (rel. Jan. 8, 2001).

NCTA Comments at 17. Given these facts, added carriage obligations for broadcasters inevitably will require the sacrifice of non-broadcast programming services. 24/

Contrary to broadcasters' claims, the burden of digital must carry is not minimized by a comparison of the "relative" impact of analog must carry. That analysis fails to consider changes in the programming marketplace that have occurred since analog must carry rules were implemented eight years ago. Between 1990 and 2000, the number of cable programming networks grew from 79 to 231 and the number national and regional networks is expected soon to reach 280. *See* NCTA Comments at 19 & Appendix. In addition, a host of new services that did not exist eight years ago compete for bandwidth on cable systems. Examples include high-speed Internet access, IP telephony, pay-per-view services, interactive television and digital audio services. *Id.* at 18-19. Even a 750 MHz cable system, capable of offering 115 channels of service, cannot accommodate the available networks and other services. 25/ In this environment, any new carriage obligation places an even greater burden on programming services such as AETN, which must compete for scarce bandwidth in an increasingly crowded marketplace.

Finally, it is impossible for broadcasters to conclude that the burdens imposed on cable programmers are outweighed by the benefits dual must carry would

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24/ For the same reason, the public broadcasting proposal to tie must carry obligations to system upgrades (750 MHz or one year after adoption of a rule, whichever comes first) does not minimize regulatory burdens. *See* Public Broadcaster Comments at 7-10.

25/ The impact is even greater on the average-sized cable system, which currently offers 65 channels. *See* NCTA Comments at 19.

shower on broadcasters where, as here, digital must carry is not backed by statutory objectives. First Amendment analysis requires the government to demonstrate a tight fit between means and ends for any regulation that burdens speech. *See Utah Licensed Beverage*, *supra*, at *5 ("a speech regulation may not be sustained if it provides only ineffective or remote support for the government's purpose") (quoting Greater New Orleans *Broadcasting Ass'n v. United States*, 527 U.S. 173, 188 (1999), and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)). It is no answer to suggest that the adverse impact of a rule is minor where the benefits are not supported by the congressional purpose. *See Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404, 2428 (2001) ("there is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification"). And, as demonstrated throughout these reply comments, dual must carry rules would not serve the purposes articulated for analog must carry in the 1992 Cable Act. Based on the record compiled in this proceeding, the Commission should affirm its tentative conclusion that a dual must carry obligation would violate the First Amendment.

C. Public Broadcasters' Carriage Proposal Does Not Solve the First Amendment Problems of Dual Must Carry

The complicated must carry proposal submitted by public broadcasters seems well-intentioned, but fails to address the significant First Amendment deficiencies inherent in mandatory dual carriage. Public broadcasters propose applying dual must carry requirements in stages, starting with 750 MHz-capacity cable systems in the top 30 television markets (plus markets with a specified number of DTV stations operating). Systems that are upgraded to 750 MHz would be "rewarded" with a

"somewhat lower" carriage obligation measured by percentage of capacity. In smaller markets, DTV station build-out requirements would be tied to an unspecified percentage of DTV receiver penetration, with a different triggering threshold for various sized markets. As the requirements become effective in each market segment, network affiliates would be given one year to begin digital operations, while independent stations and noncommercial broadcasters would be allowed two and three years respectively. Finally, dual carriage obligations would expire either when all subscribers can receive the digital signal, or when 75 percent of subscribers have DTV tuners and set-top down-converters are available commercially. Public Broadcasters Comments at 7-15 & Attachment B. The sunset would not take place until the cable operator confirms that "the broadcaster's digital signal substantially duplicates the content carried on the station's analog signal." *Id.* at 15.

Styled as a "working draft," the public broadcasters' proposal would rework the entire digital conversion, with must carry as only a small part. Although the plan is complex and has many moving parts, its overall thrust is to do the following: (1) extend the length of the digital conversion by delaying build-out requirements in smaller markets and for less economically-robust broadcast stations; (2) apply must carry requirements only to the largest capacity cable systems (unless the affected cable operators fail promptly to upgrade their systems); and (3) extend dual analog-digital operations (and must carry obligations) almost indefinitely. As such, the plan appears to be a strategic compromise designed to reduce the impact of the digital conversion on the broadcast industry.

The most obvious problem with the plan is that it has very little to do with the questions about dual must carry that were asked in the *Further Notice*. The proposal may include some sensible policy suggestions, but for reasons that are entirely separate from the must carry inquiry. For example, marketplace experience teaches us that technological transitions take time, so that it makes sense to require the vast majority of televisions be equipped to receive digital signals before demanding the return of analog spectrum. However, such a consideration in not relevant to the must carry policies articulated in the 1992 Cable Act, and it conflicts directly the policy goals espoused by commercial broadcasters (expediting the digital transition, freeing spectrum for other uses or maximizing auction revenues). *See* NAB Comments at 8-28.

The must carry aspects of public broadcasters' proposal seem almost incidental to the overall scheme, yet the plan calls for a high degree of government micro-management of cable operators' systems. For example, the most direct way to promote digital television is to ensure that DTV sets can receive signals off the air, a point the public broadcasters acknowledge by proposing that the transition sunset should be linked, at least in part, to DTV tuner penetration. 26/ Nevertheless, the public broadcasters' proposal stops short of calling for a mandate that televisions include DTV tuners, 27/ and instead reserves its most intensive regulation for cable operators: Dual

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26/ Public Broadcasters Comments at 15. The plan also asks the FCC to set DTV receiver performance thresholds in order to improve the quality of off-air reception. *Id.* at 17.

27/ *Id.* (proposing only *voluntary* commitments that all TV sets 13 inches or above include digital tuners).

must carry would apply immediately in the top 30 markets to cable systems with capacities of 750 MHz, and to all systems in these markets regardless of capacity, within one year. The proposed rules are designed to "discourage cable systems from delaying (or scaling back) system upgrades to avoid digital carriage requirements," Public Broadcasters Comments at 9, and a possible reduction in the must carry channel cap would be dangled as "an incentive and a reward to cable systems for adding capacity and converting to digital." *Id.* at 10.

Public broadcasters' demand that government cease "play[ing] a neutral role, deferring to the market," 28/ does not explain why their proposal singles out cable operators for the most intensive regulation to spur digital conversion. They might have proposed DTV programming obligations for broadcasters to create an incentive for viewers (and cable operators), 29/ or they could have suggested a spectrum fee, as the Congressional Budget Office noted. 30/ Also, they could have proposed DTV tuner requirements, analogous to the All Channel Receiver Act. Given such alternatives, public broadcasters' demand for must carry creates, rather than solves, the First Amendment problems identified in the *Further Notice*. Reviewing courts have made

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28/ *Id.* at 5.

29/ As previously noted, the Consumer Electronics Association described a lack of original digital programming as a "major impediment" to the transition, CEA Comments at 6, and commercial broadcasters acknowledged that "[f]rom a consumer's perspective, the critical factor in determining value is content, *i.e.*, programming." NAB Comments at 12.

30/ *See* CBO Report at xii (spectrum fee "would create an incentive, now absent, for broadcasters to work for the transition's timely end").

clear that where the government's interests "may be promoted through methods that do not restrict speech, those methods *must be preferred* over speech restrictions." 31/

In addition, public broadcasters' effort to reduce the impact of must carry by imposing requirements first on 750 MHz systems does not solve the First Amendment problems facing dual must carry. First, because it addresses only the issue of channel capacity, the 750 MHz threshold for initial must carry obligations does not help broadcasters make the affirmative case to support restrictions on speech. As explained above, one reason dual must carry is unconstitutional is because it does not serve any of the governmental interests set forth in the Cable Act. *See Lorillard Tobacco Co.*, 121 S.Ct. at 2428 ("A regulation cannot be sustained if it provides only ineffective or remote support for the government's purpose.") (citation omitted). Second, the 750 MHz threshold for dual must carry requirements does not eliminate the adverse impact of dual must carry on cable programmers, because the number of available networks exceeds capacity, even in large systems. *See supra* at 20. In any event, the 750 MHz threshold is not a true protection, since the public broadcasters' plan would impose dual carriage requirements on all cable systems in affected markets, regardless of channel capacity, after the first year. Public Broadcasters Comments at 9

The proposal submitted by public broadcasters, at its root, is not a must carry plan that is designed to address the First Amendment issues in this proceeding.

31/ *Utah Licensed Beverage Assn.*, 2001 WL 830304 *5 (emphasis added). *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) ("the availability of . . . options . . . which would advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights, indicates that [the challenged measure] is more extensive than necessary"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (same).

Rather, it is a DTV transition plan that purports to give a little something to the various affected industries: broadcasters would get deferred DTV obligations, with greater relief for independent and noncommercial broadcasters; larger market broadcasters would get immediate carriage rights; consumer electronics manufacturers would avoid obligations to include digital tuners in all TVs; and cable operators would get something less than "full strength" dual must carry. However, reviewing courts have warned the Commission against adopting "unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring supplicants who have somehow to be conciliated." *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992). Instead, the FCC must resolve the conflict "in favor of the party with the stronger case." *Id.* Rather than making a case for dual must carry, public broadcasters only offer a complicated scheme that falls far short of its objectives.

CONCLUSION

For the foregoing reasons, AETN respectfully submits that the Commission should affirm its tentative conclusion that the record in this proceeding cannot support the adoption of government-mandated dual carriage of a broadcaster's analog and digital signals during the DTV transition.

Respectfully submitted,

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