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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
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REPLY COMMENTS OF COURTROOM TELEVISION NETWORK LLC

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 2

I. BROADCASTERS' DEMAND FOR A FREE RIDE CONFIRMS THAT DUAL MUST CARRY REQUIREMENTS ARE PLAINLY ANTI-COMPETITIVE 5

A. The Only "Bottleneck" is Broadcasters' Unwillingness to Compete 6

B. Dual Must Carry Will Not Promote the Cable Act's Statutory Goals 13

C. Proponents of Dual Must Carry Cannot Justify Extending the Free Ride 19

II. DUAL MUST CARRY PROPOSALS FAIL TO SATISFY FIRST AMENDMENT REQUIREMENTS 21

CONCLUSION 28

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REPLY COMMENTS OF
COURTROOM TELEVISION NETWORK LLC

Courtroom Television Network LLC ("Court TV") hereby replies to the comments filed on the *Further Notice of Proposed Rulemaking* in the captioned proceeding ("*Further Notice*"). 1/ The initial comments filed by broadcasters confirm Court TV's arguments that dual DTV must carry would be profoundly anti-competitive, that the governmental interests articulated in the 1992 Cable Act would not be served by DTV must carry and that a dual carriage rule would be unconstitutional. *See generally* Comments of Courtroom Television Network, filed June 11, 2001.

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

INTRODUCTION AND SUMMARY

Last month Court TV celebrated its tenth anniversary. Launching the first – and only – network dedicated to providing courtroom trial coverage in July 1991, Court TV experimented with a unique programming format that many "experts" believed would not succeed. Now, however, a decade later, Court TV has televised all or part of more than 730 trials and has broadened its mission to include issues programming and law-related dramatic shows. During this time, Court TV has expanded its reach from 4.5 million to over 60 million cable subscribers. Corresponding with this growth, Court TV's co-owners, AOL Time Warner and Liberty Media, have committed well over $100 million over the next two years to develop documentaries, original series and made-for-TV movies. 2/ Court TV also supplements its televised programming with websites that allow viewer interaction, provide additional information about trial participants and elaborate on the issues involved in the various cases. 3/

This progress did not occur automatically, nor did government step in to ensure Court TV's success, as must carry proponents ask the Commission to do for digital broadcasting. Quite to the contrary, Court TV has struggled to

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2/ The history and growth of Court TV is described more fully in a recently published magazine supplement *Court TV at 10: The Wheels of Justice Turn Out Ratings, Revenue for Once Struggling Network,* attached as Appendix A.

3/ In addition to Court TV's home website (www.courttv.com), we recently acquired two important sites devoted to crime and justice topics, "The Smoking Gun" (www.thesmokinggun.com) and "The Crime Library" (www.crimelibrary.com).

overcome various setbacks (including implementation of analog must carry) and has made the necessary investments in capital and creativity to ensure that a larger number of subscribers have access to programming that meets their needs and interests. These efforts include the "relaunch" of Court TV in January 1999 with a revised programming format as well as a concerted effort to increase penetration. *See Court TV Timeline*, Appendix A at 18. As noted in our initial comments, in the past several years, Court TV has agreed to various financial inducements valued at $750 million (including direct payments for carriage, launch/marketing support and certain free carriage terms) in order to secure affiliation agreements to reach an additional 30 million subscribers over an approximately 30 month period. 4/ Efforts of Court TV and other similarly situated advertising supported networks to increase penetration and to create original programming enhance competition in the market for video programming and increase the diversity of programming choices – two of the key goals Congress articulated in support of analog must carry requirements. *See Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*").

4/ These facts belie the broadcast commenters' facile and unsupported assertions that cable operators will discriminate against digital broadcasters and favor cable networks. *See, e.g.*, Comments of National Association of Broadcasters/Maximum Service Television/Association of Local Television Stations at 19-20 ("NAB Comments"). The nature of a competitive marketplace is that all programmers must be willing to compete for viewers.

By sharp contrast, the advocates of dual must carry take positions that directly undermine the statutory goals of fair competition and diversity, and stake out a position that is unrelated to the one remaining goal of preserving free over-the-air television. Dual must carry proponents do not seek fair competition; they instead demand that the FCC guarantee them a mass audience, after which time they claim they will come up with the programming. 5/ Nor do they seek to bring diverse programming to television viewers; for true diversity is beside the point given the required duplication of analog and digital programming. 6/ Rather, must carry proponents claim that it is "far too late" for the Commission to "defer[] to the market" and assert that "government intervention is necessary" to achieve public policy ends. *See* Public Broadcasting Comments at 5.

5/ *See id.* at 18 (admitting that broadcasters will not carry compelling digital programming "unless there is some leverage, such as access to the mass market, to unlock the vicious circle preventing the spread of DTV").

6/ *See* Comments of the Association of America's Public Broadcasting Television Stations, the Public Broadcasting Service and the Corporation for Public Broadcasting at 15 ("Public Broadcasting Comments") (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"). *See also 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); *Further Notice,* ¶ 120 ("[c]able subscribers would not immediately benefit from a dual carriage rule if there is little to view but duplicative material"). *Compare* Comments of the Consumer Electronics Association at 8 ("simulcasting is wastefully duplicative and adds little additional quality or value to the viewer experience") ("CEA Comments").

The problem here is that the "public policy ends" articulated by must carry advocates bear no relationship to the statutory purposes underlying analog must carry. As explained below, the newly concocted interest in expediting the digital transition, advocated by some broadcasters, addresses a wholly different issue than did the analog rules designed to protect the weakest broadcasters from being dropped. The mismatch in public policy ends is underscored by broadcasters' and others' suggestions that certain statutory requirements would need to be "modified" to fit the different policies relevant to digital carriage. 7/ This fundamental disconnect between the clearly stated goals of the 1992 Cable Act and the arguments for digital must carry completely undermines broadcasters' purported justifications for dual carriage rules. In this proceeding there is a chasm between the ends authorized by Congress and the means proposed by broadcasters for dual carriage.

I. BROADCASTERS' DEMAND FOR A FREE RIDE CONFIRMS THAT DUAL MUST CARRY REQUIREMENTS ARE PLAINLY ANTI-COMPETITIVE

Court TV would never have achieved the progress it has made thus far in reaching cable subscribers if it had offered cable operators the following deal: "give us guaranteed carriage and we promise someday to begin producing quality programming." In a competitive market each participant must be

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7/ *See, e.g.*, NAB Comments at 8 (asking FCC to adopt dual must carry rules to achieve congressional goals "but perhaps in a manner somewhat different than Congress decreed with respect to carriage of analog signals"). *See infra* at 23.

prepared to exchange value for value. Consequently, it is astonishing for broadcasters to complain in this proceeding that they have reached few digital affiliation agreements, *see, e.g.*, NAB Comments at 21-26, while simultaneously admitting that they have no current incentive to produce much digital programming. *Id.* at 16 (describing the "vicious circle" where "no advertising means no programming which leads to no demand for digital receivers"). It is indeed a strange conception of "competition" for an industry that produces few goods to complain that it lacks buyers. The broadcasters' brazen demand for the Commission to guarantee it a "mass market" for digital television is the antithesis of competition.

A. The Only "Bottleneck" is Broadcasters' Unwillingness to Compete

All participants in this proceeding appear to agree that the key to the digital transition is content. *See* NAB Comments at 12 ("From a consumer's perspective, the critical factor in determining value is content, *i.e.*, programming."). The Consumer Electronics Association describes the lack of original digital programming as a "major impediment" to the transition, and notes that "[t]he history of the consumer electronics industry makes clear that consumer acceptance of new technology is driven by the widespread availability of high-quality, compelling content." 8/ Programming is also the key to DTV

8/ CEA Comments at 6. CEA notes that only 3.6% of digital programming is broadcast in the high definition format. *Id.* at 7 n.12.

carriage, as the broadcasters admit. NAB Comments at 20 ("As DTV, over time, becomes more desirable to viewers, a cable operator might carry the most popular commercial DTV broadcasters"). As a matter of simple logic, CEA concludes "cable providers will have more incentive to carry digital broadcast programming when more unique and digitally originated programming exists." CEA Comments at 7.

Although a consensus appears to exist that good programming will drive DTV carriage, and along with it the digital transition, the agreement ends there. The consumer electronics industry, while supporting must carry, also notes that broadcasters have a responsibility here and asks that the Commission prohibit simulcasting (if there is dual carriage) to give broadcasters "an incentive to upgrade their programming, and provide viewers with the full high definition ("HD") television experience." CEA Comments at 8. But broadcasters – predictably – historically have opposed *any* type of programming requirements for digital television. 9/ Rather, they describe the programming/carriage

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9/ Throughout the advanced television proceeding, the broadcast industry vehemently opposed any requirement that licensees transmit high definition programming, arguing instead for maximum flexibility. *See, e.g.*, Comments of the National Association of Broadcasters, MM Docket No. 87-268 (filed Nov. 20, 1995) at 1 ("NAB is not supportive of government-mandated minimums of HDTV-quality program of any other particular format, quality or content for the ATV channel. The driving force behind the transition to ATV is the need to deliver television programming that viewers want and will watch and that is competitive with other media offerings."); *id.* at 2 ("By providing maximum latitude, the Commission will encourage development of diverse new programming services that will facilitate the most rapid acceptance of ATV and lead to the most rapid

[footnote continues]

conundrum as a "chicken and egg" problem that can be solved only by requiring dual carriage. NAB Comments at 12. Broadcasters candidly state that they are asking for regulatory "leverage [to] access . . . the mass market." *Id.* at 18.

However, there is no "bottleneck" preventing broadcasters from providing the programming that all agree will determine the success, or failure, of DTV. Broadcasters simply are arguing that they, unlike all other market participants, should not have to invest in programming before being guaranteed a return – a proposition absolutely unique not just in the world of communications and consumer electronics, but in the free market system. NAB admits that digital networks are being deployed by telephone companies, cable operators, satellite operators and wireless communication companies who must "tak[e] the risk that revenues from increased network usage and new applications will provide an adequate return on their investments." 10/ The same principle of risk and reward governs the market for consumer electronics.

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return of the NTSC spectrum."); *id.* ("Neither the quality level nor the content of the ATV signal should be regulated. History is full of examples where the vitality of the marketplace results in unexpected demand for unpredicted services."); *id.* at 3 ("[f]ixed rules about minimum quantity of HDTV are simply unwarranted"); *id.* at 5 ("NAB believes that the most rapid ATV transition will take place with broadcasters having maximum flexibility to explore the new medium and to find, through unrestricted experimentation, which service offerings will be enticing enough to sell and satisfy the viewing audience.").

10/ 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* at 22 (June 11, 2001) (attached to NAB Comments as Appendix A) ("Kraemer/Levine Analysis").

Entrepreneurs must make investments in the hope of "priming the pump" for new markets. *See, e.g.*, Kevin Kelley, NEW RULES FOR THE NEW ECONOMY at 53 (1998) (describing Fairchild Semiconductor's creation of market for UHF tuner transistors in the early 1960s by slashing the price by 99 percent). By sharp contrast, NAB states that the digital transition will falter if creating either the supply or demand for DTV is left to broadcasters. 11/

Broadcasters' claims that FCC intervention is necessary to create a "virtuous circle" are wholly unconvincing. 12/ In the first place, there is no technical impediment to digital broadcasters reaching viewers via over-the-air transmissions, thus bypassing cable systems altogether. While there may be concerns about signal strength and equipment standards, DTV starts with an inherent ability to reach subscribers independent of cable carriage. Congressional Budget Office, *Completing the Transition to Digital Television*, at 19-22 (Sept.

11/ Specifically, NAB claims that "[i]f broadcasters are left to be the sole driving force of the transition . . . it may take 20 or more years for the 85% penetration target set by Congress to be achieved." NAB Comments at iii, 13.

12/ Broadcasters' use of the term "virtuous circle" is puzzling, given their demand that the FCC compel "virtue" from other market participants. A more apt example of the concept of a "virtuous circle" is the decision by a company to offer its *own* product below its cost in order to stimulate a new market. *See, e.g.*, Kelly, *supra* at 58 ("It cost Netscape $30 million to ship the first copy of Navigator out the door, but it cost them only $1 to ship the second one. Yet because each copy of Navigator sold increases the value of all the previous copies, and because the more value the copies accrue, the more desirable they become, it makes a weird kind of economic sense to give them away at first. Once the product's worth and indispensability is established, the company sells auxiliary services or upgrades, continuing its generosity in a virtuous circle.").

1999) ("CBO REPORT") ("The Grand Alliance's technical standard for high-definition television has successfully passed laboratory trials and initial field testing. Thus, it seems unlikely that remaining questions about DTV technology will significantly delay its introduction.").

NAB asserts that consumers will not use equipment to receive off-air transmissions, but its assumptions are based largely on irrelevant findings regarding analog A/B switches and satellite technology. 13/ Here, it stands to reason that consumers who pay thousands of dollars for a digital television will take steps to receive digital signals, and providers of equipment will have every incentive to reinforce such actions. 14/ If consumers are reluctant to purchase DTV off-air tuners, it is logical to assume that their reticence can be traced to the

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13/ The broadcasters' conclusion that over-the-air reception will not work is based on findings from the 1992 Act regarding analog A/B switches in the 1980s and extrapolations from experience with DBS. *See* Kraemer/Levine Analysis at 31-34.

14/ *See, e.g.*, Comments of Thomson Consumer Electronics, Inc. at 24, filed October 13, 1998 in *Carriage of the Transmissions of Digital Television Broadcast Stations*, Notice of Proposed Rule Making, 13 FCC Rcd 15092 (1998) ("*DTV Must Carry NPRM*") ("the Commission need not revisit its earlier decision not to regulate in the area of input selector, or 'A/B' switches. These switches . . . will be a standard [DTV] feature . . . [to] respond to consumer demands for an easy-to-operate method of accessing DTV signals directly off-air.") *See also* Comments of the Consumer Electronics Manufacturers Association, filed October 13, 1998, at 25-26, on *DTV Must Carry NPRM* ("CEMA has developed a comprehensive antenna mapping guide that will be furnished to over 30,000 retailers across the United States. The mapping guide divides every television viewing market into five color-coded regions, and will ensure, to the greatest extent possible, that every consumer is outfitted with an antenna appropriate to their location.").

lack of programming. To whatever extent regulatory intervention is warranted, it should be limited to ensuring that viewers can receive digital signals over the air. Curiously, however, when broadcasters are not demanding that cable operators guarantee a mass audience for their signals, they are quite cautious about regulation. *E.g.*, Public Broadcasting Comments at 17 ("the Commission should seek *voluntary* commitments that, beginning on a date certain, some portion of all television sets of a certain size . . . should include DTV tuners") (emphasis added).

The broadcasters' bottom line argument that there is a "bottleneck" is based on economics, not technology. They assert that there must be a mass market of viewers available "or there will be no incentive to produce and distribute digital programming." NAB Comments at 11. However, their analysis is based largely on a pre-digital economic model for broadcasting in which "broadcasters are in the business of producing *audiences*" which in turn are "sold to advertisers." Kraemer/Levine Analysis at 12 (emphasis in original) (citation omitted). While it is true that the broadcast industry historically has been advertiser-supported, digital television makes possible a much broader range of services that are not necessarily based on advertiser support.

Broadcasters are well aware of these capabilities of DTV, since they lobbied the FCC to permit "flexible use" of DTV spectrum to avoid dependence on advertiser-supported free broadcasting. The Commission acceded to broadcasters' arguments, stating:

> [W]e recognize the benefit of permitting broadcasters the opportunity to develop additional revenue streams from innovative digital services. This will help broadcast television to remain a strong presence in the video programming market that will, in turn, help support a free programming service. Thus, we will allow broadcasters flexibility to respond to the demands of their audience by providing ancillary and supplementary services that do not derogate the mandated free, over-the-air program service. Ancillary and supplementary services could include, but are not limited to, subscription television programming, computer software distribution, data transmissions, teletext, interactive services, audio signals, and any other services that do not interfere with the required free service.

Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 12 FCC Rcd 12809, ¶ 29 (1997) ("*Fifth Report and Order*"). The Commission explained that permitting broadcasters "to assemble packages of services that consumers desire . . . will promote the swift acceptance of DTV and the penetration of DTV receivers and converters." *Id.* at ¶ 33. It was believed that "giving broadcasters flexibility to offer whatever ancillary and supplementary services they choose may help them attract consumers to the service, which will, in turn, hasten the transition." *Id.*

In the instant proceeding, there has been no mention of possible ancillary services in the broadcasters' comments, but only the statement that simultaneous operation "in both the analog and digital worlds [leaves broadcasters] hemorrhaging capital with no clear return on their digital

investment." 15/ Rather, broadcasters candidly admit that they will not invest in digital services "unless there is some leverage, such as [forced] access to the mass market." NAB Comments at 18. This desire to have the government guarantee marketplace success is neither consistent with principles of competition nor backed by traditional notions of the public interest.

B. Dual Must Carry Will Not Promote the Cable Act's Statutory Goals

At bottom, the broadcasters' principal argument for dual must carry is not that the digital transition will be blocked, but that it will be delayed. Specifically, NAB claims that "[i]f broadcasters are left to be the sole driving force of the transition . . . it may take 20 or more years for the 85% penetration target set by Congress to be achieved." NAB Comments at iii, 13. Broadcasters ask rhetorically whether the transition should "be allowed to meander down the current path taking . . . likely more than 20 years more?" *Id.* at 3. The Kraemer/Levine Analysis asserts that "[w]ithout government intervention, there will not be assured mass market audience access which means delays in the development of programming and in the demand for sets." Kraemer/Levine Analysis at 17. However, the speed of the digital transition has nothing to do

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15/ Kraemer/Levine Analysis at 22 (emphasis deleted); NAB Comments at 13. *See also id.* ("The longer the transition, the more expensive the dual operation becomes, with *only* analog revenues to support both operations.") (emphasis added). The omission of any reference to ancillary services is most curious given that NAB spends the first several pages of its comments reviewing the history of the DTV proceeding from 1987 to the present. *See* NAB Comments at 1-5.

with the reason Congress adopted analog must carry requirements in the 1992 Cable Act. 16/

Congress adopted analog must carry requirements in 1992 out of concern that cable operators might cause a reduction in existing broadcast services. Here, however, broadcasters claim that regulatory intervention is needed to force-feed the demand for a new digital television service that will require viewers to purchase expensive new equipment and that normal market evolution is too slow. Quite obviously, these are very different goals.

Broadcasters erroneously attempt to link Cable Act objectives to DTV by arguing that the reduced return on station investment stemming from the digital transition "will result in cost reduction efforts such as less local programming or news, reduced capital budgets, and possibly reduction in on-air time." NAB Comments at 14; Kraemer/Levine Analysis at 23 (a long transition will put "financial stress" on "certain station categories"). By this reasoning, any regulation that benefits broadcasters financially could be justified as serving statutory objectives. 17/ Such arguments echo the long discredited Carroll

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16/ *Turner II*, 520 U.S. at 190-91 (citing *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*")) (noting that in 1992, Congress set forth three interests for must carry: (1) preserving free over-the-air local broadcasting, (2) promoting widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition); *see also* Conf. Rpt. 102-862, 102nd Cong., 2d Sess. (1992) at 58.

17/ Broadcasters' generalized arguments are entirely speculative and lack any limiting principle. Reviewing courts have restricted the Commission's ability to

[footnote continues]

Doctrine, under which the FCC previously permitted existing licensees to oppose new applicants on the theory that granting a new license would cause detrimental economic effects resulting in a net loss of service to the public. *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (1958). The Commission ultimately discarded the doctrine, finding that the economic theory on which it was based was flawed and that the policy was routinely employed by incumbent licensees to forestall competition. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 ¶¶ 14-20 (1988). In this instant proceeding, broadcasters have been given every opportunity to provide service to the public, both through existing free broadcast services and through innovative ancillary services. It is no answer for broadcasters to say that they do not care to compete, but require a guarantee of success.

Broadcasters incorrectly assert that the Commission has embraced expediting the digital transition as a statutory objective of must carry. NAB claims, for example, that the digital transition was expected to take 15 to 20 years, but that it was moved up to 2006 because the FCC "perceived [a]

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enact regulations based on such amorphous claims. *Cf. Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1134-35 (D.C. Cir. 2001) ("*Time Warner II*") (proponents of rules cannot rely on a generalized interest in promoting "diversity"); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) ("The government's formulation of the interest seems too abstract to be meaningful."); *Schurz Communications, Ind. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992).

competitive urgency for broadcasters and technological advances expected to lower costs and speed the transition." 18/ However, NAB's oblique reference to the Commission's *Fifth Report and Order* does not fairly characterize the FCC's reasoning. The Commission actually stated that, though it "previously considered a 15-year end-point for NTSC service," it appeared "that broadcasters should be able to convert to digital broadcast much more rapidly," with "2006 [being] a reasonable target" because "digital technology has developed [to allow the FCC to] expect that DTV may be adopted more quickly than originally anticipated." *DTV Fifth Report and Order*, 12 FCC Rcd at 12850.

In other words, the Commission modified the target date for the transition not because it recognized a "competitive urgency" that required a change in policy, as broadcasters suggest. Instead, it modified its target date because of competitive developments that it believed would cause broadcasters to feel competitive pressure and lead them to get on the stick. The Commission noted that:

> Competitors 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. Furthermore, technological advances have worked to lower the introductory costs to broadcasters, [and] due to the

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18/ NAB Comments at 4, citing *DTV Fifth Report and Order*, 12 FCC Rcd. at 12850.

> introduction of other services, broadcasters . . . will be able to . . . further lower[ ] the costs of converting.

Id. at 12848-51. As we now know, however, competitive pressures have spurred broadcasters to focus more on regulatory efforts than on marketplace competition, and they are now asking the Commission to help them avoid having to compete.

The central premise of the commercial broadcasters' comments – that the transition will be "too slow" without dual must carry – begs an important question: Too slow by what measure? The Congressional Budget Office has noted that it took 22 years for color TV and 15 years for VCRs to reach adoption rates of 85 percent. CBO Report at 33. After half a century, cable television had reached an average penetration of 67 percent. *Id.* at 32-33. Accordingly, the CBO concluded that the speed of consumer adoption of DTV technology "is the so-called wild card in the transition." *Id.* at 40. Congress did not set 2006 as a "deadline" for the digital transition; it expressly recognized the critical importance of market evolution for new technology, and it deferred the date for returning analog broadcast frequencies in any market in which less than 85 percent of television households are able to receive DTV signals. 47 U.S.C. § 309(j)(14)(B).

Broadcasters' demands for must carry as a way to jump-start DTV ignore basic lessons about the evolution of technology and thus place the cart squarely before the horse. As NAB informed the Commission earlier in the ATV proceeding, VCR penetration exceeded one percent (even though the devices had

been on the market for years) *only after* low-cost rentals of pre-recorded tapes became a phenomenon. Comments of the National Association of Broadcasters, MM Docket No. 87-268 (filed Nov. 20, 1995) at 2. People would not spend a few hundred dollars to purchase a VCR until low-cost programming was widely available, and it still took over a decade to reach 85 percent penetration. *Id.* In short, whether or not the transition to a new product is "too slow" depends on the availability of the product itself (*e.g.*, content) – not on carriage requirements.

Finally, the broadcast commenters take inconsistent positions regarding the degree to which expediting the digital transition is an objective of the law. Commercial broadcasters argue that must carry is "mandatory" to the extent normal market evolution will result in too slow a transition, NAB Comments at 9, and assert that carriage requirements could prompt "an accelerated transition that could result in analog turn off in [the] 2010-2012 period." *Id.* at 17. Public broadcasters, on the other hand, while advocating must carry, would defer station construction deadlines in smaller markets (based on national DTV receiver penetration targets) and would leave the final digital transition deadlines open. Public Broadcaster Comments at 12-15. If the broadcasters cannot agree that the speed of the digital transition is the key, it is impossible to conclude that expediting the transition was an important congressional objective for the must carry regime.

C. Proponents of Dual Must Carry Cannot Justify Extending the Free Ride

Broadcasters are correct when they point out that "the future of broadcast TV rests on going digital," NAB at 13, but this insight hardly distinguishes broadcasting from other media. Other service providers, including cable operators, have begun to prepare for this future by making the necessary investments. 19/ Cable programmers, like Court TV, have made significant investments to reach more viewers and to improve programming without any guarantee of carriage or profitability. The difference between broadcasting and other media is that broadcasting repeatedly has been favored with significant regulatory inducements, including:

- a grant of billions of dollars worth of free spectrum with no set return date;
- guaranteed cable carriage of either a broadcaster's analog or digital channel, along with preferential channel placement;
- retransmission consent protections that can be used to create leverage for carriage of multiple programming services;
- a complete absence of high definition programming obligations; and
- the ability to engage in flexible use of additional broadcast spectrum for innovative, for-profit ventures.

19/ *E.g.,* Comments of the National Cable & Telecommunications Association at 18-19 ("NCTA") ("[c]able operators have spent billions of dollars to increase capacity" for new digital services); Kraemer/Levine Analysis at 22; *DTV Fifth Report and Order*, 12 FCC Rcd at 12848-51.

Nothing in the broadcasters' comments in this proceeding justifies adding another regulatory perk to this already lengthy list. Dual must carry undoubtedly would benefit broadcasters, but it is not the key to the digital transition. The key to the transition is for broadcasters to do what every other industry must do – invest in the facilities and programming necessary to attract viewers and co-venturers. To the extent broadcasters insist on a governmental solution to expedite the transition, however, the Congressional Budget Office noted a number of possibilities:

- set a firm completion date for the transition, *see* CBO Report at ix;
- a fee on analog broadcasters of $200 million per year that "would create an incentive, now absent, for broadcasters to work for the transition's timely end," *id.* at xii;
- "additional government mandates related to digital TV," *id.*;
- "relaxation of some of the legal requirements that must be met before analog stations can be taken off the air," *id.*; or
- "delays in auctioning licenses for freed-up spectrum." *Id.*

The proponents of dual must carry cannot show that mandatory carriage is preferable to any of these other policy options, because the reasons Congress adopted analog must carry requirements are unrelated to digital television. Accordingly, the Commission should reject broadcasters' attempts to use the transition to digital television as an opportunity to create yet another subsidy for their business.

II. DUAL MUST CARRY PROPOSALS FAIL TO SATISFY FIRST AMENDMENT REQUIREMENTS

Like the Commission's *Further Notice*, broadcast commenters focused solely on the issue of cable channel capacity as the touchstone for analyzing the First Amendment issues presented by any dual carriage requirement. As NAB concluded most starkly, "if it were certain that all digital signals could be carried without displacing any cable channels, there would be no First Amendment question presented here at all." NAB Comments at 35-36. *See also* Public Broadcasting Comments at 20. Broadcasters claim that upgrades in cable channel capacity remove any threat that digital must carry requirements would be more burdensome than the analog requirements upheld by the Supreme Court. But their analysis ignores the fact that government has an initial obligation – not met here – to justify any must carry rule in constitutional terms. *See Turner I*, 512 U.S. at 663-664. Broadcasters also fail to come to grips with the First Amendment burdens that would be imposed by dual must carry.

A. Broadcasters Fail to Make an Affirmative Case for Dual Must Carry

Broadcasters' discussion of their need for "leverage" to gain a mass audience for DTV in order to hasten the digital transition falls far short of the level of proof required by the Supreme Court in *Turner*. Whether or not such a demand for a marketplace advantage could be considered legitimate, it is plainly insufficient for broadcasters to describe the importance of governmental interests "in the abstract." *Turner I*, 512 U.S. at 663. It is incumbent upon proponents of

dual must carry rules to demonstrate their substantiality. *See, e.g.*, *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("*Time Warner II*") (vacating as unconstitutional the FCC's rules implementing the horizontal and vertical cable ownership limits in Section 613 of the Act). Thus, advocates of a rule must do more than simply "posit the existence of the disease sought to be cured." *Turner I*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

More importantly, the governmental purpose must be one that was adopted by Congress as a reason to impose must carry requirements. *See Turner II*, 520 U.S. at 190-191 (declining to consider rationales that are "inconsistent with Congress' stated interests in enacting must carry" in reviewing the rules' constitutionality); *Utah Licensed Beverage Ass'n v. Leavitt*, 2001 WL 830304 at *4 (10th Cir. July 24, 2001) (reviewing courts may not "supplant the precise interests put forward by the State with other suppositions") (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)). As noted above, the statutory objectives for analog must carry set forth in the 1992 Act are far different from the goals advocated by broadcasters in this proceeding. *See supra* at 13-18. Numerous commenters in this proceeding, including Court TV, have shown that broadcasters' demands for dual carriage are unrelated to the reasons Congress

adopted analog must carry in 1992. 20/ Even the broadcast commenters acknowledge, if indirectly, the inconsistency between the 1992 Act and their current demands when they note that certain statutory requirements would have to be modified to accommodate dual must carry. 21/

B. Dual Must Carry Would Impose Significant Burdens on Cable Operators and Programmers

Even if cable system capacity alone were the touchstone for determining whether a dual must carry requirement could withstand constitutional scrutiny, the burden on cable operators and programmers would be sufficient to invalidate the rules. The NAB's claim that the cable industry will not be affected adversely by dual carriage requirements because of aggregate increases channel capacity nationwide ignores the reality that the damage from

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20/ *See, e.g.*, NCTA at 7-9; A&E Television Networks Comments at 6-14; Comments of AT&T Corp. at 16-20; Comments of International Cable Channels Partnership, Ltd. at 6-8; Comments of Time Warner Cable at 4-20.

21/ NAB Comments at 8 (asking FCC to adopt dual must carry rules to achieve congressional goals "but perhaps in a manner somewhat different than Congress decreed with respect to carriage of analog signals"); Public Broadcasting Comments at 9 & n.10 (asking FCC to modify must carry channel capacity limits and acknowledging 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"). *Compare* NAB/MSTV/ALTV Petition for Reconsideration and Clarification at 17 (asking FCC to modify operation of channel capacity caps in the digital context, acknowledging 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.").