September 5, 2002

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20445

Re: Ex Parte Communication
CS Docket No. 98-120, *Digital Carriage*

Dear Mr. Chairman:

The undersigned organizations, representing the free over-the-air broadcasting industry whose viability and vitality Congress sought to preserve in the must carry law, here submit three brief attachments pertaining to the digital cable carriage item now before you.

These memoranda address issues that appear to be the most relevant in the Commission's current deliberations over the content of cable carriage obligations. The decisions before you, interpreting for digital television the statutory requirements for cable carriage of the "entirety" of the primary video and audio service of local broadcast stations, of "program-related material" and for carriage "without material degradation," indeed will affect the vitality of local broadcast service throughout the dawning age of digital television and far into the future.

Included are a memo addressing the most salient points that were raised in meetings with Commissioners and staff over the last few weeks, a distillation of relevant constitutional principles and a memo on the concurring opinion of Justice Breyer in *Turner II*.

The undersigned organizations, on behalf of the commercial and noncommercial broadcasting services, urge your careful consideration of these points, for the benefit of *all* broadcast stations and their viewing publics, and most particularly, for the noncable

viewing audience that relies on the free over-the-air broadcast service as its main source of news, information and entertainment.

Respectfully submitted,

The National Association of Broadcasters

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The Honorable Michael J. Copps
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Primary Video, Material Degradation, Program-Related and PSIP in the DTV Carriage Proceeding

- All of the issues in the DTV cable carriage proceeding have been fully briefed, once in 1998 and again in 2001. It is past time for decisions on the pending issues. There are no further outstanding, available and relevant facts to be adduced.

Constitutional Underpinnings

- Under the *Turner* decisions, cable carriage obligations need not be reduced to the absolute minimum or least intrusive or least restrictive. Under the Court's consideration of must carry under "intermediate scrutiny," what is required is a reasonable fit between the government interests/goals and the regulatory requirement. Under *Turner*, the goals of preserving the benefits of the free over-the-air system, promoting the widespread dissemination of information from a multiplicity of sources and promoting fair competition in the television programming market are all served by a cable carriage regulation that ensures a stable economic foundation for broadcast digital programming offerings, for noncable and cable homes, by *all* broadcasters, commercial, public, network affiliate or not.

- Under *Turner II*, it is not only the survival of broadcasting that is to be preserved by must carry, but the economic viability and vitality of a multiplicity of over-the-air broadcasters, which Congress found and the *Turner II* Court agreed was threatened by cable's history, incentive and ability to discriminate against local broadcasters, particularly those most competitive with cable for audience and advertising. (*Turner II:* "Congress' evident interest in 'preserving the existing structure' of the broadcast industry discloses a purpose to prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households.")

- The "avoidance principle" that statutes should be interpreted to avoid serious constitutional questions is not applicable here because, under *Turner II*, there is no *serious* constitutional issue raised by carriage of all non-subscription parts of a broadcast DTV signal.

- Cable parties are re-arguing the same issues they raised, to no avail, in the *Turner* cases. The facts and the record today unquestionably show that cable operators have deployed a sea of capacity, that carriage of a single broadcast DTV signal – whether HDTV or four or more multicast streams -- poses a fraction of the burden on operators that was upheld in *Turner II*.

- Cable argues that the carriage of a single multicast stream is less burdensome than carriage of all free over the air program streams. Whatever miniscule reduction of burden this may achieve, it is not constitutionally significant. A less or least burdensome interpretation is not the test applied in *Turner*. More importantly, the less burdensome interpretation must be rejected because it would not serve the important government interests of preserving the benefits of free over the air television and promoting the widespread dissemination of information from a multiplicity of sources for noncable and cable homes.

- As in the *Turner* cases, cable parties, continue to argue that must carry for the "entirety" of the full free DTV broadcast stream amounts to an "unfair preference" for broadcasters over cable programmers. What they refuse to accept is the very point of must carry: Congress determined that broadcast programming *should have* a preferred berth on monopoly cable systems to serve overriding policy goals for the benefit of the *entire* viewing public and against cable's history, incentives and ability to disadvantage broadcast competitors. Cable simply discounts the public interest, as determined by Congress and the Supreme Court, in preserving the competitiveness and multiplicity of free television for *non-cable* viewers.

<u>Statutory Support</u>

- §336 of the Communications Act, added by the 1996 Telecom Act and entitled "Broadcast Spectrum Flexibility," evidences Congress' intention that broadcasters be allowed to offer new services enabled by 'advanced television."

Primary Video Statutory Language

- The statutory must carry provisions, while applicable to digital, were written for the analog world, and thus, as the statute itself directs in §614(b)(4)(B), certain provisions must be adapted to fit the digital context.
- The literal words of the "content to be carried" provision simply cannot apply directly in the digital situation. What is required is an application to the new digital context of *what was intended by the term"primary video"* for the analog situation.

    - What was intended to be (and is) carried of the analog signal is "the entirety" of the video, the audio, the closed captioning information, and program-related material. The language of the statutory provision breaks down the broadcast signal into "the primary audio and video signal," the closed captioning information, and the information in the VBI and on subcarriers (some of which is program-related and some of which is not program-related).
    - Thus, in context, it becomes clear that what was meant by "primary" is the "basic" broadcast service viewed by the public without special equipment or subscription fee, versus ancillary or "secondary" material carried, in analog, in the VBI and on subcarriers.
    - "Primary" thus equates, as in the dictionary definitions, with "first in importance," "basic," "fundamental," as opposed to secondary or ancillary. Thus, "primary" does not relate to "one" or "single" but rather to "first in importance" or "fundamental." Of everything in the signal, it is the video and audio that are primary.

- The same dichotomy that was intended for analog should be applied to digital. That is, the entirety of the free video and audio (the "primary" broadcast service), the closed captioning information, and the program-related material contained in the digital bit stream should be carried as of right. (The term "program-related" must also be adapted for the digital context.)

Primary Video Policy Concerns

- Without a broad reading of the "primary video" language in the must carry provisions, Congress' and *Turner II*'s recitation of cable's incentives to drop local broadcasters will translate into cable's refusal to carry broadcasters' multi-cast program streams or other free services DTV enables broadcasters to provide to viewers. Under the must carry analysis of *Turner II*, without the economic support of access to cable audiences, multi-cast programming "denied carriage will either deteriorate to a substantial degree or fail altogether."

    - Few if any would produce the programming, implement the technology and provide multicasting for only the OTA audience.
    - One of the major benefits of digital DTV technology, the ability to dynamically change and trade off the quality of the video and the number of separate programs, will be stymied.
    - OTA viewers and broadcasters, as well as cable subscribers, will be denied competition and diversity from multi-casting.
    - Public broadcasters, in particular, have determined that they can best take advantage of the new digital technology and optimize their use of the spectrum by multicasting diverse educational services to multiple audiences outside of prime time. Their judgments as to what program offerings best serve their communities' needs should not be thwarted by the cable bottleneck.

- The Commission has already determined that the carriage of a full HDTV program stream is required. The capacity burden on cable for carriage of four or more multicast programs within the 6 MHz broadcast DTV stream imposes no greater burden on cable than the required HDTV stream.
    - It would be burdensome and not practical for broadcasters to have to alert cable operators of their changing programs and bit rate allocations, so that cable could strip all but one program from a multicast and still have the full 19.4 Mb/s broadcast stream capacity available for HD programs.

- The "burden" on cable of carrying the broadcaster's entire free 6 MHz DTV bit stream, whether that stream contains a single or several

programs, is *de minimis* in the sea of cable capacity documented in this proceeding.

- As the responses to the Commission's survey of MSOs in 2001 showed, 86 percent of cable subscribers will be served by systems with 750 or more MHz capacity by the end of next year.
- Digital cable systems will be able to carry two entire 6 MHz broadcast digital signals in the 6 MHz cable bandwidth that is required for a cable system to carry an analog broadcast signal. Carriage of local broadcast digital signals, therefore, by definition will impose far less "burden" on cable systems than the carriage of analog signals does today.[1] NAB and MSTV last year calculated, based on projections of cable capacity by the cable industry, that after the transition to digital, carriage of the entirety of local commercial and noncommercial television signals on a digital cable system will use only 3.37% of bandwidth capacity delivered to the average subscriber – a fraction of the average capacity used for carriage of analog signals when must carry went into effect in 1993.
- Even if arguments that carriage of an entire digital signal might reduce the capacity that cable systems would use to provide internet access or telephone service were true – *and they are not* – the choice of cable systems to devote capacity to services which do not involve their selection of programming has no constitutional protection.

<u>Material Degradation</u>

- Cable's carrying broadcasters' DTV streams (data packets of video, audio and data bits) via QAM modulation rather than VSB doesn't affect or degrade the content of the "data packets."

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[1] Thus, the predicate of the First and Fifth Amendment arguments propounded in an *ex parte* submission by NCTA of a memo by Professor Lawrence Tribe – that carriage of multiple program streams would occupy multiple cable channels – is incorrect and that error infects Professor Tribe's entire analysis. *See* NAB *Ex Parte* Submission, CS Docket No. 98-120 (Aug. 5, 2002).

- No “material degradation” in the digital world requires not permitting cable to alter the bits within the “data packets” of the broadcast DTV stream.
    - Changing the format of broadcast DTV video streams to a lower format changes the bits and by definition degrades the quality of the video.
    - Changing (lowering) the bit rate of broadcast DTV video and/or audio streams degrades the quality of the video and/or audio.
    - The *way* a video format or bit rate is changed can degrade the quality of the video.
- The only certain way to not materially degrade the broadcast video/audio quality (and to enforce the provision) is to not allow changing the bits in a broadcast program’s bit stream.
- Broadcasters, however, have no problem with cable’s being allowed to strip "null packets" (i.e., unused bits in a 19.4 Mb/s digital broadcast stream) from broadcasters’ DTV streams for potential cable re-use, when, for example, broadcasters are not using the entire bit stream.

<u>Program-Related</u>

- For purposes of applying the term “program-related” from the must carry provisions to the content of digital signals carried by cable, the *WGN* test, as narrowly interpreted in the FCC’s 2001 Report and Order, is inappropriate and unworkable in a digital environment.
- On reconsideration of this issue in the analog context, the Commission clarified that “the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness.”
- A narrow interpretation of what constitutes program-relatedness raises serious concerns in a digital environment. For example, a broadcaster’s time-shifting of programming on a second or third channel would fail the test, as would zone-specific, or community-specific newscasting, though clearly related in terms of content.
- A determination of program-relatedness based on individualized determinations about specific programs or services would be unworkable, since the volume of decisions would overwhelm the resources of broadcasters, cable systems and the Commission.

- The Commission has already established a bright line test to define ancillary and supplementary services – services are ancillary to the broadcaster's main signal when they are offered on a subscription basis.
- The Commission should interpret "program-related" for digital carriage purposes to include all non-subscription material that adds to, supplements, or relates to the program service of the broadcasting station.

PSIP

- Mandating cable carriage of broadcast PSIP information that is within the broadcast DTV stream is critical for consumer-purchased receivers or set top boxes finding desired channels and information.

- The PSIP standard is the only document that defines the structure of digital program ratings information. Without using it no rating can be provided and no consumer-purchased receiver can determine what the rating is of a digitally delivered program.

- Digital closed-captioning is dependent on PSIP to tell the receiver that captioning is present, how the data is to be formatted for display, and to inform the receiver when more than one caption service is present. There are no other standards or recommended practices that guide receiver selection among captioning services.

- Cable carriage of broadcast PSIP information is critical for receivers to be able to operated PSIP-based advanced features which enable improving service to selected audience segments.

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Constitutional Standards Applicable to "Primary Video" Carriage Obligations

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September 5, 2002

The Commission's staff has raised two related issues in connection with the constitutional analysis of the digital carriage rules the Commission is considering. The first issue involves the role that principles of "constitutional avoidance" should play in the Commission's analysis. The second related issue involves whether the Supreme Court's decisions in the *Turner, Turner Broadcasting System, Inc. v.* FCC, 512 U.S. 622 (1994) ("*Turner I*") and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 213 (1997) ("*Turner II*"), require the Commission adopt the narrowest and least burdensome method of implementing Congress's instructions regarding carriage of local DTV signals. This analysis responds to those concerns.

Constitutional Avoidance. The interpretative canon of "constitutional avoidance" provides no support for refusing to adopt a requirement that cable systems carry all nonsubscription programming of local DTV stations. That statutory construction canon has an extremely narrow scope, and is not remotely applicable in this context. As the Supreme Court has aptly stated, "[t]he constitutional doubts argument has been the last refuge of many an interpretive lost cause." *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993). "Statutes should be interpreted to avoid *serious* constitutional doubts, not to eliminate all possible contentions that the statute *might* be unconstitutional." *Id.* (citation omitted) (emphasis in original). To trigger the avoidance principle, a constitutional doubt must be "grave." *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). Even constitutional arguments with "some force" do not suffice. *Id.* at 191.

The Commission's duty is to implement the will of Congress faithfully, and the Commission should not depart from Congress's commands based on vague, unsubstantiated

suggestions that implementing Congress's intent will impose burdens on regulated entities that might raise constitutional issues. As the Supreme Court has explained, the canon of constitutional avoidance is not a "prerogative to ignore the legislative will." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 841 (1986); *see also Heckler v. Mathews*, 465 U.S. 728, 742-43 (1984). Indeed, an expansive application of the principle would be inconsistent with an agency's responsibilities under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Supreme Court has made crystal clear that constitutional avoidance has a particularly limited scope as applied to agency decisions implementing their governing statutes – even where the statute may be ambiguous and thus susceptible to more than one reasonable interpretation. In *Rust v. Sullivan*, the Court flatly rejected the argument that the implementing agency was required as a matter of "constitutional avoidance" to adopt the narrowest available regulatory option for restricting the use of federal funds by organizations that advocate abortion as a means of family planning. 500 U.S. at 191. The Court explained that proposed regulations must raise the most "grave and doubtful constitutional questions" to justify a conclusion that "Congress did not intend to authorize their issuance." *Id.* (citation omitted). It is not enough that there may be constitutional objections with "some force." *Id.*

As *Rust* makes clear, the Commission's task is to implement the will of Congress within the confines of *Chevron*, not to engage in its own freewheeling constitutional speculation. The reason for this is clear: if agencies go to great lengths to avoid even raising constitutional issues when implementing the statutes they are charged with enforcing, they will often forego entirely legitimate regulatory options that would better achieve Congress's intent and better serve the public interest. Thus, if the Commission were to rely on "constitutional avoidance" to justify

adopting the narrowest or least burdensome primary video interpretation, that justification would be misconceived and would constitute a reason in itself for a reviewing court to conclude that the Commission's decision is arbitrary and capricious.

That is particularly true with regard to the proposed requirement that cable systems carry all nonsubscription programming of local DTV stations. Such a requirement would raise no serious issue under either the First Amendment or the Fifth Amendment, and applying the doctrine of constitutional avoidance would be particularly misguided.

First Amendment. The canon of constitutional avoidance does not remotely require, or even support, the conclusion that the Commission should minimize the burden to cable imposed by a broad interpretation of the must carry obligations. In the *Turner* decisions, the Supreme Court emphatically rejected the notion that the must-carry requirements of the 1992 Cable Act needed to be the narrowest, least burdensome means of effectuating Congress's objectives of ensuring continued free television for noncable households, ensuring a vibrant diversity of programming choices, and preventing anticompetitive abuses. As Justice Kennedy's opinion for the Court in *Turner II* explained, the requirement that a regulatory option be the least restrictive or least burdensome means of achieving the government's objectives is one that applies only to laws subject to strict scrutiny – that is, to laws that regulate speech because of its content. 520 U.S. at 212-13. The Court has, however, definitively held that must-carry obligations are content neutral. Such "[c]ontent-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do, and thus are subject to a less rigorous analysis, *which affords the Government latitude in designing a regulatory solution.*" *Id.* at 213 (emphasis added). Moreover, "less restrictive alternative analysis . . . has never been part of the inquiry into the validity of content-neutral regulations on speech." *Id.* at 217 (quotation and citation

omitted). A regulatory option is not invalid merely "because some alternative solution is marginally less intrusive on a speaker's First Amendment interests," even if a reviewing court concludes that "the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 217-18. To pass constitutional muster, a content-neutral regulatory option need only be reasonable in relation to the goals it seeks to achieve. *Id.* The requirement that cable systems carry all nonsubscription programming of local DTV stations easily meets that requirement.

Justice Breyer's concurrence in *Turner II* strengthens that conclusion. Justice Breyer was even less willing than the other Justices voting to uphold the analog must-carry requirements of the 1992 Cable Act to subject Congress's choices to a rigorous "less restrictive means" analysis. His approach simply requires a balancing of the benefits achieved by the regulation against any adverse consequences to speech it might have. *Id.* at 227 (question is whether regulation "strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences"). Justice Breyer agreed that the burden imposed by the analog must-carry requirement "is limited and will diminish as typical cable system capacity grows over time." *Id.* at 228. He also recognized that must-carry "will help the typical over-the-air viewer (by maintaining an expanded range of choice) more than it will hurt the typical cable subscriber (by restricting cable slots otherwise available for preferred programming). The latter's choices are many and varied, and the range of choice is rapidly increasing." *Id.* Precisely the same analysis supports the constitutionality of requiring cable systems to carry all nonsubscription programming of local DTV stations.

Fifth Amendment. Avoidance of potential issues under the Just Compensation Clause of the Fifth Amendment is, if anything, even less appropriate. When agency regulations are

challenged on the ground that they may be implemented in ways that could give rise to future takings claims, "adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible applications of a statute or regulation." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1975); *accord National Mining Ass'n v. Babbitt*, 172 F.3d 906, 917 (D.C. Cir. 1999). The Supreme Court has thus held that it will not invalidate an agency's implementing regulation unless "there is an identifiable class of cases in which application of a statute will *necessarily* constitute a taking." *United States v. Security Indus. Bank*, 459 U.S. 70-75-76 (1982) (emphasis added). The doctrine of constitutional avoidance must be sparingly applied in the takings context, because the Just Compensation Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Eastern Enterprises. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring). These principles are familiar to the Commission. Indeed, the Commission advocated precisely this understanding of the constitutional avoidance principle in defending its TELRIC rule to the Supreme Court in *Verizon v. FCC*. *See* Brief for Respondents Federal Communications Commission and The United States, Nos. 00-555, 00-587, 00-590 and 00-602, at 10, 26-27 (June 2001).

Requiring cable systems to carry all nonsubscription programming of local DTV stations does not raise any serious Fifth Amendment issue. Such a requirement simply does not involve any physical taking of the property of a cable system, and thus does not trigger the analysis set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which applies only to an extremely narrow category of cases involving the permanent physical occupation of real property. Rather, the primary video requirement is properly analyzed under the "regulatory

taking" doctrine, triggering only a deferential and "fact specific" inquiry under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1481-84 (2002). Cable has not even attempted to argue that must carry regulations would constitute a regulatory taking, and any such argument would be frivolous. Moreover, a requirement that cable systems carry all nonsubscription programming of local DTV stations cannot impose any greater burden on the property of cable systems than the 1992 Cable Act itself or the primary video rule initially adopted by the Commission – for the simple reason that implementing the rule would not require any additional capacity on the cable system beyond that already authorized. Thus, it raises no independent issues under the Fifth Amendment.

For these reasons, neither the principle of constitutional avoidance nor the *Turner* decisions pose any obstacle to a requirement that cable systems carry all nonsubscription programming of local DTV stations.

The Breyer Concurrence Does Not Require a More Restrictive Application of Must Carry

- Breyer joined the opinion of the Court, other than its reliance on an "anticompetitive rationale." 520 U.S. at 225

- Breyer voted to uphold the statute because it advanced other objectives, namely perserving the benefits of free, over-the-air local broadcast television and promoting the widespread dissemination of information from a multiplicity of sources. *Id.* at 226.

- The statute "undoubtedly seeks to provide over-the-air viewers who *lack* cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate." *Id.* Permitting local stations that develop muti-cast programs the same opportunity to reach an audience will add to the "rich mix" of programming and achieve the goals that Congress set and the Breyer concurrence identified in upholding must carry.

- Courts must decide in applying intermediate scrutiny whether a regulation "strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences." *Id.* at 227. Expanding the definition of primary video will directly enhance the variety of speech available to cable and non-cable homes while having at most a *de minimis* restriction on cable services, and is even less likely to have an impact on cable *program* services.

- Breyer agreed that cable "constitutes a kind of bottleneck that controls the range of viewer choice." *Id.* at 227-28. He further recognized that without carriage rules, cable systems would carry fewer signals, that station revenues would decline, and that "*the quality of over-the-air programming on such stations would almost inevitably suffer.*" *Id.* at 228 (emphasis added).

- Breyer agreed that "the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers is limited and will diminish as typical cable system capacity grows over time." *Id.*

- Breyer concluded that Congress was reasonable in believing that must carry "will help the typical over-the-air viewer (by maintaining an *expanded range of choice*) more than it will hurt the typical cable subscriber (by restricting cable slots otherwise available for preferred programming). The latter's choices are many and varied, and the range of choice is rapidly increasing." *Id.*

- Thus, Justice Breyer's opinion does not set a more restrictive test for carriage regulations but instead rests on a conclusion that the broad purposes of must carry fully justify any minimum and declining restriction on cable choice. His reasoning full supports a requirement that cable systems carry all non-subscription programming of local DTV stations.