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The Honorable Michael K. Powell
 Chairman
 Federal Communications Commission
 445 Twelfth Street, SW
 Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

Re: CS Docket Nos. 98-120, 00-96, and 00-2

Dear Chairman Powell:

Three realities should impel the Commission to renew its commitment to resolving promptly the issue of cable carriage during the digital transition and, to advance that important goal, the public television community here offers a newly revised proposal.

Reality One: At the FCC, in Congress, from the White House, certainly within the affected industries and even among the public, the goal of expediting the digital broadcast transition has a new urgency. But it remains as true today as it was when the Congressional Budget Office studied the issue: "The most important factor to the success of the transition is cable carriage of digital signals during the transition." In fact, the glacial marketplace progress in the three years since the CBO released its study underscores the undeniability of this conclusion. Moreover, the 1992 Cable Act directed the Commission upon adopting a digital standard—which it did **six** years ago—to initiate a rulemaking to decide this matter. Surely, it is now time to conclude it.

Reality Two: As was evident to Congress in **1992**, as you pointed out three years ago and as the past years of delay and frustration have demonstrated, market forces are not sufficient to achieve the statutory 85% DTV penetration level anytime in the foreseeable future. (An NAB study predicted that it would take until 2020 or later.) This reality also is undeniable.

Reality Three: The future of public television depends on a successful roll-out of digital broadcast services—a mix of HDTV and multicast offerings. Public stations have a great deal at stake in meeting their obligations under the digital transition. They have already spent nearly a billion dollars on digital plant, they face a build-out deadline in a scant two months and they confront the prospect of over a billion more in future DTV expenditures (including an indefinite period of costly dual analog/digital operations). Accordingly, and in light of reality one—cable carriage is essential—and reality two—market forces won't lead to sufficient carriage—a fair **and effective transitional carriage** requirement is necessary.

On June 11, 2001, the Association of Public Television Stations, the Corporation for Public Broadcasting and the Public Broadcasting Service jointly requested the Commission to act on outstanding digital transition issues. Under your leadership, a start—a good start—has been made toward resolving them. Steps that we requested and that you have taken have addressed the need for a task force to coordinate the FCC's then fragmented proceedings on the digital transition, the necessity of DTV tuner requirements, measures to assure cable/receiver interoperability and copy protection safeguards. But the single most important issue—carriage during the digital transition—lingers.

We heeded your call to try to resolve that issue in private negotiations with the cable industry. Even before then—over three years ago—we began, on a high priority basis, to devote substantial resources to seeking national carriage agreements with cable MSOs. Our efforts have included strenuous overtures to MSOs, visits to cable company headquarters, meetings with NCTA representatives and preparing and presenting draft proposals and agreements.

However, as we reported in our meeting with you on September 4, 2002, we have succeeded only with Time Warner Cable and Insight, which cover slightly more than 20% of the country's cable subscribers. A few cable systems have cherry picked public television by entering carriage arrangements with a single public station in a market, *e.g.*, Comcast has an agreement to carry WNET in New Jersey but not New Jersey Network. However, that fact only underscores the need for Commission action.

Recognizing in 2001 that a new initiative was needed to break the protracted impasse over transitional cable carriage, APTS, CPB and PBS submitted a "Working Draft" proposal that covered digital carriage, as well as other issues. Subsequent developments enable us now to focus on, substantially revise and greatly simplify the transitional carriage proposal we submitted at that time. Moreover, our new proposal, described in Attachment A, further reduces the burden on cable—to the extent that it is now substantially less than the burden entailed by the 1992 analog carriage requirement. In highlight, our revised proposal would:

- impose a 28% cap on cable capacity devoted to carriage of broadcast signals—both DTV and analog, commercial and noncommercial stations—compared to the Act's present one-third cap on commercial analog signals only;
- phase in digital carriage requirements as cable systems add capacity, exempt smaller systems and exclude carriage of duplicative program material (whether in HDTV or multicast format) and
- establish a sunset for the transitional carriage requirement that would harness marketplace incentives to support and speed the transition.

Twenty months ago, when we submitted our earlier proposal, we urged each Commissioner to work with us, our commercial station colleagues and cable operators to craft an interim carriage solution that would be tightly circumscribed, operate in harmony with market forces not against them and pass First Amendment muster. It was inconceivable then and it is inconceivable now that between analog-only and full analog/digital carriage there can be no constitutionally permissible transitional carriage requirement. It cannot be that the analog must-carry requirements go right up to the limits of the Commission's authority and that not a single additional viewer can be given the benefits of digital carriage without crossing a line of constitutional permissibility. The new, more limited proposal that we submit today would not entail *any* additional burden for cable operators. It would be substantially less burdensome in fact than the Congressionally-mandated analog carriage requirement that the Supreme Court held to be constitutional.

We add one last point of overarching importance. All three of our organizations, the vast majority of our stations and their partners — universities, state governments and their underwriters, including loyal members and charitable foundations — are convinced that public television's future viability depends upon being able to provide a rich mix of HDTV and multicast services. **As** licensees, our stations are charged with putting their digital spectrum to its highest and best use to the maximum benefit of the viewing public, and their overwhelming judgment is that such use includes multicasting. Without a carriage requirement for multicasting services during the transition and thereafter, two things will happen: (1) public broadcasters will be driven to a single video-stream strategy to the impoverishment of their viewers and themselves, at the sacrifice of digital's full potential and with public television's future service put in jeopardy; and (2) as a result, cable operators will have to devote their capacity to carrying an HDTV video-stream (instead of a mixed multicast/HDTV video-stream) that would consume similar capacity as a multicast service. Because an exclusively HDTV video-stream would yield little or no additional capacity for cable systems, there is no sound justification for the Commission not to include multicast services within the scope of a reasonable transitional carriage requirement as well as the post-transition digital-only requirement.

We hope to meet with you to discuss our proposal and any other ideas you or others may have for breaking the crippling impasse on the all-important issue of cable carriage of digital signals during the transition — an impasse that threatens both the digital broadcast transition and public television generally.

Respectfully submitted,

ASSOCIATION OF PUBLIC
TELEVISION STATIONS

CORPORATION FOR PUBLIC
BROADCASTING

PUBLIC BROADCASTING
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Attachment

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**PUBLIC TELEVISION'S
TRANSITIONAL DIGITAL
CARRIAGE PROPOSAL**

Public television proposes a narrowly tailored, transitional digital carriage requirement that is designed to efficiently and quickly drive the digital broadcast transition and is constitutionally sound

1. BASIC ELEMENTS OF PROPOSAL

The core principle -- Cable systems would carry, in both digital and analog, the noncommercial television stations they are now required to carry only in analog. The same eligibility requirements would apply to stations seeking digital carriage as currently apply to analog stations, and the same protections against carriage of duplicative signals would apply. Consistent with current analog provisions, commercial stations would have the option to elect must carry or retransmission consent (as mandated by the Act), separately for each of their two signals.¹

Limitations on the requirement -- *First*, the requirement would initially apply only to systems with **at least 750 MHz** capacity, but by a date certain it would apply to all systems, regardless of capacity (subject to a small-system exception).² *Second*, small systems -- those with fewer than a specified number of subscribers -- would be exempted from the transitional

¹ Commercial broadcasters may have different views about how a **transitional** carriage requirement should apply to them.

² The Commission could establish a date certain, or, just as the current analog carriage rules provide for a sliding scale (the **more** capacity a system has, **the** more broadcast channels it must carry), the Commission could devise a similar requirement for systems below 750 MHz capacity.

camage requirement.³ **Third**, a 28 percent cap would be imposed on the amount of capacity that a cable system would be required to devote to carriage of all broadcast stations' signals, both analog and digital, eligible for carriage under this proposal. **Fourth**, a sunset provision would apply to cable operators' analog carriage requirement.

The 28 percent cap -- The present one-third cap on the amount of capacity a cable system must devote to camage of broadcast stations applies only to commercial stations; the carriage requirement for noncommercial stations is on top of the commercial cap. Our proposed 28 percent cap would apply to camage of both the analog and digital signals of both commercial and noncommercial stations.⁴ The proposed cap for the transition period would, therefore, be at least 15% less than the cap on the analog camage requirement upheld by the Supreme Court in *Turner II*. The reduction in burden would be even greater because the proposed 28% cap would be inclusive of noncommercial stations as well as commercial stations.

Sunset proposal -- Under our proposal, a cable system would no longer be obligated to carry stations' analog signals at such time as all of the system's subscribers that have digital receivers can view the station in digital and all of the system's analog subscribers can view the station in analog through downconversion. Cable systems have powerful incentives to install the necessary equipment to reach this sunset. It would free them of a dual carriage obligation. Moreover, a digital-only camage requirement would allow cable systems to reduce by half the capacity required for analog-only camage. This is because a 6 MHz *digital* broadcast signal can be accommodated in a 3 MHz cable channel, whereas a 6 MHz *analog* broadcast signal requires a 6 MHz cable channel, that is, twice as much spectrum.

³ For example in connection with rate regulation, the Act uses 1,000 subscribers as the cut-off for its "small system" exception. See 47 U.S.C. § 543(1).

Other provisions -- Pending before the FCC are proceedings that would resolve digital carriage obligations concerning:

- the definition of “primary video” (which will determine whether public broadcasting can continue to pursue an HDTV/multicast mix of digital services that it believes constitutes the highest and best use of its digital spectrum and is *essential* to public broadcasting’s future viability),
- the definition of “program-related,”
- PSIP carriage requirements and channel positioning,
- EPG carriage requirements,
- the application of the non-degradation principle to digital and
- tier carriage requirements.

Resolution of these issues has been pending for four years, should not be delayed further, and should apply to digital carriage during the transition,

II. THIS TRANSITIONAL CARRIAGE PROPOSAL IS CONSTITUTIONAL AND QUITE LIMITED

A.

We will not repeat here the arguments in favor of a digital carriage requirement during the transition. They have already been fully developed in numerous pleadings previously filed in this proceeding.⁵ We do, however, summarize how this particular proposal amply passes constitutional scrutiny.

⁴ As in the case of the present rule, the cap would apply only to stations entitled to mandatory carriage (whether or not they elect retransmission consent). If a cable system reaches the cap, it could elect which signals not to carry.

⁵ See Joint Petition for Reconsideration of the Association of America’s Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting in CS Docket 98-120, at 14-17 (filed April 25, 2001); NAB/MSTV/ALTV Petition for Reconsideration and Clarification in CS Docket 98-120, at 6-9 (filed April 25, 2001); NABBIMSTVIALTV Opposition to Petitions for Reconsideration in CS Docket 98-120, at 2-5 (filed May 25, 2001); Joint Reply to Oppositions to Petitions for Reconsideration of the Association of America’s Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting in CS Docket 98-120, at 2-6 (filed June 7, 2001); NAB/MSTV/ALTV Reply to Oppositions to Petitions for Reconsideration in CS Docket 98-120, at 3-5 (filed June 4, 2001).

The same public policy reasons in favor of analog carriage requirements found to be sufficient by the Court in *Turner II* apply with equal or greater force to the proposal here:

- preserving the benefits of free, over-the-air local broadcast television;
- promoting the widespread dissemination of information from a multiplicity of sources and
- promoting fair competition in the market for television programming.⁶

Moreover, our proposed carriage requirement is supported by additional compelling policy objectives. It would, without question, propel the digital broadcast transition, which would in turn:

- allow the government to reclaim the analog spectrum and to auction it for advanced telecommunications services or allocate it for unlicensed uses;
- avoid the waste of indefinite dual analog/digital broadcast operations; and
- achieve more efficient use of the spectrum.

Indeed, as the Congressional Budget Office concluded, digital carriage during the transition is essential to a successful transition. With close to 70% of American homes equipped with cable, it is a mathematical impossibility that the country will achieve 85% digital penetration – which is the statutorily-defined milestone for the end of the transition – without cable’s carrying broadcasters’ digital signals in the interim,

Moreover, the burden imposed on cable systems by our proposal would, because of its limiting features, be substantially less than the burden imposed on cable by the analog carriage requirement mandated by Congress in 1992 and upheld by the Supreme Court in *Turner II*. The 28 percent cap that would apply to carriage of both *the* analog and digital signals of the commercial **and** noncommercial stations is well below the one-third cap on just the analog

⁶ *Turner II*, 520 U.S. at 189 (quoting *Turner I*, 512 U.S. at 662)

signals of commercial stations that was held by the Supreme Court to be appropriate for furthering the substantial government interests in *Turner*. Moreover, the great majority of network affiliated stations have foregone must carry status. Cable systems carry them pursuant to retransmission agreements that cable systems sought out and voluntarily entered into. Accordingly, the theoretical burdens of a proposal that requires dedicating up to 28% of cable capacity to broadcast stations is in large part only theoretical.

B.

The digital transition was formally launched when the FCC adopted the DTV standard in 1997.⁷ The transition was targeted to end in 2006. Cable has had no carriage obligations with respect to digital signals for six years.⁸ It does not seem unreasonable that two-thirds of the way through the originally prescribed transition period, cable should have to shoulder some responsibility for helping to implement the transition.

The Commission's original *Notice of Proposed Rule Making* about possible carriage requirements during the transition listed seven options, in increasing degrees of laxity.⁹ The second most lax proposal (the "no must carry" proposal being the most lax) was called the "Deferral Proposal," and it suggested that a transitional digital carriage requirement be deferred until May 1, 2002. Thus, the cable industry has to date been the beneficiary of a *de facto* deferral, due to the Commission's delay, substantially exceeding that contemplated as a lenient rulemaking option.

⁷ See *Fifth Report and Order* in MM Docket 87-268, 12 FCC Rcd 12809 (1997); *Sixth Report and Order* in MM Docket 87-268, 12 FCC Rcd 14588 (1997).

⁸ The absence of a prospective cable carriage obligation hurt the transition even before stations put digital signals on the air because the uncertainty about carriage obligations hurt financing plans necessary for stations to make the conversion.

⁹ See *In re Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules*, Notice of Proposed Rule Making, 13 FCC Rcd 15092, at ¶ 39-51 (1998).

Another option proposed by the Commission -- the “system upgrade proposal” -- would have required systems to add DTV signals as those systems added capacity in order to minimize disruption of cable’s carriage of existing program services. In fact, during the six years since the standard was adopted, cable system capacity has soared. (According to FCC statistics, as of July, 2001, 68.7% of cable systems had capacity of 750 MHz or more.) But cable operators have used this greatly expanded capacity not to carry the fledging and competitive DTV broadcast services as they came on the air, but instead, to carry new cable programming services in which they often had financial interests. Thus, cable systems should not be heard now to complain about the disruption to their existing service caused by having to carry broadcasters’ digital signals.

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Public television’s proposal falls squarely within the ambit of the various options the Commission laid out in 1998.¹⁰ Moreover, it is merely a more sharply focused version of what APTS, CPB and PBS proposed in their June 11, 2001 Comments in this proceeding. Accordingly, although the Commission may wish to put it out on public notice, that is certainly not a requirement under the Administrative Procedure Act. **As** with its earlier proposal, the public broadcasting community advances this as a reasonable and limited suggestion to kickstart market forces, and it remains eager to engage in discussions about variations or different concepts.

¹⁰ See *supra* note 9