

November 10, 2003

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

*Ex Parte Notice*

Re: Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120  
(also CS Docket Nos. 00-96 and 00-2)

Dear Ms. Dortch:

Our client, Comcast Corporation (“Comcast”), has been asked by Commission staff for its views on the so-called “either/or” proposal under which broadcasters could elect must-carry rights either for their analog or their digital transmissions during the transition. On behalf of Comcast, we are pleased to have the opportunity to respond.

Comcast firmly believes that the Commission does *not* have the authority to expand broadcasters’ must-carry rights in any respect, including through adoption of the “either/or” proposal. As Comcast’s *ex parte* letter of October 16 discusses in detail, it is not at all clear that even the current analog must-carry requirements would pass judicial muster today, given how dramatically the marketplace environment has changed since the period (1988-1991) on which Congress’s findings justifying those rules were based.<sup>1</sup> Expanded must-carry requirements would be even more difficult to sustain given the absence of clear statutory authorization, the substantially weaker case for each of the governmental interests relied upon in the *Turner* litigation, and the substantially greater burdens that expanded must-carry rights would impose on cable operators and programmers.

Despite representations to the contrary, the “either/or” proposal is not a “middle ground” that somehow manages to avoid the constitutional and statutory pitfalls of both dual and multicast must-carry. Like those proposals, an “either/or” option would constitute a change to and expansion of broadcasters’ current must-carry rights. Today, broadcasters’ must-carry rights consist solely of the ability to demand carriage of a single analog signal (or, for those broadcast licensees that have ceased analog transmissions and relinquished control of the additional 6 MHz they were loaned for purposes of the transition, a single digital signal -- which the Commission has found to be “essentially a trade-

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<sup>1</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a), 106 Stat. 1460 (“1992 Cable Act”).

off”<sup>2</sup>). And, today, a broadcaster who believes that a cable system would carry its analog broadcast signal without governmental coercion is free to negotiate a retransmission consent arrangement relating to that signal, but it does not have the right to demand must-carry for its digital broadcast signal; for digital carriage, the broadcaster must compete on the merits against other sources of programming. By contrast, under the “either/or” proposal, the broadcaster who believes a cable system would carry its analog signal in the absence of governmental coercion would be free to demand compulsory carriage of its digital signal, thereby reducing the ability of the cable operator to choose other programming that it believes its customers will value more (and diminishing the opportunity for non-broadcast programming networks to compete successfully). For the majority of commercial broadcasters that today arrange analog carriage under retransmission consent rather than must-carry, an “either/or” approach would not be a “trade-off” but an opportunity to demand digital carriage arrangements that would otherwise be left to voluntary commercial negotiations. For these broadcasters, the effects would be precisely the same as adoption of a dual must-carry regime.<sup>3</sup>

Were broadcasters’ must-carry rights to be expanded in this fashion, cable operators and programmers could reasonably be expected to initiate judicial proceedings that would review the same factors that were assessed in the *Turner* cases -- but this time the review would take place in a dramatically different legal and factual context, on a decidedly different record. A court would undoubtedly start with the statute, which lacks any clear authorization for an “either/or” approach. Indeed, the only relevant language appears to be that which refers to the establishment of rules to “ensure cable carriage of such broadcast signals of local commercial television stations *which have been changed* to conform” with standards for advanced television. 47 U.S.C. § 534(b)(4)(B) (emphasis added). A broadcaster that has not yet relinquished its analog signal has not yet “changed” and the statute would thus appear to preclude adoption of the “either/or” proposal.<sup>4</sup>

The statutory analysis would next be informed by the constitutional considerations that were discussed at length in the *Turner* cases. The case for each of the governmental interests relied upon to support analog must-carry in *Turner* is weaker when used in an attempt to support any expansion of must-carry, including through an “either/or” approach. As for preservation of the benefits of free, over-the-air television, this situation by definition does not implicate Congress’s desire (in the Court’s words) “to preserve the *existing structure* of the Nation’s broadcast television medium,” *Turner I*, 512 U.S. at 652 (emphasis added), and there are no legislative findings that failing to supplement

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<sup>2</sup> *DTV Must-Carry Order* ¶12.

<sup>3</sup> *Accord* Ex Parte Letter of A&E Television Networks and Courtroom Television Network 8 (Nov. 5, 2003) (“‘Either/or’ is really just a back door way of requiring dual carriage, which the Commission has already rejected.”).

<sup>4</sup> The Commission has already adopted this reading of the statute. *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, 15 FCC Rcd. 20845 ¶ 65 & n.128 (2000) (determining that “cable systems are *ultimately* obligated to accord ‘must carry’ rights to local broadcasters’ digital signals . . . *after the transition to DTV is completed and broadcasters’ analog spectrum is returned*” (emphasis added)); *WHDT-DT, Channel 59, Stuart, Florida*, 16 FCC Rcd. 2692 ¶ 12 (2001) (“In the *700 MHz Order* . . . the Commission clearly stated that digital television signals have carriage rights under the Act and these rights exist now in situations *where the transition is complete*.” (emphasis added)).

broadcasters' existing analog must-carry rights with a new "either/or" option presents a "real threat" to the viability of local broadcasters. *See Turner II*, 520 U.S. at 196.<sup>5</sup> The governmental interest in promoting "the widespread dissemination of information from a multiplicity of sources" is plainly not advanced by adopting an arrangement that will result in some broadcasters occupying more of a cable operators' bandwidth than they do now; to the extent that a broadcaster who believes it can negotiate retransmission consent for its analog signal secures compulsory carriage of its digital signal, the effect is merely to permit the same speaker to occupy two channels (and if simulcast requirements go into effect, it will be with programming that is increasingly duplicative). The governmental interest in promoting fair competition has less to do with must-carry than ever before. A cable company's incentive to choose the programming that it believes its viewers will value most is immeasurably increased by the competition in every market among cable operators and two strong satellite competitors (to say nothing of overbuilders and the recently launched third DBS provider), and the "problem" posed by vertical integration between cable operators and programmers has been vastly reduced by marketplace forces. Further, the public interest in "fair competition" cannot ignore the rights of non-broadcast programmers to compete on the merits for carriage.

A judicial review process would also look to whether the "either/or" approach to must-carry was "narrowly tailored" to promote legitimate governmental interests. Here, the absence of congressional findings (or even administrative record evidence) is glaring. In the analog must-carry context, the Court was able to find -- and placed significant reliance on the finding -- that the "actual effects are modest." *Turner II*, 520 U.S. at 214. The detailed factual record amassed by Congress in several years of hearings, supplemented by another 18 months of detailed factual development by the District Court,<sup>6</sup> allowed the majority to find that only 1.18 percent of the broadcast channels that were

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<sup>5</sup> As noted in Comcast's letter of October 16, the conclusion that such a threat existed in 1992 rested heavily on facts that are no longer true. But even if one ignored the many changes in the competitive marketplace that have occurred since 1992, there is no basis for making any determinations about how the lack of must-carry for digital signals -- during a time when analog broadcasting is continuing and analog must-carry rights are not being eliminated -- could cause the "economic viability of free local broadcast television [to] be seriously jeopardized," *1992 Cable Act* § 2(a)(16). It would be extremely difficult to evaluate this factor in isolation, teasing it out from the many other variables in the digital transition (such as the failure of hundreds of broadcasters to begin broadcasting digital signals in accordance with the FCC's deadlines) and the larger changes that are occurring in video distribution and consumption. But clearly the burden would be on the Commission to make this showing; recall that the *Turner I* remand was ordered because the government had not yet sustained "two essential propositions": that significant numbers of broadcast stations would be refused carriage in the absence of must-carry, and that the stations denied carriage would either deteriorate to a substantial degree or fail altogether. *Turner I*, 512 U.S. at 666-67. The Court also remanded for "findings concerning the *actual effects* of must-carry on the speech of cable operators and cable programmers -- *i.e.*, the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry requirements by devoting previously unused channel capacity to the carriage of local broadcasters." *Id.* at 667-68.

<sup>6</sup> Notably, the broadcasters' *Turner I* brief emphasized the abundant record underlying the analog must-carry requirement, citing "lengthy committee hearings in 1988, 1989, 1990, and 1991," the "voluminous empirical record" concerning the cable industry in general, and the "two separate hearings, and hundreds of pages of testimony" concerning the must-carry provisions alone. Brief of Appellee National Association of Broadcaster at text accompanying nn. 6-7, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (No. 93-44) (filed Dec. 7, 1993).

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carried were added because of must-carry, that cable operators were able, despite must-carry, to continue to carry “99.8 percent” of the channels that they previously carried, that 94.5 percent of cable systems did not have to drop any programming to make room for must-carry signals, and that the remaining 5.5 percent only had to drop 1.22 services from their line-ups. *See Turner II*, 520 U.S. at 214. No comparable findings have been made -- or could be made -- in the case of an “either/or” approach. The Commission could only guess as to the number of broadcasters that would choose this option and as to the effect that such choices would have on other video programming (or, indeed, on other services that cable operators might use the bandwidth to provide); it certainly has no solid evidentiary basis for a determination that the effects would be “modest.”<sup>7</sup>

An “either/or” approach may have additional difficulties that could be identified if subjected to full notice and comment scrutiny, after articulation of a specific proposal (significantly, an “either/or” proposal is not included in the currently pending Further Notice of Proposed Rulemaking). For example, what would be the timetable for implementing such a proposal, and what effect would such an approach have upon existing retransmission consent agreements and must-carry elections? To the extent a broadcaster is continuing to transmit an analog signal and elects digital must-carry, would the digital signal entitled to carriage consist of a single programming stream or several? That the answers to these and many other questions are unknown and unknowable at this time makes it all the more clear that the Commission should refrain from expanding broadcasters’ must-carry rights in any respect, including by adoption of the “either/or” approach.

This letter is filed pursuant to Section 1.1206(b)(2) of the Commission’s rules. Please let me know if you have any questions.

Respectfully submitted,

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James L. Casserly  
Ryan G. Wallach

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<sup>7</sup> Must-carry requirements adopted without a strong -- and current -- evidentiary foundation would presumably meet the same fate as those struck down in *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1457-63 (D.C. Cir. 1985), and *Century Communications Corp. v. FCC*, 835 F.2d 292, 300-05 (D.C. Cir. 1987). The Commission’s *Turner I* brief expressly relied on the “extensive legislative record, reduced to congressional findings of fact,” as a basis for distinguishing the *Quincy* and *Century* precedents. *See* Brief for the Federal Appellees at n.17, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (No. 93-44) (filed Dec. 6, 1993).