April 15, 2004

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Chairman Michael J. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Submission in MB Docket Nos. 03-15 & 98-120

Dear Chairman Powell:

In recent weeks, there have been discussions with the Media Bureau about its most recent proposals with respect to the digital transition. We write now to offer comments on the Bureau Plan and to suggest different approaches to speeding up the transition. On Tuesday, April 13, 2004, the Media Bureau proposed a revised version of its earlier ideas. While the revisions constructively address some of the defects in the earlier plan, fundamental flaws remain because the Media Bureau's proposal would condone and encourage cable's down-converting (i.e., unlawfully degrading) broadcasters' digital services at the head-end, and it would thwart the benefits that digital was supposed to deliver to the public. It would also thwart Congress's main purpose for the transition, which was to assure universal availability of digital services to the American public.

We appreciate that the Bureau has moved the target date for its plan to end the transition back from 2006 to 2009, acknowledging the enormous dislocation and viewer disenfranchisement that its earlier concept would have brought about. Broadcasters sincerely hope and believe that, with the steps the Commission has taken so far and the further steps that we recommend below, we will reach the end of the DTV transition in most markets by 2009 without the need to go outside the statutory framework as would be the case with the Bureau Plan. This letter explains that there are proposals already in the record that would bring a prompt end to the transition within the boundaries of Congress's mandate.

You and this industry have taken great strides towards completing the transition to digital television. You adopted revised build-out rules that have been extremely successful in getting TV stations on the air in digital; today 99.6 percent of all TV households are in markets with at least one DTV signal. The Powell Plan that you introduced in 2002 recognized the key fact that all parts of the television industry – programmers, stations, multichannel video programming distributors and manufacturers – must play an active role in the transition to digital. That plan also recognized the importance of the availability to consumers of high definition signals in high definition format. And, you have adopted rules requiring DTV tuners in new television sets, plug and play rules and the broadcast flag. Each of these steps will contribute to bringing the transition to a successful close.

Congress sought to achieve three goals in the DTV transition:

- Bring the benefits of digital technology with its potential for more programming options and advanced services to *consumers*;
- Avoid the loss of free television to large numbers of consumers stranded with analog-only receivers; and
- Reclaim channels 52-69 to be reallocated for other purposes.

The Media Bureau Plan advances only the third goal; the others would be left to the marketplace to achieve or not.[1] The Commission, however, is not authorized to pick and choose among the goals Congress set for the transition; it must treat them all as equally important. Congress's rejection of band clearing plans that would reduce the level of free television service shows that early return of spectrum at the cost of television service is contrary to Congressional intent.[2]

Broadcasters do not wish to incur dual operating costs during the transition any longer than necessary; thus we have a strong interest in expediting the transition. That is why we have supported various initiatives that the Commission has launched under your leadership for promoting the transition, including making HD services available to consumers, and it is also why we submitted a middle ground, either-or proposal for interim cable carriage. That proposal provided that cable systems could cease carrying broadcasters' analog signals if they carried broadcasters' full digital signals and provided for down-conversion only *at the home* where required, so that analog sets would continue to receive service (down-converted at the set), while digital sets would receive full digital service. Under that scenario, all the covered cable homes would count towards the 85 percent threshold in a manner consistent with Congressional intent. Down-conversion at the head-end as proposed by the Media Bureau would lead in the wrong direction by counting towards the 85 percent benchmark households that do not receive true digital service, which, in turn, would discourage consumers from buying digital sets, discourage development of digital services and undercut the Commission's efforts to facilitate the transition for consumers.

The public should have access to all free digital services that optimize consumer benefits – HDTV for sure, but also, as licensees determine in different market circumstances, innovative multicast services. The opportunity for these new universal free services was one of the key reasons Congress authorized the DTV transition. The consumer appeal of this

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[1] The Bureau appears to believe that full carriage of local broadcast digital signals will occur on cable systems through the operation of marketplace forces. The gravamen of the 1992 Cable Act, however, was that cable systems' carriage decisions were not based on consumer preference but on the opportunity to disadvantage competitors for advertising and ratings.

[2] Auction Reform Act of 2002, Pub. L. No. 107-195, § 6, 116 Stat. 715 (2002).

HDTV/multicast mix will help drive the transition. On January 8 and 13, 2004, the NBC and CBS Affiliates filed declarations demonstrating (1) that the multicast services they would provide would serve consumer interests, (2) the need for cable carriage, (3) the disappointing experiences of stations' seeking to negotiate for multicast carriage and (4) the importance of multicasting to the health of the public's television service. NBC, Disney and the ABC, CBS and NBC affiliate associations have strongly supported multicast carriage.

The Media Bureau's set of ideas for the digital transition would create serious disincentives for these innovative services – to the detriment of consumers and contrary to the Act. Accordingly, the National Association of Broadcasters, MSTV, and the ABC, CBS, Fox and NBC affiliate associations join in this critique of the Media Bureau proposals and suggest alternatives that are consumer-friendly, comport with Congressional intent and do not violate the Act. We also collectively urge the Commission to make clear that cable systems may not strip multicast services out of broadcasters' digital signals.

Injury To Consumers; Inconsistency With Congressional Intent

The crux of the Bureau's plan is to count cable and satellite homes as "digital" when, in reality, they would receive only "down-converted" analog versions of digital signals. That is, subscribers who had purchased digital sets would not be able to view digital broadcast signals in the high quality format in which they were transmitted by broadcasters. The Bureau would nonetheless count all cable homes in a market toward the 85 percent benchmark for declaring the digital transition complete, add in homes of DBS subscribers – though they presumably also would receive degraded signals – and thereby deem the transition to be complete in that market. At that point broadcasters would be required to turn in their analog channels, their analog signals would go dark, and service to over-the-air viewers with analog receivers would disappear.[3]

The underlying purpose of the 85 percent benchmark for ending analog broadcasting was to have the pace of the digital transition set by consumers. By focusing on the ability of consumers to *receive digital signals in their homes*, Congress intended for consumers to have the choice of viewing local broadcast signals in digital format over new receivers or in analog format with converters attached to their old analog sets.[4] In establishing the condition for terminating analog service, Section 309(j)(14)(B)(iii) mandates that viewers receive a digital signal in the home to count toward the 85 percent benchmark. Thus, Congress made clear that cable and over-the-air homes with analog sets not equipped with down-converters do not qualify.

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[3] Cable homes with only analog receivers would also be stranded if cable service is interrupted during an emergency or disaster since no over-the-air analog service would be available.

[4] The distinction between conversion at the head-end or at a consumer's home is critical. In the latter case, while not being able to view HDTV, consumers could still have access to the full range of other broadcast digital services. Under the Bureau Plan with conversion at the head-end, consumers would receive only a version of what they get today.

The revised Bureau proposal would apparently give broadcasters the right to choose at the end of 2008 between cable pass-through of their digital signals (although the Bureau apparently would not determine now whether that would require carriage of the entire digital signal even then) or down-conversion of these digital signals to analog at the cable head-end.[5] Under the first option, viewers with analog sets would lose local broadcast service, and under the second option, cable subscribers with digital sets would be denied broadcasters' digital services unless they could negotiate for carriage of the digital signal with local cable systems.[6] Under either scenario, cable operators would bear no responsibility for the digital transition by providing for down-conversion in analog homes.

The purpose of the transition is to convert the American system of broadcasting to digital, ultimately for the benefit of the American consumer, not for the benefit of the broadcaster or the cable operator.[7] Congress directed the FCC to fashion transitional rules designed to ensure that the viewer gets access to broadcasters' digital signals, whether HDTV or multicast or a mix. The Media Bureau proposal would sacrifice that goal to focus exclusively on the goal of retrieving the spectrum for new purposes (whose speculative value has not been weighed against the injury the Bureau Plan would impose). As noted earlier, while spectrum recovery is also a goal of the digital transition, it cannot be pursued to the exclusion of protecting television viewers and fostering digital television service to the public.

The Bureau's idea would not only fail to advance, but also would retard, the primary purpose of the transition – to deliver improved digital signals to the public and replace viewer reliance on analog-quality service. Several specific harms to consumers would result:

- *No assured HDTV for cable viewers with digital sets*: Cable homes with digital sets would not be assured of any access to broadcast HDTV or multicast services because cable systems could down-convert at the head-end, both before and even after the give-back (unless under the revised plan the television station elected digital pass-through at the cost of disenfranchising cable subscribers with analog sets).

- *No assured HDTV for DBS viewers with digital sets*: DBS systems could presumably down-convert broadcasters' HDTV services pursuant to the Media Bureau's proposal

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[5] Subsequent reports in the trade press have suggested that perhaps this would be the cable operator's choice, not the broadcaster's.

[6] Based on our experience with these kinds of negotiations, broadcasters generally have been unsuccessful in working out carriage deals that pass all of their free digital services through to viewers.

[7] 142 Cong. Rec. H8254-03 (explaining that broadcast licensees will have to make a huge investment in the digital transition "[t]hat is for the benefit of the public, which is going to be watching a new kind of technology coming over their television sets") (Rep. Dingell).

indefinitely into the future, so that even DBS homes with DTV sets would not receive HDTV service.[8]

- *Slowed access to affordable digital sets*: Cable subscribers with analog sets would have reduced incentives to upgrade to digital sets because they would have no assurance of receiving broadcasters' digital signals after making that investment. As a consequence, the price for digital sets would remain high, thereby discouraging their adoption by American viewers.

- *No television service of any kind for analog over-the-air households, including many rural and poor viewers*: Over-the-air viewers with digital sets would continue to receive service after 2009, but over-the-air viewers with analog sets, unless they purchased set-top boxes, would lose service. Many rural viewers and the poor would be disenfranchised, and broadcasting would lose its proud achievement of providing universal service.[9]

Additional Public Interest Harms

In addition to the injuries to consumers described above, the Media Bureau's proposal would harm the public interest in the following ways:

- *Harm to the DTV transition*: The incentive for consumers to obtain DTV receivers or converters would decline, delaying or preventing the benefits of digital technology flowing to consumers. The consumer benefits of the Commission's tuner and plug and play decisions would largely be lost since most consumers would receive only analog versions of DTV signals.

- *Harm to manufacturers*: Receiver manufacturers would suffer because the plan would discourage the demand for digital sets and for new digital features that receiver manufacturers have been mandated to produce in increasing volume.

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[8] Allowing DBS providers to deliver high definition *distant* signals to subscribers would not be a remedy and indeed would harm *local* digital broadcast service. Like cable operators, DBS providers should be required to provide local digital signals without degradation, as the Act requires. *See* Letter from Marsha J. MacBride and Benjamin F.P. Ivins, National Association of Broadcasters, to Michael K. Powell, Chairman, FCC, in MB Docket No. 03-15 (Mar. 22, 2004).

[9] Although the Bureau appears to recognize the need for Congressional action to take care of consumers who would be stranded by the Bureau Plan, statements by Bureau officials seem to indicate that the Commission could act on its own to adopt the Plan. Surely, the Commission could not consider taking any action that would directly harm millions of American consumers. It is worth noting in this regard that even the cable industry has concluded that a Berlin-like forced transition is not appropriate for the United States. *See* Letter from Michael S. Schooler, NCTA, to Marlene H. Dortch, CS Docket Nos. 98-120, 03-15 (March 29, 2004) & Attachment.

- *Harm to diversity*: Cable programmers would not have the greater access to cable carriage that would result if cable systems were to transmit broadcasters' digital signals from their head-ends, which would free up 50 percent of the capacity that cable systems currently devote to carriage of broadcast signals.[10] Also, programmers that seek access via broadcasters' multicast services would be thwarted because broadcasters will not roll out multicast services without cable carriage of those services.

- *Harm to localism and public service:* Without access to analog over-the-air viewers, broadcasters' viewing base would be gutted. By not being able to deliver HDTV and multicast services to cable and DBS subscribers with HDTV sets, they would be relegated to second-class status. Avoiding that result and strengthening the free, over-the-air system were the reasons the Commission and Congress supported the DTV transition in the first place. Broadcasters' efforts to deliver localized multicast services (local news and weather and local sports coverage, for example), as well as multicast services offered by independent programmers, would be aborted.[11]

Violation Of The Act

Cable's down-conversion of broadcasters' digital signals at the head-end would contravene the Cable Act's bar on material degradation of local broadcast signals. 47 U.S.C. §§ 614(b)(4), 615(g)(2). A similar provision applies to DBS carriage of local broadcast signals. *Id.* § 338(g). The Bureau Plan, however, rests on cable systems' doing what the Communications Act prohibits – carrying local broadcast signals in a degraded fashion that gives cable and DBS subscribers less than they would receive if they obtained the signals over the air. The Commission, indeed, has already recognized under the Act that "a broadcast signal delivered in HDTV must be carried in HDTV."[12] The Bureau proposal flies in the face of that conclusion.

As discussed above, the Bureau's proposal would violate the Act in a second important respect. Congress directed that the transition end when 85 percent of households in a market are capable of receiving *digital* signals in their homes. *See* 47 U.S.C. § 309(j)(14)(B). An MVPD that delivers digital signals that have been down-converted to an *analog* format at the head-end does not carry "the *digital* television service programming channels" of local broadcast stations as required by the Act, and therefore, the households it serves do not count toward the 85 percent benchmark.

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[10] This would not be the case where broadcasters chose full digital pass-through.

[11] This harm could be avoided under the revised Bureau plan by broadcasters' choosing digital pass-through, but only at the cost of cable homes with analog sets losing local broadcast service.

[12] First Report and Order and Further NPRM, FCC 01-22, Jan. 23, 2001, at ¶ 73.

A Consumer-Friendly And Statutorily-Permissible Alternative

A proposal in violation of the Act, Congress's intent and consumers' interests is not necessary to complete the transition speedily. Congress has already enacted a statutory framework that strikes a fair, reasonable and consumer-driven balance among various policy considerations. Proposals for facilitating and expediting the digital transition should stay within the boundaries of that well-conceived framework. That is what the Commission accomplished by dealing with such issues as cable compatibility, the broadcast flag and tuner requirements – all necessary for a successful DTV roll-out. But the most central issue of cable carriage has not been finally resolved even after five years of deliberations. It is resolution of that issue that remains the missing piece in the FCC's otherwise constructive implementation of the Act's intent.

A middle ground position already exists in the record that would advance the transition consistent with the Act without harming consumers, degrading broadcasters' digital signals, counting households that do not receive true digital service toward the 85 percent benchmark or creating a disincentive for the purchase of digital sets.[13] MSTV and NAB proposed in November 2003 that a cable system be permitted to "terminate carriage of a station's analog channel *if* the cable system (a) passes through the station's digital signal to all digital television receivers and (b) down-converts the digital signal for receipt at no extra charge on all analog-only receivers for carriage on the analog basic tier."[14] Specifically, that policy would:

- Ensure that all non-subscription content in digital signals are passed through to subscribers' homes *without material degradation*; this is both consistent with the Act and encourages digital set penetration;
- Allow MVPD households with analog sets to continue to receive local broadcast signals by down-converting *at the set*; and
- Count toward the 85 percent threshold only those households that receive undegraded digital signals – also consistent with the Act.

There are other actions that the Commission can take that will facilitate the conclusion of analog broadcasting and the return of spectrum for other purposes. The Commission should bring to a rapid conclusion long-pending negotiations with Canada to

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[13] This proposal imposes no material burden on cable operators. At its option, a cable system could cease carrying broadcasters' analog signals when it had provided digital set-top boxes to all of its subscribers. Cable operators recently have volunteered to provide new set-top boxes in order to ensure broad-based channel blocking capability by all consumers (in an effort to avoid Congressional decency mandates).

[14] Letter from Edward O. Fritts, NAB, and David L. Donovan, MSTV, to Michael Powell, Chairman, FCC, in CS Docket Nos. 98-120, 00-96, at 2 (Nov. 25, 2003).

provide interim DTV channels for all U.S. stations and should initiate discussions to develop a final DTV channel agreement with Canada and Mexico. The Commission should require stations with analog and DTV assignments in the "core" to make a channel election in 2005.

Broadcasters are also prepared to work with the Commission on DTV repacking and a final DTV assignment plan. To that end, the Commission should avoid taking steps that will make it more difficult to move to an all-digital environment.[15] Broadcasters will cooperate with the Commission to develop better market-by-market measurements of DTV receive-capability so that the Commission can accurately determine when the transition should end.

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The Commission and the country are on the threshold of achieving the fruits of the arduous and risky digital transition – the ubiquitous availability of a mix of new services, HDTV and multicast, to all Americans over sets that are becoming increasingly affordable and of higher and higher quality. It will take some time for this quickening evolution to reach its full potential. Only prompt resolution of cable carriage issues as required by Congress remains to be undertaken. In addition to American viewers, cable operators, receiver manufacturers, broadcasters and programmers will benefit from a fully-formed transition plan that includes cable carriage. This is the path Congress clearly had in mind when it adopted the 1992 and 1997 legislation.

The "short cuts" being considered by the Media Bureau would hurt all of these interests. Instead, the Commission should remain faithful to the path that Congress correctly believed would best serve consumer interests.

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[15] Comments of the Association for Maximum Service Television and the National Association of Broadcasters in MB Docket No. 03-15 (Apr. 21, 2003).

Respectfully submitted,

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