

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Carriage of Digital Television Broadcast)	CS Docket No. 98-120
Signals: Amendments to Part 76)	
of the Commission's Rules)	
)	

**REPLY IN SUPPORT OF THE
PETITION FOR RECONSIDERATION OF THE
NATIONAL ASSOCIATION OF BROADCASTERS AND
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

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EXECUTIVE SUMMARY

The National Association of Broadcasters and the Association for Maximum Service Television, Inc. hereby file this reply in support of their petition for reconsideration of the Commission's *Second Report and Order*.

As NAB and MSTV demonstrated, the Commission erred in refusing to require cable carriage of local commercial television stations' analog *and* digital signals during the transition and in refusing to require cable carriage of local broadcasters' digital multicast programming streams both during and after the transition. None of the oppositions filed by cable operators and programmers to NAB/MSTV's reconsideration petition rehabilitate the critical flaws in the *Second Report and Order* that compel reconsideration here:

- The *Second Report and Order*, like the *First Report and Order*, provides *no* explanation for why the Cable Act does not *require* carriage of *all* the signals of local commercial television stations during the transition — both digital *and* analog;
- The *Second Report and Order* improperly applied strict scrutiny, rather than the intermediate scrutiny that the Commission acknowledges is appropriate, by repeatedly considering whether transitional and multicast carriage rules are “necessary” or “essential” to the promotion of governmental interests;
- The *Second Report and Order* erroneously found that neither transitional nor multicast carriage furthered the important governmental interests recognized in *Turner* — promoting the benefits of free, over-the-air local television and ensuring diverse broadcast programming — as well as other important governmental interests, such as advancing the digital transition and freeing spectrum for vital public safety services, that the Commission may properly consider; and
- The *Second Report and Order* failed to consider the extent to which the rapid growth of cable capacity in recent years has rendered negligible any burden that must-carry imposes on cable operators. The plans of large operators to simulcast *all programs* in digital and analog put to rest its cable capacity claims.

The cable oppositions largely — and at times completely — neglect these four important issues that are so central to the case for reconsideration here. Instead, they devote much of their attention to a host of issues relating to whether must-carry is fair. But Congress considered

extensively and long ago resolved that question when it required cable operators to carry local broadcasters' signals as a means of ensuring that cable operators would not act upon their natural incentives to weaken over-the-air broadcasting as a competitive medium. The Supreme Court affirmed this congressional judgment and it is not within the scope of the Commission's authority to reverse the course established by Congress. The focal point for the Commission must be the text of the Cable Act, Congress's extensive legislative findings, and the interests Congress specified in a vibrant system of local broadcasting and the transition to digital television — each of which supports transitional *and* multicast carriage of local broadcasters' signals.

For these reasons, NAB and MSTV respectfully request the Commission to reconsider its *Second Report and Order*.

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The National Association of Broadcasters (“NAB”) and the Association for Maximum Service Television, Inc. (“MSTV”)¹ hereby submit this reply in support of their Petition for Reconsideration of the *Second Report and Order*² in this proceeding.³

Although cable operators and programmers (collectively “Cable”) have raised a flurry of arguments opposing digital carriage rules, they notably do not refute the key arguments compelling reconsideration:

- The Commission has not explained how the plain language of the Cable Act can be reconciled with the agency’s decision;
- The *Second Report and Order* incorrectly used strict scrutiny to evaluate digital carriage rules;

¹ NAB is a non-profit, incorporated association of radio and television stations. NAB serves and represents the American broadcasting industry. MSTV represents over 500 local television stations on technical issues relating to analog and digital television services.

² Second Report and Order and First Order on Reconsideration, *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005) (hereinafter *Second Report and Order*).

³ Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., CS Docket No. 98-120 (filed Apr. 21, 2005) (hereinafter Reconsideration Petition).

- Carriage of multicast signals would materially advance important governmental interests supporting must carry; and
- Cable capacity is more than sufficient so that mandating transitional and multicast carriage of broadcast digital signals would present no significant constitutional issue.

Accordingly, the Commission should grant the Reconsideration Petition.

I. THE OPPOSITIONS FAIL TO SHOW THAT THE COMMISSION JUSTIFIED ITS CONCLUSION THAT THE CABLE ACT DOES NOT REQUIRE TRANSITIONAL CARRIAGE.

In the *Second Report and Order*, the Commission concluded, with no supporting analysis whatsoever, that the 1992 Cable Act “is ambiguous on the issue of dual carriage.”⁴ But, as NAB/MSTV demonstrated in their Reconsideration Petition, the Commission’s decision must be reconsidered because the Commission, now *in two separate decisions*, has failed to provide *any* explanation for why the plain language of Section 614(a) of the Act, which requires cable operators to carry “the signals of local commercial television stations,” is supposedly ambiguous and does not require carriage of digital signals.⁵ It is hornbook law that a conclusory statement by an agency declaring a statute ambiguous will not suffice as reasoned decisionmaking. *See, e.g., Bowen v. American Hosp. Ass’n*, 463 U.S. 29, 43 (1983).

Now, the cable operators and programmers — in ten separate oppositions, spanning hundreds of pages — have failed to even attempt to show, let alone demonstrate, that the Commission ever did in fact explain how Congress’s direct command in Section 614(a) leaves any ambiguity. Indeed, Cable offers no explanation whatsoever as to the meaning of Section 614(a). Cable’s failure to show the Commission where it analyzed the statute, as required by the

⁴ *Second Report and Order* ¶ 13.

⁵ Reconsideration Petition at 4-6.

Administrative Procedures Act,⁶ only serves to highlight the procedural error committed by the Commission, compelling reconsideration here.

In light of the plain words of Section 614(a), which *require* carriage of both signals, the Commission should never have even reached the question whether a transitional carriage requirement would satisfy *Turner*.⁷ There was no need to. The Commission, like all federal agencies, is obligated to follow the command of Congress. It is not up to the agency to consider the constitutionality of the choices Congress made in enacting the must-carry requirements.⁸ But even assuming *arguendo* that it was proper to address the constitutional issue (which it was not), the Commission erred in that analysis as well, as we discuss in Part II below, by applying the wrong level of constitutional scrutiny.

II. THE COMMISSION APPLIED THE WRONG LEVEL OF FIRST AMENDMENT SCRUTINY.

There is no dispute that, if digital carriage rules present a First Amendment issue, intermediate scrutiny applies.⁹ Yet, as NAB/MSTV argued in their Reconsideration Petition, the Commission mistakenly used strict scrutiny — an error that infects the entire decision and requires reconsideration.¹⁰

⁶ 5 U.S.C. § 553(c).

⁷ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (hereinafter *Turner I*); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (hereinafter *Turner II*) (collectively, “*Turner decisions*”).

⁸ *See Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (noting that “the constitutionality of a statutory requirement [is] a matter which is beyond [the] jurisdiction [of an agency] to determine”).

⁹ *Turner I*, 512 U.S. at 646.

¹⁰ *See* Reconsideration Petition at 9-11.

Cable argues that even though the *Second Report and Order* repeatedly stated that neither transitional nor multicast carriage could be adopted unless they are “necessary” to promoting important governmental interests¹¹ — *i.e.*, the standard that would be applied under *strict* scrutiny¹² — the Commission actually used intermediate scrutiny.¹³ The relevant passages of the *Second Report and Order* demonstrate in an overwhelming fashion that it did not:

- The Commission will not adopt a transitional carriage rule because there is “nothing in the record that would allow us to conclude that mandatory dual carriage is **necessary** to further the governmental interests.” *Second Report and Order* ¶ 15 (emphasis added).
- “[C]able carriage is not **needed** to ensure that non-cable, over-the-air viewers have access to digital broadcast signals.” *Id.* ¶ 18 (emphasis added).
- “On balance, we find that the current record fails to demonstrate that dual carriage is **needed** to further” the governmental interest in the dissemination of information from a multiplicity of sources. *Id.* ¶ 19 (emphasis added).
- “[I]t has not been proven **necessary** [for cable operators] to guarantee such access for both analog and digital signals to ensure fair competition.” *Id.* ¶ 22 (emphasis added).
- “[W]e find that the imposition of a dual carriage requirement . . . is not **necessary** to complete the transition.” *Id.* ¶ 24 (emphasis added).
- “We thus decline to impose dual carriage requirements . . . in the absence of record evidence showing dual carriage is **necessary** for a timely completion of the transition.” *Id.* ¶ 25 (emphasis added).

¹¹ See *Second Report and Order* ¶¶ 15, 22, 24, 25, 37, 38, 41.

¹² See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (“[T]he danger of censorship presented by a facially content-based statute . . . requires that that weapon be employed only where it is **necessary** to serve the asserted compelling interest.”) (internal citations, quotation marks and brackets omitted) (emphasis in original).

¹³ See A&E Television Networks Opposition to Petitions for Reconsideration, CS Docket No. 98-120 (filed May 26, 2005), at 13-15 (hereinafter A&E Opposition); Joint Opposition to Petitions for Reconsideration of Altitude Sports & Entertainment *et al.*, CS Docket No. 98-120, at 16-17 (filed May 26, 2005) (hereinafter Altitude Sports Opposition); Opposition of Comcast Corporation to Petitions for Reconsideration, CS Docket No. 98-120, at 10 (filed May 26, 2005) (hereinafter Comcast Opposition).

- “We cannot find on the current record that a multicasting carriage requirement is *necessary* to further either of the[] goals” recognized as important in *Turner. Id.* ¶ 37 (emphasis added).
- “[T]here is nothing in the current record to convince us that mandatory carriage of all multiple streams of a broadcaster’s transmission is *necessary* to achieve either of the[] goals” recognized as important in *Turner. Id.* ¶ 38 (emphasis added).
- Broadcasters “have not made the case on the current record that . . . additional programming streams are *essential* to preserve the benefits of a free, over-the-air television system for viewers.” *Id.* (emphasis added).
- “Given the lack of a meaningful showing on the current record that mandatory carriage of more than one programming stream is *necessary* to achieve any of the goals discussed above, we determine not to impose such a requirement.” *Id.* ¶ 41 (emphasis added).

Notably, Cable does not dispute that the Commission referred to the incorrect constitutional standard. Rather, Cable argues that there is no problem because the Commission cited a case describing intermediate scrutiny (*United States v. O’Brien*, 391 U.S. 367 (1968)) and the agency once discussed the concept of what would further governmental interests (after having specifically relied on the wrong standard) without using the word “necessary.”¹⁴ Neither is an answer. The point here is that the Commission, in evaluating digital carriage, used the strict scrutiny standard, and the Commission’s own words powerfully demonstrate that fact. That the Commission cited *O’Brien* and once may have properly described a portion of the standard (indeed, a prong of *O’Brien* that is not even in dispute here) of course proves nothing.¹⁵

The Commission’s failure to properly apply the intermediate standard of scrutiny that it acknowledges is the right one would virtually guarantee reversal on appeal. *See Straus*

¹⁴ Comcast Opposition at 11.

¹⁵ The fact that the Supreme Court used “necessary” in connection with the third prong of the *O’Brien* test dealing with narrow tailoring does not mean that the Commission’s use of that standard with respect to the first two prongs was also proper. Conflating the separate parts of the intermediate scrutiny test cannot cure the defect in the Commission’s analysis.

Communications, Inc. v. FCC, 530 F.2d 1001, 1011 (D.C. Cir. 1976) (where reviewing court “cannot fairly discern that the agency has in fact applied the proper standard of review” in a proceeding implicating First Amendment interests, it must “remand the case for the Commission appropriately to apply the proper standard”).

III. **DIGITAL CARRIAGE RULES WOULD BE CONTENT-NEUTRAL AND ADVANCE GOVERNMENTAL INTERESTS.**

In their arguments opposing reconsideration, cable operators and programmers make two incorrect arguments about the extent to which transitional and multicast carriage further important governmental interests. First, Cable is wrong in asserting that broadcasters failed to supply ample evidence that multicast carriage would advance important governmental interests. Second, Cable is also wrong when it contends that the Commission would be imposing invalid content-based regulation if it considered the extent to which multicast carriage promotes those important interests. The Commission therefore should reconsider the *Second Report and Order* to take account of the record evidence about the extent to which important governmental interests would be furthered by digital carriage rules.

A. **Digital Carriage Rules Will Advance the Interests Sanctioned By *Turner*.**

Cable operators and programmers contend that transitional and multicast carriage rules are not justified because broadcasters allegedly did not show how they would benefit the public.¹⁶ Indeed, this was what the Commission found in the *Second Report and Order*.¹⁷ But that conclusion ignored the record and must be reconsidered.

¹⁶ See, e.g., A&E Opposition at 18; Comcast Opposition at 12.

¹⁷ *Second Report and Order* ¶ 38.

As the evidence shows, transitional and multicast carriage will promote both the benefits of free, over-the-air local television and programming from diverse sources — the very governmental interests that the *Turner* cases expressly found to be important. As Justice Breyer noted in his concurrence in *Turner II*, one of Congress’s chief objectives in enacting the must-carry provisions of the Cable Act was to “provide over-the-air viewers who *lack* cable with a rich mix of over-the-air programming” and “an expanded range of choice.” 520 U.S. at 226, 228 (emphasis in original). That is exactly what multicasting promises to offer to those over-the-air viewers. *See* Reconsideration Petition at 20-25 (describing broadcasters’ myriad current and planned uses of multicast signals). Thus, the governmental interest in a vibrant, over-the-air local broadcasting system would be directly advanced by preventing cable operators from blocking the growth of new programming options that both cable and over-the-air viewers can receive. Moreover, digital carry rules clearly would advance the government’s important interest in diverse programming since, unlike other programming carried on a cable system, broadcast programming would not be subject to the control of the cable operator.

Cable has no problem admitting — in the context of *cable programs* — that program services cannot succeed in the absence of cable carriage.¹⁸ What they fail to recognize is that this problem is at least as acute in the context of broadcast programs, given that cable operators have “incentives to drop local broadcasters in favor of other programmers less likely to compete with them for audience and advertisers.” *Turner II*, 520 U.S. at 200. And while cable argues

¹⁸ *See* Altitude Sports Opposition at 21 (“Without increased distribution on cable systems, multichannel networks will not succeed.”); Courtroom Television Network LLC’s Opposition to Petitions for Reconsideration, CS Docket No. 98-120, at 10 (filed May 26, 2005) (hereinafter Courtroom TV Opposition) (warning that if multicast carriage requirement is adopted, “cable programmers like Court TV cannot prevail in competition”).

that the value of broadcast programming must be weighed against the value of cable programs,¹⁹ such balancing is not supported by the Cable Act, which specifically focuses on the need to ensure carriage of *local broadcast stations* in light of the intrinsic incentives that cable operators have to harm them — incentives that do not apply to cable programmers.²⁰

Finally, there is no merit to Cable’s argument that the goals of must-carry are focused solely on protecting existing broadcast services, and not on making new and innovative services available to over-the-air viewers.²¹ As *Turner II* held, “Congress has an independent interest in preserving a *multiplicity* of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable.” 520 U.S. at 194 (emphasis added).²² Given Cable’s claims about the recent explosion in cable programming

¹⁹ Altitude Sports Opposition at 19-23; Opposition of Cablevision Systems Corporation to Petitions for Reconsideration, CS Docket No. 98-120, at 8-9 (filed May 26, 2005) (hereinafter Cablevision Opposition); Comcast Opposition at 24-25; Courtroom TV Opposition at 8-9; Opposition of Crown Media United States, LLC, The Outdoor Channel, Inc., Game Show Network, LLC and Starz Entertainment Group LLC to the Petition for Reconsideration Filed by the National Association of Broadcasters and the Association for Maximum Service Television, Inc., CS Docket No. 98-120, at 10-11 (filed May 26, 2005) (hereinafter Crown Media Opposition); Opposition of Discovery Communications, Inc. to Petitions for Reconsideration, CS Docket No. 98-120, at 12-13 (filed May 26, 2005) (hereinafter Discovery Opposition); Opposition of The Weather Channel, Inc. to Petitions for Reconsideration, CS Docket No. 98-120, at 6 (filed May 26, 2005) (hereinafter Weather Channel Opposition).

²⁰ 47 U.S.C. § 521 note (Cable Act §§ 2(a)(14)-(15)) (because “[c]able television systems and broadcast television stations increasingly compete for television advertising revenues,” “there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal [and] refuse to carry new signals”); *see also* Reply Comments of NAB/MSTV/ALTV, CS Docket No. 98-120, at 15 n.85 (filed Aug. 16, 2001).

²¹ A&E Opposition at 17-18 & n.29.

²² Justice Breyer also described Congress’ purpose in adopting must carry as promoting “an *expanded range of choice*” for over-the-air viewers. *Turner II*, 520 U.S. at 228 (Breyer, J., concurring) (emphasis added). Thus, the opportunity for broadcasters to provide additional programming directly serves the interests identified in *Turner*.

options,²³ multicasting is an especially appropriate means of ensuring that viewers’ over-the-air options are “on an equal footing” with the options that cable subscribers enjoy.

B. Digital Carriage Rules Would Advance Other Important Governmental Interests.

Several opponents to the Reconsideration Petition argue that any consideration by the Commission of interests other than the two specifically relied on in *Turner II* — preservation of over-the-air broadcasting and programming diversity — is forbidden.²⁴ Nothing in the *Turner* cases, however, held that those interests are the only ones that could support the constitutionality of must-carry. In light of today’s “quicksilver technological environment” for communications services,²⁵ the government’s interests in a particular legislative enactment cannot be deemed frozen in time. That is particularly the case with respect to this statute, where Congress articulated its broad and multifaceted interests in enacting must-carry. Those interests, which were given voice in the “unusually detailed” findings accompanying the Cable Act,²⁶ extend well beyond the twin aims of ensuring the availability of over-the-air programming and promoting diversity in programming choices.

In particular, the Commission was correct in considering the extent to which multicasting promoted the digital transition, although it reached the wrong conclusion on that issue.²⁷ The

²³ See, e.g., Cablevision Opposition at 6.

²⁴ A&E Opposition at 17; Courtroom TV Networks Opposition at 5.

²⁵ *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

²⁶ *Turner I*, 512 U.S. at 646.

²⁷ *Second Report and Order* ¶¶ 23-25, 40.

D.C. Circuit recently recognized the importance of that issue in its DTV tuner decision.²⁸

Additional digital programming (including multicasting) will serve as a powerful incentive to consumers to purchase digital reception capability, thereby facilitating the end of the transition.²⁹

Advancing the digital transition will also clear spectrum for the provision of vital public safety services, which constitute a substantial, if not compelling, governmental interest.³⁰

C. The Must-Carry Rules Are Not Content Based.

Contrary to the arguments made in several oppositions,³¹ it is not the case that if the Commission even considers the benefits of broadcast multicast programming, the resulting rules will be content based and thus presumptively invalid. Just as *Turner I* held that “Congress’ acknowledgment that broadcast television stations make a valuable contribution to the Nation’s communications system does not render the must-carry scheme content based,” 512 U.S. at 649, the Commission can consider the extent to which transitional and multicast carriage will promote

²⁸ See *Consumer Electronics Ass’n v. FCC*, 347 F.3d 291, 300-02 (D.C. Cir. 2003).

²⁹ Comcast and NCTA are wrong in arguing that only HD programming could speed up the transition. See Comcast Opposition at 22 n.72; Opposition of the National Cable and Telecommunications Association to Petitions for Reconsideration, CS Docket No. 98-120, at 18-19 (filed May 26, 2005) (hereinafter NCTA Opposition). The availability of attractive standard definition programs on local television signals will also provide incentives to consumers to purchase digital reception capability, either an HD receiver or a converter that will allow viewing of digital programs on analog sets. Either purchase would count a household towards the requirements of Section 309(j)(14)(B)(iii)(II).

³⁰ As NAB/MSTV have previously noted (*see* Reconsideration Petition at 17 n.36), the Commission further erred in refusing to consider how multicasting advances the government’s important interest in preventing anticompetitive cable practices, given that Congress specifically addressed concern about cable’s incentive to act in an anticompetitive fashion towards local broadcasters. 47 U.S.C. § 521 note (Cable Act § 2(a)(15)).

³¹ See, e.g., A&E Opposition at 22; Comcast Opposition at 24-25; Courtroom TV Opposition at 17.

Congress's expressed interest in ensuring the benefits of over-the-air local broadcasting.³² What the Commission cannot do under a content-neutral regime is "mandate[] cable carriage of broadcast television stations as a means of ensuring that particular programs will be shown, or not shown, on cable systems." *Turner I*, 512 U.S. at 649-50.³³

IV. CABLE HAS MISAPPLIED THE *TURNER* DECISIONS.

Much of Cable's opposition rests on arguments that misapply the *Turner* decisions. Both cable operators and programmers argue that must carry is "unfair[],"³⁴ that it improperly relieves broadcasters of the need to compete in the marketplace,³⁵ or that the vast growth in cable capacity is irrelevant to the validity of carriage rules.³⁶ But Congress determined that cable systems' incentives to discriminate against some local broadcast signals justified mandatory carriage of those signals, and it is not appropriate for this Commission to consider whether Congress' judgment was fair.³⁷ Instead, as Justice Breyer concluded, the validity of must carry

³² See 47 U.S.C. § 521 note (Cable Act §§ 2(a)(8)-(12)).

³³ Compare National Association of Broadcasters' and Association for Maximum Service Television, Inc.'s Partial Opposition to the Petition for Reconsideration of the Minority Media and Telecommunications Council, CS Docket No. 98-120, at 3 (filed May 26, 2005) (arguing against a "local content" requirement as a condition for mandatory multicast carriage on the grounds that such a requirement "could well raise constitutional concerns," "[d]epending on how one approaches [the] definition[]" of "local content").

³⁴ See, e.g., Courtroom TV Opposition at 6 (opining that the fact that the *Turner* decisions upheld must-carry "does not change the essential unfairness of must-carry requirements").

³⁵ See, e.g., A&E Opposition at 18; Courtroom TV Opposition at 7-8; Discovery Opposition at 8-9.

³⁶ See, e.g., A&E Opposition at 20; Courtroom TV Opposition at 3; NCTA Opposition at 21; Time Warner Cable's Opposition to Petitions for Reconsideration, CS Docket No. 98-120, at 5 (filed May 26, 2005) (hereinafter Time Warner Opposition).

³⁷ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

depends on whether it “strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences.”³⁸ Given the lack of any credible evidence that transitional or multicast carriage would restrict speech at all, even minimal speech-enhancing benefits would support carriage rules. And as the evidence shows, the benefits of those rules are far more than minimal.

A. Despite Cable’s Claims, the Growth in Cable Capacity Is Plainly Relevant to Any Analysis of Must Carry.

In *Turner I*, the Supreme Court subjected analog must-carry to intermediate scrutiny because it assumed that cable systems would be constrained in their ability to carry programming of their choice and that broadcasters’ signals would occupy capacity that otherwise would go to cable programmers. Thus, a key issue in the *Turner I* remand was the amount of cable capacity needed to meet must-carry obligations; *even then*, the facts showed that must carry imposed an almost insignificant burden on cable. NAB/MSTV, relying on data supplied by the cable industry itself, showed that, because of the immense increase in cable capacity, only a tiny fraction of that capacity would have to be devoted to carrying analog *and* digital local signals. Because cable programming choices would not be affected to any significant degree by must-carry obligations, no constitutional issue would be presented by digital carriage rules.³⁹

Notably, none of the Cable oppositions include any data showing either the actual capacity of cable systems or how that capacity is used. And while Cable continues to claim that a requirement to carry multicast streams of local stations would prevent carriage of other

³⁸ *Turner II*, 520 U.S. at 227 (Breyer, J., concurring).

³⁹ Reconsideration Petition at 11-16.

programs,⁴⁰ not one of the ten Cable oppositions explained how the intermittently available bits freed from carrying a local signal would result in any realistic ability to add other program services. Cable's failure to provide factual support for these claims dooms its capacity arguments.

Indeed, the announced plans of cable operators belie any claim that capacity is limited. *Multichannel News* reported that “[a]ll of the major MSOs have announced plans to launch digital simulcast — or are actively launching it — in their systems.”⁴¹ Digital simulcasting involves carrying *all signals* on a cable system — cable and broadcast — in both analog and digital formats. Comcast “will launch digital simulcast on most of its systems in 2005,” and “Charter, Cox Communications, Inc., Time Warner Cable, Insight Communications Co. and Adelphia Communications Corp. also said they would start digital simulcast conversion.”⁴² Although carrying all programming in both digital and analog formats would certainly use up far more capacity than the carriage rules Congress envisioned, Comcast's senior vice president of engineering operations conceded, “[w]e have plenty of capacity on the network side.”⁴³ As a news report concluded, “it would seem unlikely that [Comcast and Time Warner] would have a capacity problem with dual carriage if voluntary dual carriage is their publicly announced business plan.”⁴⁴ The Commission, therefore, cannot take seriously cable operator or

⁴⁰ Altitude Sports Opposition at 20-21; Cablevision Opposition at 6-7; Comcast Opposition at 13; Discovery Opposition at 11; Weather Channel Opposition at 5-6.

⁴¹ *Multichannel News*, May 23, 2005, at 1.

⁴² *Id.* at 76. Those operators, according to NCTA's web site, serve 71.66 percent of all cable subscribers.

⁴³ *Id.* at 78.

⁴⁴ *Multichannel News*, May 31, 2005, at 4.

programmer claims that carriage of analog and digital signals during the transition or of multicast program streams would have any impact on cable speech.

Cable's argument that capacity remains limited because capacity has been diverted to non-video services such as Internet access or telephony⁴⁵ has no bearing on this proceeding because such a diversion of cable capacity for non-programming services is irrelevant to a First Amendment analysis of must-carry rules. The baseline for determining the "burden" that carriage rules would have on cable systems cannot be the capacity that a cable operator chooses to devote to video; the choice to offer other types of services is a business decision *made by the cable operator*, and any resulting capacity constraints are thus unrelated to the effects of must carry.⁴⁶

The cable oppositions seek to avoid the implications of cable capacity growth.⁴⁷ Several argue that even an insignificant impact on speech requires a First Amendment analysis.⁴⁸ But if

⁴⁵ *E.g.*, Altitude Sports Opposition at 20-21. Again, none of these oppositions provided any data concerning the amount of capacity used for non-video services.

⁴⁶ *See* Reply Comments of NAB/MSTV/ALTV, CS Docket No. 98-120, at 35-36 (filed Aug. 16, 2001). Further, since the content of telephone and Internet traffic by its nature is determined by users, the First Amendment interest in protecting speech choices by cable operators and programmers recognized in *Turner* simply do not apply to the use of cable for Internet or other non-video purposes. The Supreme Court has emphasized that Cable's protected First Amendment interests center on their provision of "original programming" or their exercise of "editorial discretion over which stations or programs to include in [their] repertoire." *Turner I*, 512 U.S. at 636.

⁴⁷ NCTA asserts that the study NAB cited is inaccurate. NCTA Opposition at 9 n.36 (citing PDS Consulting, *Cable TV System Capacity*, Attachment to NCTA *Ex Parte* Filing, CS Docket No. 98-120 (filed Oct. 16, 2001)). The PDS Consulting study contended that the capacity growth predicted in the *Weiss Study* cited by NAB was too high since, PDS argued, smaller cable systems would not add capacity at the levels Weiss assumed. *See* Merrill Weiss Group, *Analysis of Cable Operator Responses to FCC Survey of Cable MSOs*, Attachment A to the Reply Comments of NAB/MSTV/ALTV, CS Docket No. 98-120 (filed Aug. 16, 2001). In fact, the growth of cable capacity has exceeded the *Weiss Study's* estimates. While the NAB/MSTV argument was predicated on the *Weiss Study's* prediction that 83 percent of cable subscribers

the level of infringement on cable speech is *de minimis*, then the benefits needed to justify that infringement — to the extent those burdens must be considered at all — would also be reduced. As the Court concluded in *Turner II*, “the burden imposed by must-carry is congruent to the benefit it affords.”⁴⁹

Cable programmers also argue that they are already harmed because some program channels were placed on digital tiers,⁵⁰ or that channel capacity is occupied by cable

would be served by systems with 750 MHz or greater capacity, the Commission recently cited NCTA statistics showing that 89.6 percent of homes passed by cable were served by expanded systems. Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, FCC 05-13, ¶ 24 n.71 (rel. Feb. 4, 2005). Indeed, NCTA’s website reports that 97 percent of homes now passed by cable have access to expanded services. See <<http://www.ncta.com/DOCS/PageContent.cfm?pageID=86>>. Further, while the PDS study criticized Weiss’ use of average system capacity, the Supreme Court in *Turner II* used system averages to evaluate burden. 520 U.S. at 214-15; see also Merrill Weiss Group, “Response to Report on Cable TV System Capacity by PDS Consulting for the National Cable & Telecommunications Association,” attached to Letter from Henry L. (Jeff) Baumann, NAB, to Michael K. Powell, Chairman, Federal Communications Commission, CS Docket No. 98-120 (filed Mar. 27, 2002).

⁴⁸ See A&E Opposition at 20; Courtroom TV Opposition at 3; NCTA Opposition at 21. Time Warner (see Opposition at 5) argues that capacity is irrelevant to the question of the intrusion on cable operators’ editorial discretion, but fails to explain why, if that were so, both the *Turner* Court and the Commission in the *First Report and Order* believed it was important to look at cable capacity. See *First Report and Order and Further Notice of Proposed Rulemaking, Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598 ¶¶ 12, 37-43 (2001). Similar arguments were made unsuccessfully in *Turner II* and time and repetition have not heightened their luster. 520 U.S. at 215. Cable also argues that the Commission should not look at capacity as a numerical issue, but instead consider the “economic” capacity of cable systems to carry program networks. See, e.g., A&E Opposition at 21-22; Comcast Opposition at 29-30. There is no support in the Cable Act or in *Turner* for using an economic comparison to evaluate carriage rules.

⁴⁹ *Turner II*, 520 U.S. at 215.

⁵⁰ See Discovery Opposition at 9-10.

programming that gained carriage through retransmission consent.⁵¹ Neither is relevant to digital must carry. Digital television signals are typically carried by cable systems on the digital portion of their plant and carriage of broadcast signals in digital would have no impact on the availability of an analog channel to a cable programmer. This proceeding is about *must carry*; stations electing *retransmission consent* negotiate for carriage, and the capacity used to fulfill those agreements cannot be viewed as a burden of must carry.⁵²

In sum, because capacity is very large — and getting larger — carriage of local digital signals will not impair the ability of cable operators to carry programming of their choice or of cable programmers to reach the cable audience. Thus, requiring such carriage will not implicate cable’s First Amendment rights.

B. Cable’s Other Arguments Against Must Carry Have No Merit.

Cable argues that there is no need for the Commission to require carriage of multicast streams because some cable operators have agreed to carry certain multicast streams of some broadcasters.⁵³ This fact, however, only *strengthens* the arguments in support of a multicasting carriage rule. To the extent that multicast programming of some stations is carried voluntarily, that carriage reduces whatever “burden” multicast carriage imposes. Moreover, the fact that some cable systems elect to carry multicast streams of local digital stations shows that such

⁵¹ See Cablevision Opposition at 6; Courtroom TV Opposition at 7; Discovery Opposition at 10.

⁵² *Turner II*, 520 U.S. at 215.

⁵³ See, e.g., Cablevision Opposition at 4-5; Comcast Opposition at 19; NCTA Opposition at 15.

carriage does not unreasonably burden cable systems.⁵⁴ *Turner II* held that the need for must carry was not obviated by the fact that many — indeed at that time, most — local signals were carried voluntarily.⁵⁵

Cable also contends that the Commission should not require carriage of multicast programming on broadcast signals because such carriage supposedly would give broadcasters an unfair advantage or relieve them of the need to provide attractive programming.⁵⁶ Of course, even if they are carried, broadcast programs need to attract an audience to obtain advertising revenue. At bottom, this is an argument against the wisdom of must carry which should be addressed to Congress, not the Commission. Besides, the fact that broadcasters have to compete with cable channels for viewers and advertisers is precisely the reason why Congress concluded that cable systems would have the incentive to deny carriage to local broadcast stations, particularly new ones.⁵⁷ Thus, digital carriage rules would not relieve broadcasters of the need to compete; instead, they would prevent cable systems from denying them the *ability* to compete.⁵⁸

⁵⁴ Further, contrary to the suggestion of Comcast (*see* Opposition at 29 n.93), there is no indication that cable systems carrying digital multicast streams also provide those streams to analog receivers. To the extent that an operator chooses to do so, that would be a voluntary decision on its part unrelated to any digital carriage requirement.

⁵⁵ *Turner II*, 520 U.S. at 210-11.

⁵⁶ *See, e.g.*, A&E Opposition at 18; Courtroom TV Opposition at 7-8; Discovery Opposition at 8-9.

⁵⁷ *See* 47 U.S.C. § 521 note (Cable Act §§ 2(a)(14)-(16)).

⁵⁸ Comcast (*see* Opposition at 30-31) also contends that a multicast carriage rule would raise Fifth Amendment takings issues. The Supreme Court's recent decision in *Lingle v. Chevron U.S.A. Inc.*, No. 04-163 (U.S. May 23, 2005), puts this argument to rest. *Lingle* confirmed that, for regulatory actions to be deemed to be takings, they must "deprive an owner of 'all economically beneficial us[e] of the property.'" Slip op. at 8 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). Since local broadcast signals make up part of the basic tier that must be provided to all cable subscribers, cable operators retain

CONCLUSION

For the foregoing reasons and the reasons set forth in NAB/MSTV's Petition for Reconsideration, the Commission should reconsider the *Second Report and Order* and adopt rules requiring local cable operators to carry both analog and digital signals and all non-subscription portions of local commercial digital broadcast signals.

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economically beneficial use of the capacity used for must carry signals, even if they might prefer another use. Regulatory actions that “merely affect[] property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’” will generally not be viewed as takings. *Lingle*, slip op. at 9 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Even if it were assumed that a multicast carriage rule would affect cable operators’ economic interests, it clearly is not “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Lingle*, slip op. at 9.

CERTIFICATE OF SERVICE

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