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

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

COMMENTS OF THE

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby responds to the Federal Communications Commission's ("FCC") Second Further Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding. NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high speed Internet access after investing $110 billion over ten years to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art digital telephone service to millions of American consumers.

INTRODUCTION AND SUMMARY

Pursuant to government mandate, on February 17, 2009, broadcasters must return one of the two channels the government has licensed to them, and must cease broadcasting in analog. As a result, by that date all analog television sets that receive broadcast signals over-the-air must be equipped with set-top converter boxes in order to continue to receive television service.

It is important to understand what the "broadcast digital transition" is and what it is not. It is not a societal conclusion that every American must use a digital service. It is not a "Manhattan Project" designed to leap into a bold new future. It is simply a recognition that

broadcasters have been given not one, but two, free channels of valuable spectrum based on their original promise to move America into the age of high-definition television, subsequently revised into a promise to deliver a better, clearer digital signal to consumers. Last year, the government set a hard date to reclaim the spectrum currently used for analog signals in order to assign the spectrum to achieve what it regards as more important governmental objectives.

Thus, for households in which all their television sets are served by cable, February 17, 2009 can and should be a non-event. Cable operators already provide digital programming, including digital broadcast signals, to cable households and already have the means to ensure continuing service to analog television sets with no government intervention or subsidy required. They remain committed to working with local broadcasters to help ensure that cable viewers do not experience disruption after February 17, 2009. What cable operators need to make the broadcaster's transition seamless for their customers is the continuing freedom to determine on a system-by-system basis how best to achieve that transition.

Unfortunately, the *Notice* proposes a different path. It proposes an unlawful command-and-control approach over the cable operator's property, using the broadcast digital transition as cloak to disguise a perpetual violation of the Constitution. Specifically, the *Notice* suggests that as of February 17, 2009, cable operators must either (1) carry the digital must-carry signal in *both* an analog and digital format, including high definition ("HD"), or (2) convert their systems to all-digital delivery, "provided that all subscribers have the necessary equipment to view the broadcast content."

The second option is effectively no option at all. To exercise it would mean forcing cable customers to attach (and pay for) a set-top box to every one of the estimated 126 million analog television sets that are projected to still be in use in cable homes as of February 2009,

even if they have no interest in obtaining the particular must-carry programming at issue. To put this in perspective: the 15 million over-the-air homes that will need converter boxes for over-the-air reception have been the subject of several pieces of legislation, a $1.5 billion subsidy fund, and a proposed national consumer education campaign involving entire industries and hundreds of organizations. Contrast this to the almost whimsical *Notice* proposals that will affect a far larger number of American households at an estimated cost of $6.3 billion.

The first option, then, is in effect the only proposed rule. And that carriage proposal is not new. While the *Notice* makes no mention of its patrimony, this is hardly the first time the FCC has considered whether to impose a cable requirement to carry a must-carry broadcaster in both analog and digital. In fact, the FCC has twice rejected such a dual carriage obligation on constitutional grounds – constitutional concerns that are not discussed, not even hinted at, in the *Notice*.

In 2001, the FCC decided that once the transition ended, cable operators would be required to carry must-carry digital broadcast signals in digital format only. The agency also decided that cable customers could choose to obtain (and pay for) a set-top box necessary to view digital broadcast signals on an analog television set if they wished. The Commission also concluded that cable operators would not be required to carry "all the bits" that a digital broadcaster might transmit over the air. Instead they would be required to ensure that a digital must-carry broadcaster's signal enjoyed comparable carriage to the signal of other digital programmers – including digital broadcasters – carried on the cable system. The Commission had it right the first time, and the *Notice* provides no legitimate reason for this proposed about-face.

The broadcasters' transition to digital television, without careful planning, has the potential to seriously disrupt the viewing habits of over-the-air households. Recognizing this, the cable industry stepped up, as a public service, to work with a variety of organizations, including broadcaster and other groups, to ensure that American consumers are as prepared as possible for a smooth broadcast digital transition. The transition should also be as easy as possible for cable homes. The Commission should not throw sand into the gears of this transition by piling new, unnecessary and unconstitutional burdens on cable operators in the last few months leading up to February 17, 2009.

While the discussion below explains why we have serious concerns about the statutory and constitutional bases for mandates along the lines of what the *Notice* has proposed, we have repeatedly made clear that our industry is committed to making the transition as seamless as possible for our customers. Thus, as we did in 2005 in working with Congress on a bipartisan basis on the digital transition legislation, we will continue to explore with the Commission and leaders of Congress how the cable industry might help provide voluntary solutions to the challenges posed by the transition.

DISCUSSION

I. THE COMMISSION CANNOT REQUIRE DUAL CARRIAGE OF A MUST-CARRY STATION

A. The Notice Proposes Dual Carriage

The *Notice* proposes that after broadcasters have returned their analog spectrum and transmit only a digital primary signal, a cable operator "must either: (1) carry the signals of commercial and non-commercial must-carry stations in analog format to all analog cable subscribers, or (2) for all-digital systems, carry those signals only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast

content. This requirement would be *in addition to* the requirement that the cable operator pass through the HD signal to cable subscribers of an HD package…"[1] While the *Notice* does not show the simple math, we will do so here: one signal in HD, plus one in analog, equals two signals. This is a dual carriage obligation.[2]

The purported "option" in the *Notice* is a fantasy. Cable operators would be permitted to carry a single version of a digital must-carry broadcast signal only if a system is "all-digital" and "all subscribers with analog television sets have the necessary equipment to view the broadcast content."[3] While "all-digital" is not defined,[4] it seems that the Commission contemplates that to qualify under this option a cable system would no longer be permitted to provide any analog service. However, of the 7,000 cable systems in the United States, there is at most a handful of which we are aware that would meet this standard anytime soon.

The reasons why are obvious. Cable operators have been offering digital tiers for years. They have been aggressively marketing those tiers to customers, working to induce them to adopt digital. Digital video recorders, video on demand, digital programming tiers: these are all services that customers could enjoy on analog television sets with the addition of a digital box. Cable operators have every incentive to move customers to digital.

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1 *Notice* at ¶ 17 (emphasis supplied).

2 The *Notice* does not address whether cable operators would be required to carry a *standard definition* must-carry signal in an analog format, too. However, the implication of the *Notice* is that dual carriage would also be required in that circumstance.

3 *Notic*e at ¶ 17.

4 Sometimes, cable systems are considered "all-digital" when they simulcast a standard definition digital version of the analog tier of service. This digital simulcast, however, is not the same thing as a digital-only system. Only in the latter case would there be no tier of analog service so that all customers would be required to lease or purchase a converter device in order to view digital signals on an analog television set.

But even with all these efforts and attractive offerings, millions of cable customers choose to remain analog-only households. Digital subscribership varies from system to system. Overall, only a little over half of cable customers subscribe to the digital tier of service. And even those digital households typically have one or more additional television sets that receive only the analog tier of service. To move to a "digital-only" system, then, would require customers to be equipped with digital-to-analog set-top devices for the 126 million analog sets projected to be in cable customers' homes in 2009.[5] At a cost of $50 per set-top, even for the most basic converter box, that amounts to a $6.3 billion price tag for the industry – and ultimately for consumers.

In 2006, Congress decided that there are policy reasons, wholly apart from the gradual consumer acceptance of digital television technology, to set a firm date by which over-the-air customers must be forced to move to digital. Congress abandoned a "market transition" based on an 85 percent digital deployment test and set a hard cut-off date. The hard date provides for the more rapid reallocation of analog broadcast frequencies for other uses, including public safety. And it allows broadcasters to eliminate the costs of maintaining and powering two transmitters. The hard date for over-the-air viewers thus will proceed on one timetable unrelated to the deployment of digital TV sets in their homes. But it does not follow that cable subscribers are any more ready for all-digital TV than under the previous assumptions of the 85 percent test.

An operator's decision to go "all-digital" on any particular system has significant ramifications beyond those associated with avoiding a "dual carriage" obligation. Operators may make this choice based on the unique facts and circumstances of each system, including the percentage of digital versus analog customers. But it would be arbitrary and capricious for the

[5] Based on NCTA estimates of digital set-top box deployment, using Kagan data.

FCC to use this rulemaking as a way to push cable operators to go "all-digital" when there otherwise is no reason to do so.

There is no such compelling government purpose to set firm deadlines for the digital transition for cable customers. It should proceed at its own pace, as consumer interest and wise business practices direct. It makes no sense for the FCC to force a cable operator to move to all-digital on a wholly artificial timetable. And it makes even less sense for the agency to suggest that operators must eliminate the analog tier, forcing cable customers to obtain set-top boxes for their analog television sets.

In short, a digital cut-over *is* a necessity for over-the-air viewers if spectrum is to be available for other purposes. A digital cut-over is *not* a necessity for cable customers and will impose titanic costs on them, all because of the *Notice's* erroneous view of what the must-carry statute requires.

B. The Cable Act Does Not Compel Dual Carriage; And Operators Will Make the Transition Work for Their Customers

At bottom, then, the *Notice* gives cable operators only one choice – forced carriage of each digital broadcast signal in a digital format and a second channel with the same signal translated into analog. This is mandatory dual carriage. And mandatory dual carriage has twice been solidly rejected by a unanimous Commission.

The Cable Act does not compel dual carriage. There is only one way to read the Act – to require carriage of a broadcaster's primary video signal, post-transition, in *one* format. Section 614 nowhere suggests that cable operators should be forced to carry signals from television stations in a format other than the one in which it is transmitted over-the-air.

The Commission in this *Notice* and elsewhere has consistently said that this means, post-transition, that a cable operator must retransmit the broadcaster's digital signal in a digital

format. In 2001, for example, the FCC explained that while a digital-only station during the transition could require an operator to carry one of its HD or SD television signals in an analog format instead, "as the transition moves forward, television broadcast stations will be required to deliver their signals in digital format *and cable operators will be required to carry them in digital format*…."[6] Carriage of the primary digital signal, then, is the only thing the statute requires of cable operators.

This is not to say that cable operators will necessarily choose to provide must-carry signals only in a digital format. Cable operators have every interest in making the digital transition as seamless as possible for their customers. They have strong marketplace reasons to continue to provide signals in a format that their customers desire – or lose that customer to a competitor who does. If significant numbers of customers wish to receive broadcast signals in an analog format, operators will have every incentive to provide them.

And it may be the case that a digital broadcaster may also have a strong preference to continue to be carried in analog. In such cases, a cable operator and a broadcaster may voluntarily choose to agree to carriage terms that differ from what the FCC proposes. For example, a must-carry broadcaster might desire carriage in analog in lieu of digital carriage. Or, a cable operator might unilaterally choose to voluntarily carry an analog version of the digital broadcast signal, translated to analog at the headend by the operator, in addition to the digital version that it must carry. The cable industry has a track record of reaching agreements outside

[6] *First Report and Order*, 16 FCC Rcd 2598 (2001) at ¶ 74 (emphasis supplied) (hereinafter "First Report and Order"). *See also WHDT-DT*, 16 FCC Rcd 2692 (2001) at ¶ 14 (same); *Service Rules for the 746-764 and 776-794 MHz Bands*, 15 FCC Rcd. 20845 (2000) at ¶ 65 ("we wish to clarify that cable systems are ultimately obligated to accord 'must carry' rights to local broadcasters' digital signals.").

the regulatory arena that ensure the voluntary provision of a variety of broadcast offerings, including the signals of must-carry stations.[7]

The *Notice*, however, reflects the view that the Act *mandates* that cable operators either provide an analog *and* digital version of the same signal *or* convert to "all-digital." This is premised on the notion that one or the other of these mandates would be necessary post-transition to satisfy Section 614(b)(7)'s obligation to make commercial must-carry stations "viewable" on both analog and digital television sets.

This enlargement of the must-carry obligation reads entirely too much into the "viewable" requirement, unfairly twisting it to force cable operators and their customers to shoulder the lion's share of the costs and burdens of the broadcasters' digital transition. That is not what the words of the statute demand, the Constitution allows, or good policy dictates.

Section 614(b)(7)'s viewability provision arose in the analog world of television, addressed to questions of installations, second set connections and notice requirements when cable was the sole supplier of set-top boxes. The subsection provides that commercial must-carry signals

> shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3).

[7] For example, in 2005, NCTA reached agreement with public television stations for carriage of digital programming during the transition and for multicast carriage post-transition. Press Release: "Public Television and Cable Announce Major Digital Carriage Agreement," (Jan. 31, 2005).

The requirements of this provision in the analog world of 1992 cannot be read to require dual carriage or forced boxes on all analog sets in 2009. To do so would be to put words, and create significant constitutionally-suspect duties, into the statute that Congress did not speak nor contemplate, given the technology known at the time.

Nothing about this provision suggests that cable operators must provide broadcast signals in a different format than transmitted over-the-air. And the Commission has never before read the statute that broadly. In implementing this provision in 1993, the FCC for the most part repeated the statutory language and viewed this in large measure as a notice requirement. It explained that this provision requires cable operators "to notify new subscribers upon initial installation and all affected subscribers once a year of the need for additional equipment to receive the must carry signals."[8] The statute contemplates that operators might provide must-carry signals in a way that might require customers to obtain converter boxes for those signals to be viewable; indeed, the third sentence of Section 614(b)(7) expressly recognizes that there could be situations where customers would need to rent or buy additional equipment to view certain must-carry signals. Under these circumstances, Section 614(b)(7) cannot be read to force operators to translate a digital signal to analog so customer can "view" those signals on analog sets.

Nor can this provision mean that operators otherwise must go "all digital" to satisfy the viewability obligation. This subsection had implications for the capabilities of *analog* boxes that an operator might supply to a customer, as the FCC found on reconsideration of its original *Order*. At the time, certain television sets were not "cable-ready" and could not receive channels

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[8] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2965, 2974 (1993).

at all that might be carried in the upper bands. The agency noted that some boxes supplied by operators did not contain "the necessary channel capacity to permit a subscriber to access a UHF must-carry signal through the converter. For example, a converter may supply channels 2-36 while the must-carry station is on channel 55. Where a cable operator chooses to provide subscribers with signals of must-carry stations through the use of converter boxes supplied by the cable operator, the converter boxes must be capable of passing through all of the signals entitled to carriage on the basic service tier, not just some of them."[9] It was these issues, not some expansive "viewability" touchstone, to which the statute addressed itself.

Thus, this provision arose in different context dealing with the capabilities of analog boxes that operators might provide to analog customers. Looking toward the move to digital the Commission later asked how to interpret this provision in the context of digital must-carry. The FCC in 1998 inquired whether this provision would require operators to "offer converter boxes to every subscriber if digital broadcast television stations cannot be received without some set-top device facilitating reception of the stations' transmission."[10]

In its *2001 Order*, the Commission concluded that this provision was not nearly so expansive. Rather, reading Section 614(b)(7) in tandem with the 1996 Act's navigation device provision found in Section 629, the Commission concluded that cable operators are *not* required to "provide subscribers with a set top box capable of processing digital signals for display on analog sets."[11] A different result would be "inconsistent with section 629 of the Act," which was "enacted to ensure the commercial availability of navigation devices…."[12] And though the

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[9] *Memorandum Opinion and Order*, 9 FCC Rcd. at 6725-6.

[10] *1998 Notice* at ¶ 77.

[11] *First Report and Order* at ¶ 79.

[12] *Id.*

current *Notice* conveniently omits this ground in its description of the *2001 Order*,[13] it is plain that a mandate for a set-top on every TV set provided by the cable operator would preempt the market for these devices at retail – a market that the Commission, or at least the Media Bureau, said as recently as June 29 that it wants to foster in denying numerous separable security waivers.

The day after the broadcasters' transition, cable systems will continue to receive all must-carry broadcast stations and, unless otherwise arranged with the broadcaster, retransmit those signals in the same digital format they are received by over-the-air viewers. Those signals will still be available on a prescribed channel position to every cable customer. Available everywhere, they will be viewable in all homes with the appropriate equipment if the customer chooses, or otherwise by agreement with the cable operator and broadcaster.

Congress, not the cable industry, decided that analog television signals will no longer be viewable on analog television sets after February 17, 2009 without the use of additional equipment. Section 614(b)(7) was never meant to address this entirely separate issue of TV sets that no longer work with over-the-air signals, an issue which on its face is unrelated to cable's carriage of TV signals.[14] The FCC cannot in the guise of an inapposite "viewability" provision shift the cost of a hard date – versus a market-oriented 85 percent standard – to the cable industry to fix it. Nor can it lay the blame on Congress' doorstep by reading a statute in a way Congress never intended.

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[13] *Notice* at ¶ 20.

[14] Contrary to the *Notice's* suggestion (*Notice* at n.33), analog television sets in 2009 no longer will be "television receivers" within the meaning of Section 614(b)(7), since they will no longer be able to receive over-the-air broadcast signals without a separate set-top device. *See generally Assoc. of Maximum Service Telecasters v. FCC*, 853 F.2d 973 (D.C. Cir 1988) (upholding FCC determination that receiving device was not a "television broadcast receiver" because it was not "intended for reception of over-the-air signals.").

The FCC had it right in 2001. Its rule, which neither requires operators to take the consumer unfriendly steps of eliminating analog tiers nor imposes dual carriage, "ensures that the option to pay for a converter or digital set-top box with that function remains at the discretion of the cable subscriber and is not mandated through government regulation."[15] That continues to be the correct reading of the Act as a whole, the must-carry rules in particular, and the right public policy.

In any event, to the extent Section 614(b)(7) is at all ambiguous, settled principles of statutory interpretation impel the same conclusion.

C. Dual Carriage Post-Transition Would be Unconstitutional

1. The Commission Has Twice Found Dual Carriage Unconstitutional

The *Notice* thoroughly disregards FCC precedent here. Twice, when confronted with the option of mandating "simultaneous carriage of both a television station's digital and analog signals (dual carriage)"[16] *during* the transition, the Commission found that such a requirement would be unconstitutional under the standards set forth by the Supreme Court in the *Turner Broadcasting* decisions.[17] The agency "tentatively conclude[d] that, based on the existing record evidence, a dual carriage requirement appears to burden cable operators' First Amendment interests substantially more than is necessary to further the government's substantial interests of preserving the benefits of free over-the-air local broadcast television; promoting the widespread

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[15] *Id.* at ¶ 80.

[16] *Id*. at ¶ 2.

[17] *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

dissemination of information from a multiplicity of sources; and promoting fair competition in the market for television programming."[18]

After four years of study, the Commission, by a 5 – 0 vote, reaffirmed this conclusion. The agency unambiguously found that "mandatory dual carriage would essentially double the carriage rights and substantially increase the burdens on free speech beyond those upheld" by the Supreme Court in the *Turner Broadcasting* case."[19] The FCC "analyzed the governmental interests identified in *Turner*, additional governmental interests proposed by the broadcast industry, and policy concerns" and found that "there has not been an adequate showing that dual carriage is necessary to achieve any valid governmental interest. Therefore, in the absence of a clear statutory requirement for dual carriage, we decline to impose this burden on cable operators."[20]

Requiring cable operators to carry two versions of a broadcaster's digital signal *after* the transition – one in analog and another in digital – would impose a similar dual carriage burden on cable operators, as well as on cable program networks, who have no such guaranteed access to cable channels. But the *Notice*, astonishingly, does not even mention the constitutional implications of such a requirement, much less explain why the conclusions it reached twice before would somehow not apply to this dual carriage mandate. As the attached analysis by former Assistant Attorney General and constitutional law expert Charles Cooper demonstrates,

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[18] *First Report and Order*, 16 FCC Rcd at 2600.

[19] *Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516, 4524 (2005) ("*Second Report and Order*").

[20] *Id*. at 4530.

those conclusions were right – and they *do* apply to the dual carriage rule proposed by the Commission.[21]

2. Any Must-Carry Requirement Would Today Be Subject to "Strict Scrutiny" Under the First Amendment

Indeed, Cooper suggests that, in light of significant changes in the video marketplace, must-carry requirements would today be subject to an even more stringent standard of scrutiny than the "heightened scrutiny" that was applied by the Supreme Court in *Turner*. As he explains, the narrow majority of the Court that upheld the must-carry provisions of the 1992 Cable Act found that the rules had a "content-neutral" justification – namely, the "special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."[22]

But, according to Cooper, "[t]he contemporary market for multi-channel video programming bears little resemblance to the market that existed a decade-and-a-half ago when Congress enacted the 1992 Cable Act."[23] The concerns about "bottleneck monopoly power" upon which the Court relied have been undermined by at least two developments. First, the rapid growth of substantial head-to-head competition to cable from DBS and others has eroded any cable bottleneck between broadcast signals and MVPD households. Second, it is now the case that virtually all television sets are equipped with multiple inputs and remote control switching, so that "a TV viewer armed with a universal remote control need only press a button to switch

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[21] *See* C. Cooper, B. Koukoutchos and J. Massey, "Both Prongs of the Commission's Proposed Digital Carriage Requirement Would Violate the Constitution," attached to these comments as Appendix A. Brian Koukoutchos and Jonathan Massey collaborated with Charles Cooper as co-authors of the paper, which is cited herein as "Cooper."

[22] Cooper at 7, *citing Turner I*, 512 U.S. at 61.

[23] *Id.* at 9.

seamlessly from the signal provided by the cable operator, to the signal from a DVD player or VCR, to a signal broadcast by a local television station, to a DBS signal received from a satellite, to the input from a video-game console"[24]

Even as far back as 1986, when the Commission adopted must-carry rules that were ultimately struck down as unconstitutional, it expected that widespread availability of "A/B switches" would, within a few years, be sufficient to eliminate the need for the rules.[25] The ubiquitous availability of TV sets, with remote controls that include a contemporary A/B switch ("TV," "Cable," "Aux") that enable seamless switching by viewers means that it is no longer tenable to suggest that cable carriage is the only viable way for over-the-air signals to reach cable customers.

In the absence of this "content neutral" justification for mandatory carriage, Cooper maintains that "a First Amendment challenge to a must-carry regime today would likely be subject to strict scrutiny, which such a requirement could not possibly satisfy. . . . Indeed, any challenge would not only doom the expansion of must-carry to redundant analog and digital signals, but would also draw into question the existing single-channel must-carry requirement upheld in the *Turner* decisions."[26]

3. Even Under the *Turner* Standard, Dual Carriage Would Be Unconstitutional

In any event, as Cooper's paper shows, the Commission's new dual carriage proposal for after the transition – like dual carriage during the transition – would not even survive the intermediate scrutiny applied in *Turner*.

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[24] *Id.* at 12.

[25] *See* Century Communications Corp. v. FCC, 835 F.2d 292, 296 (1987), *cert. denied*, 486 U.S. 1032 (1988).

[26] Cooper at 13.

a) Dual Must-Carry Imposes a Severe Burden on Protected Speech

On its face, a dual carriage requirement would "impose a greater burden than the must-carry rules upheld in Turner."[27] As Cooper explains, requiring must-carry stations to be carried *twice* on cable systems would displace additional "speech that the cable operators, in the exercise of their editorial discretion, believe to be 'deserving of expression, consideration, and adherence.'"[28] And this, in turn, severely burdens the First Amendment rights of non-broadcast cable programmers, whose speech would in such circumstances be displaced.

This government-ordered permanent occupation of the cable system affects more than video. It slams into the nation's goal of expanded broadband deployment, codified by Congress in Section 706 of the Telecommunications Act of 1996 and realized by the billions invested by the cable industry in expanding residential high speed internet service. The cable industry has announced over the last year its intention to make "wideband" technology available to its customers, with throughput rates of 150 megabits. By "bonding" up to 24 6-MHz channels, this technology vastly increases the speed of the network. Ultra fast speeds bring their own value, of course, but it is also the case that these kinds of technological innovations will help drive broadband deployment to the point where it is universally available to all Americans. Congress has recognized the importance of faster speeds and ubiquitous broadband deployment to this nation's future.[29] The *Notice*'s dual-carriage proposal, were it to be imposed on the cable

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[27] *Id.* at 5 (emphasis in original).

[28] *Id.*, *citing Turner I*, 512 U.S. at 641.

[29] *See, e.g.*, Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (47 U.S.C. § 157 nt.).

industry, would usurp valuable bandwidth and make it more difficult for cable to engage in the kind of technology innovation demanded by the marketplace and policymakers alike.

Moreover, the spectrum burden imposed post-transition would be equal to – or even greater than – the pre-transition dual carriage burdens that the Commission found to be too high. Just as dual carriage *pre-transition* would take up more than the 6 MHz of cable bandwidth required for analog carriage (typically, up to 9 MHz), so too would this new, *post-transition* dual carriage scheme. And in several other respects, post-transition dual carriage would be even *more* burdensome. In addition to the capacity squeeze, operators would incur the additional costs and obligation of converting a signal to create a second stream of a broadcaster's programming on its network[30] and then carry both streams *indefinitely*.

The proposal also would impose a burden that would be significantly greater, in terms of total channel capacity, than a post-transition *multicast* obligation also twice rejected by the Commission as unduly burdensome on the First Amendment rights of operators and programmers. The reasons why a multicast must-carry requirement, a less bandwidth burdensome requirement, would violate the First Amendment were spelled out in two papers by Harvard Law School Professor Laurence Tribe, which NCTA submitted previously in this docket.[31] There, *at most* an operator would be forced to devote 6 MHz to digital broadcast signal carriage. Here, at the *very least* an operator would need to devote 7 MHz to carriage of an analog plus a standard definition version of the same signal indefinitely – and significantly more

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[30] While the current rules require digital-only must-carry broadcasters to incur the cost of changing a digital signal to analog for transmission on a cable system, the *Notice* suggests that operators perhaps should be responsible for any expenses associated with translating a digital signal to analog. *Notice* at ¶ 19.

[31] L. H. Tribe, "Why the Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obligation," (July 9, 2002) ("Tribe I"); L. H. Tribe, "Why the Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obligation: A Reply to the Broadcast Organizations," (Nov. 24, 2003) ("Tribe II").

bandwidth would be needed to carry a high definition signal. More importantly, the additional carriage requirement would overrule many additional editorial choices made by cable operators, thus increasing the burden on their First Amendment rights considerably.

The ever-expanding space that would be consigned to must-carry signals comes at the expense – and First Amendment rights and interests – of cable operators, programmers, and their customers. Cable operators have defined channel capacity, capacity that is even more constrained since continued analog service consumes a large portion of bandwidth of the typical 750 MHz system. At the same time, video and non-video uses for that capacity are exploding.

Cable operators are vigorously competing against new entrants and DBS on the quality and breadth of their service offerings.[32] Operators are "scrambling to carve out bandwidth,"[33] looking to add more HD services to compete against DirecTV's proposed 150 channel HD offering. Even today, before the end of the broadcasters' transition, some programmers are being forced to vacate their analog tier slots.[34] Programmers are being moved from analog to digital tiers so operators can reclaim the 6 MHz of capacity for other digital uses.[35]

Even capacity for digital programming remains tight. Two hundred MHz of a typical 750 MHz system is used for a wide range of digital services: not only linear channels of standard definition and high definition digital programming, but also video-on-demand and high speed

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[32] "Cable Execs Stress Competitive Moves to Boost HDTV Carriage," Communications Daily (June 22, 2007) at 1 ("Big cable operators and networks are carrying more HDTV to sate rapidly rising demand and stunt ambitious HD plans by DirecTV and Verizon.").

[33] *Id.* (describing Cox goal of providing 50 HD channels by year end).

[34] C-SPAN 2 was forced to share its analog channel with MASN in the DC market due to analog capacity constraints. *See* "This Just In," *Multichannel News*, March 26, 2007, http://www.multichannel.com/article/CA6427630.html.

[35] *See, e.g.*, "Comcast Slashes Chicago Analog Tier," *Multichannel News* (Apr. 9, 2007) (Comcast planned to eliminate 38 channels on is expanded basic analog tier, returning 228 MHz of bandwidth for transmitting hundreds of digital signals.).

data. Operators are increasingly looking to technical solutions to free up space on digital tiers, too. Switched digital video is one solution, which allows operators to use their existing infrastructure to deliver digital programming more efficiently, but it has not yet been widely deployed.[36]

Programmers, meanwhile, are preparing to launch new channels of HD programming, to remain competitive with those already in HD. Today, 30 networks are provided in HD; by year end, cable networks have announced plans to offer an additional 50 networks in HD.[37] Competition remains fierce for access to this limited cable capacity.

The *Notice* would add to this already severe capacity crunch. It would require cable programmers, for a second time, to take a back seat to lightly viewed broadcast stations. And worse, it would take a back seat for *two* versions of the *same* program content. This multiplies the burden on operators and programmers – a burden already highly suspect in its analog-only form under *Turner*.

b) Dual Carriage Would Not Advance Any Important Government Interest

While dual carriage would impose substantial burdens on the editorial discretion – and the channel capacity – of cable systems, it would not advance any "important government interest," as required under the *Turner* standard of intermediate scrutiny. As Cooper shows, it serves neither of the two statutory interests that the Court found sufficiently "important" to justify mandatory carriage of a *single* signal.

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[36] Switched Digital Video works so that "channels that are less frequently used can be designated as switched services. They are not broadcast throughout the cable network. Instead, they are placed onto the cable plant only if at least one set-top is tuned to that service." Motorola, White Paper: "Using Bandwidth More Efficiently with Switched Digital Video," at 2 (Dec. 2006).

[37] "Cable Innovates, Consumers Win": Keynote Comments of Kyle McSlarrow, President & CEO, National Cable & Telecommunications Assoc., Opening General Session – SCTE Cable – Tec Expo (June 20, 2007) at 2.

First, there is no evidence that a dual-carriage rule would advance the objective of preserving free, over-the-air broadcast television. The Supreme Court made clear that the important governmental interest justifying must-carry was "not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households."[38] The Court held that requiring cable operators to carry each must-carry signal on their systems would further this interest without excessively burdening speech. Otherwise, it would be impossible for *any* cable customers (who did not also have over-the-air antennas attached to their sets) to receive those signals *at all*, even if they wanted to view them.

But once a signal is carried by the system, this is no longer the case. Any supposed cable "bottleneck" is removed. Any customer who wants to view a broadcasters' signal may do so. As Cooper points out,

> Speculation about hypothetical market dysfunction is not enough. "*Turner I* demands that the [government] do more than 'simply "posit the existence of the disease sought to be cured."' It requires that the [government] draw 'reasonable inferences based on substantial evidence.'" That standard cannot be satisfied here.[39]

Second, a dual carriage requirement obviously does absolutely nothing to promote the other statutory interest relied upon in *Turner* – *i.e.*, promoting "the widest possible dissemination of information from diverse and antagonistic sources." The Commission has recognized that carrying multiple signals from the same broadcaster "would not enhance source diversity" – even when the signals are "multicast" signals providing different programming.[40] As Cooper

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[38] *Turner II*, 520 U.S. at 522.

[39] Cooper at 15-16 (*quoting Time Warner Ent't Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001)).

[40] *See Second Report and Order*, 20 FCC Rcd at 4535.

notes, "That unimpeachable conclusion is particularly damning here, because a dual-carriage rule would entail the redundant transmission of the *very same* programming."[41]

Moreover, the Commission has also recognized that mandatory carriage of multiple signals from the same broadcaster "would arguably diminish the ability of other independent voices to be carried on the cable system" by displacing other non-broadcast program networks that might otherwise be carried on cable systems.[42] Thus, as Cooper confirms, "a dual-carriage rule would not add to the number of sources of speech; it can only *diminish* the number of speakers by shutting out sources that would otherwise be granted the additional channels consumed by broadcasters under a dual-carriage mandate."[43]

The Commission has also asserted a new governmental interest *not* set forth by Congress or considered by the Court in *Turner* as a justification for its dual carriage proposal. It suggests that the purpose of its proposal is to ensure the goal "that every customer should enjoy the benefits of the digital transition" – "[t]hat is, our policies should advance the goal of transitioning all consumers… to digital."[44] First, as Cooper points out, the Commission may not seek to justify must-carry requirements by manufacturing new government interests "that were never considered by Congress or endorsed by the Supreme Court."[45]

In any event, even assuming that the government had some legitimate interest in transitioning all consumers to digital and that this interest were sufficiently important to justify the burdens of dual must-carry on cable operators and programmers, it is hard to see how the

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[41] Cooper at 16.

[42] *Id.*

[43] *Id.* (emphasis added).

[44] *Notice* at ¶ 18.

[45] Cooper at 17.

Commission's proposal would advance this interest. Thus, as Cooper explains, "[e]nsuring that digital broadcast signals can be watched on analog sets (whether via analog carriage or digital converter boxes) would only retard, not advance, this objective."[46] Perpetuating analog carriage makes it *unnecessary* for customers to transition to digital in order to watch must-carry channels.

4. The Alternative of Providing All Customers With Digital Boxes Does Not Cure the Constitutional Defects of the FCC's Proposal

The Commission's proposal provides cable operators with an alternative to dual carriage, but, as Cooper points out, it is a Hobson's Choice,[47] which does not cure the proposal's First Amendment problems. First of all, as discussed above, the option of providing digital set-top boxes to all customers is simply not a realistic and feasible alternative for most cable systems. On average, only half of all customers have chosen to subscribe to digital services today. Forcing the other half to install digital boxes on their television sets simply in order to receive must-carry broadcast stations is "no choice at all."[48]

Allowing a cable operator to escape the unconstitutional burdens of dual carriage only by opting for an intolerable alternative is impermissible. According to Cooper, "It is settled that extortionate schemes like the analog converter-box 'option' are themselves invalid under the 'unconstitutional conditions' doctrine."[49]

In any event, wholly apart from the fact that it is a false alternative to the unconstitutional dual carriage requirement, forcing operators to convert all their analog customers to digital would itself raise serious First Amendment problems. It would directly affect and restrict the

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[46] *Id.* at 19.

[47] *Id.* at 35.

[48] *Id.* at 36.

[49] *Id.*

packages and options that a cable operator could choose to provide to its customers. It would force operators to remove an option that half of current customers currently choose, and it would therefore likely affect their ability to offer the services that, in their view, best met the needs, interests and demands of consumers.

As Cooper confirms, imposing such restrictions on newspapers, booksellers and other media of communication would not be tolerated, and they would be impermissible with respect to cable as well: "A requirement that cable operators transmit *all* their programming in digital format would trigger First Amendment scrutiny as an unreasonable restriction on the 'time, place or manner' of speech. It would be just as invalid as a rule barring newspaper companies from selling papers and requiring them to publish only in digital form on the Internet. . . ."[50]

Cooper explains that "[r]estrictions on the manner of speech are invalid unless they are 'narrowly tailored to serve a significant governmental interest.'"[51] A rule compelling cable systems to convert to all-digital systems would fail this test. There is no reason why forcing cable systems to transmit *all* their programming in digital is necessary to facilitate the transition or viewability of digital *broadcasting*. As Cooper points out, the transition to digital broadcasting "will happen by congressional fiat in February 2009 without regard to the format in which cable operators carry signals."[52] And equipment will be available to enable cable customers to view digital broadcast signals, whether or not other signals are available in analog format.

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[50] *Id.* at 2.

[51] *Id.* at 32-33 (*quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

[52] *Id.* at 34.

5. A Dual Carriage Requirement Would Constitute a Fifth Amendment Taking, Which Would Expose the Treasury to Liability for Just Compensation

While the Commission has twice found that a dual carriage requirement would violate the First Amendment, Cooper shows that such a requirement (as well as the illusory digital box option) would also, in the absence of just compensation, result in an unconstitutional taking of property under the Fifth Amendment. And this would be the case even if the requirement somehow survived First Amendment scrutiny.

Must-carry obligations give broadcasters "exclusive use of a portion of a cable company's system indefinitely and thereby effect a permanent physical occupation of that property."[53] The Supreme Court has made clear that such a permanent physical occupation is the essence of a *per se* taking, for which just compensation is required. And under the provisions of Sections 614 and 615, cable operators receive *no* compensation for carrying must-carry signals.

This analysis applies, as Cooper makes clear, even to mandatory carriage of a single signal in a single format.[54] The Fifth Amendment question was not before the courts in *Turner*, but Judge Williams, who dissented from the three-judge district court's decision that must-carry was permissible under the First Amendment, noted that he did *not* regard the contention that must-carry effects "an unconstitutional taking of cablecasters' property in violation of the Fifth Amendment" as "frivolous."[55]

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[53] Cooper at 19.

[54] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In his analysis of the First Amendment infirmities of a multicast must-carry requirement, (*see* note 30, *supra*), Professor Tribe also found that all must-carry requirements effect a *per* se Fifth Amendment taking. *See* Tribe I, *supra*, at 12-15.

[55] *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 67 n. 10 (Williams, J., dissenting).

If must-carry is a Fifth Amendment taking without compensation, cable operators' remedy is a Tucker Act claim against the Federal Treasury. But, as Cooper points out, the FCC has no authority to expose the Treasury to such a claim "unless there is clear congressional authorization in advance for the action."[56] Indeed, the Supreme Court "has long held that statutes shall not be read to delegate the congressional power to take property unless they do so 'in express terms or by necessary implication.'"[57]

While Congress has no doubt mandated that each must-carry broadcaster's signal be carried *once* on a cable system, there is certainly no express and unambiguous requirement that it be carried *twice* – even if that were one reasonable way to construe the statute, which it is not. In these circumstances, "[t]he Commission must construe the statute in a manner that avoids serious constitutional problems by refraining from imposing a dual-carriage rule."[58]

II. THE COMMISSION SHOULD MAINTAIN ITS "NON-DEGRADATION" STANDARD

The required carriage of must-carry signals, regardless of viewer interest in receiving them, is burdensome enough. But the *Notice's* novel proposal to reverse its interpretation of the "manner of carriage" rules adds another millstone to the forced speech scheme. The proposal to require carriage of "all the content bits" of digital must-carry stations proposes a wrong-headed solution to a nonexistent problem. It would hold cable operators' technological advancements hostage to the least efficient must-carry broadcaster's transmission standard, an outcome not supported by the Cable Act. And it would force operators to devote more capacity to carriage of

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[56] Cooper at 30, *citing, inter alia, Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985); *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). *See also* Tribe I, *supra*, at 15-18.

[57] Cooper at 31, *quoting Western Union Telegraph Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904).

[58] Cooper at 32.

must-carry broadcasters, overriding more speech choices and increasing burdens on cable programmers competing for space.

The FCC has recognized from the very start, up until the *Notice*, that the material degradation provision, Sec. 614(b)(4)(A),[59] was *not* meant to "imped[e] technological advances and experimentation by the cable industry (*e.g.*, signal compression and 500-channel technology)."[60] Its intent was to ensure that operators "make reasonable efforts and use good engineering practices and proper equipment to guard against *unnecessary degradation* of broadcast television signals."[61] This provision focused on "degradation beyond the normal operations and processing and transmission of signals on the cable system."[62]

The FCC's existing standard, which the *Notice* also proposes as an option to continue, and which NCTA endorses, already satisfies this requirement.[63] It "protects the interest of cable subscribers by focusing on the comparable resolution of the picture, as visible to a consumer, rather than the number of … bits transmitted, which may not make a viewable difference on a consumer's equipment."[64] Today's standard requires that "in the context of mandatory carriage of digital broadcast signals, a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer (*e.g.*, non-broadcast

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[59] The commercial must-carry provision of the 1992 Act states "that the signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal." Non-commercial stations also must be carried "without material degradation." 47 U.S.C. § 534(b)(4)(A).

[60] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2965, 2990 (1993) ("Must Carry Report and Order").

[61] *Id.* (emphasis supplied).

[62] *Id.* at n. 295.

[63] *First Report and Order*, at ¶ 72.

[64] *Id.* at ¶ 73.

cable programming, other broadcast digital program, etc.) carried on the cable system, provided, however, that a broadcast signal delivered in HDTV must be carried in HDTV."

The *Notice* provides no reason for substituting this sound policy with its alternative formulation to carry all of a primary digital signal's "content bits." There is no reason to jettison a standard that is working for one that is spectrally wasteful and technologically retrograde. Cable operators have every interest in ensuring they provide high quality digital programming to customers. They have every incentive to do so in a way that is maximally efficient on the cable plant. And there is no evidence of a problem with the hundreds of broadcaster digital signals which have been carried by cable during the transition.

Broadcasters themselves elsewhere acknowledge such an approach as backward-looking. They have touted their ability to use portions of their 19.4 Mbps stream for other uses without degrading the quality of *their* HD transmissions, using various degrees of compression. "One standard definition channel could be accommodated around the clock – even when the station is carrying the network's HDTV programs – *without a significant degradation in quality*, the National Association of Broadcasters claims."[65] In fact, the Advanced Television Systems Committee ("ATSC") is developing a standard that will enable broadcasters to deliver television content and data to mobile and handheld devices via their DTV broadcast signal – using up some portion of the broadcaster's over-the-air bit stream. This, too, will not affect broadcasters' ability to provide HD, according to the ATSC: "broadcasters will be able to allocate a portion of the 19.39 Mbps/8-VSB signal to mobile and handheld *while continuing to transmit services such as HDTV*."[66]

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[65] "Digital TV at Last?" *Scientific American*, Feb. 2007 at 74 (emphasis supplied).

[66] "*ATSC to Develop Standard for Mobile and Handheld Services*," Press Release, Apr. 9, 2007 (emphasis supplied).

A “carry all the content bits” rule not only would defy broadcaster’s own expectations; it would upend cable digital operations for no legitimate reason. Cable operators have been at the vanguard of using digital technology. Their operations rely on advanced techniques, which preserve scarce cable bandwidth without affecting picture quality by eliminating extraneous information – *i.e.*, “content bits” – that may be unnecessary to the presentation of a high quality picture.

Cable operators routinely use digital compression and statistical multiplexing to present digital programming – broadcast *and* non-broadcast – on their cable systems. Compression and statistical multiplexing are critical elements in any operator’s efforts to maximize the information-carrying efficiency of the cable plant. These techniques allow an operator to use each 6 MHz slot on its system in the most efficient way possible, for both cable and broadcast programming. It is source agnostic: statistical multiplexing simply looks at the nature of the content (*e.g.*, fast action vs. talking heads) to determine how many bits to allocate to any particular picture.

Operators, along with other providers of digital content, are also looking to improve system efficiency by moving from using the MPEG-2 standard toward use of the more efficient advanced coding technology such as the MPEG-4 AVC or VC-1 standards. These advanced digital compression technologies do a more efficient job of coding than MPEG-2, providing the same picture quality using fewer bits. The FCC, in the DBS context, acknowledged that “compression technology is rapidly evolving and we do not want to impede innovation by proscribing certain techniques. We also believe that new compression methods may benefit subscribers as satellite carriers could offer more services, particularly those involving broadband

applications."[67] A "carry all the bits" requirement, by contrast, would also unnecessarily freeze technological advancements for cable and other providers of digital programming. It essentially repudiates all that has been learned about and applied to the technique of compression.

The flaws in the "carry all content bits" proposal cannot be remedied by the additional gloss, suggested in the *Notice*, of allowing an operator to carry less than all the bits only by "demonstrat[ing] to the broadcaster that such reduction will not result in material degradation."[68] Cable operators do not have agreements with broadcasters who opt for must-carry instead of retransmission consent; their carriage is by operation of law.[69] Adding this extra complication on to mandatory carriage is unnecessary.

If a station has reason to believe that its signal is materially degraded, it can bring an action at the Commission. But the *Notice's* proposed alternative of provide an automatic right to carriage of "all the bits" pending resolution of a complaint at the Commission[70] will simply increase the need for FCC involvement in adjudicating meritless disputes. And it will inflict needless damage on cable operators and programmers, resulting from wasteful uses of channel capacity pending resolution of these complaints.

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[67] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issue*, 16 FCC Rcd. 1918, 1969 (2000).

[68] *Notice* at ¶ 15.

[69] The *First Report and Order* made clear that the "material degradation" provision applies only to those commercial stations carried pursuant to must-carry. *First Report and Order* at ¶ 73 ("*in the context of mandatory carriage of digital broadcast signals*, a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution that that afforded to any digital programmer (*e.g.*, non-broadcast cable programming, *other broadcast digital program*, etc.) carried on the cable system….") (emphasis supplied). To the extent the *Second Further Notice* is ambiguous about whether retransmission consent stations are also covered by the material degradation provision, the Commission should make clear that they are not. Retransmission consent stations already negotiate for the terms and conditions of their carriage, and they should not be permitted to avail themselves of these protections designed for stations that purportedly cannot fend for themselves in the marketplace.

[70] *Notice* at ¶ 15.

More generally, the existing standard preserves operators' flexibility to optimize use of their plant while protecting digital must-carry broadcasters against discriminatory treatment – which, after all, is the purpose of this provision. This test ensures that must-carry broadcasters will get the benefit of the same treatment as any digital programmer carried on the system. And given that cable operators are engaged in a heated battle with their DBS competitors over which MVPD has the superior picture quality,[71] there is every reason to believe that those incentives will ensure that cable customers receive the best quality pictures across the board, which by the policy's terms, covers must-carry stations.

The *Notice* also asks whether there is any method by which to measure compliance with this existing nondiscrimination standard.[72] While today there is no uniform objective test for measuring the digital signal inputs from programming sources at the cable headend, cable systems are subject to measurable standards for the transmission of all digital signals – broadcast and non-broadcast – on their plant. These technical standards ensure the delivery of high quality digital signals to digital television sets.[73] Therefore, FCC rules in place already provide an objective measurement tool – coupled with the existing non-discrimination standard – to ensure high quality pictures across all digital channels.

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[71] *"Cable Execs Stress Competitive Moves to Boost HDTV Carriage,"* Communications Daily, June 22, 2007 at 1 - 2 (explaining that "Cox pitch will stress quality differences between cable-delivered and satellite-delivered high-def video. As in Comcast campaign launched last month, the Cox effort will promote results of a 'blind taste test' finding that two-thirds of consumers preferred cable's HD quality to satellite's HD quality.").

[72] *Notice* at ¶12.

[73] 47 C.F.R. § 76.640 (requiring digital cable systems to meet technical standards and requirements to support unidirectional digital cable products.).

CONCLUSION

The Commission's determination of the digital must-carry rules must be guided by two touchstones: Congress's articulated findings and statutory language creating must-carry; and the Constitution's limitations on such forced speech requirement on cable systems, as developed in the *Turner* cases. It must conclude, as it has twice before, that a dual must-carry requirement is a nonstarter under the First Amendment. And, as it accounts for Congress's goal of retail competition under Section 629, and the mayhem that an FCC-mandated forced box requirement on every cable customer's set would engender, it must also jettison its second proposal.

This is why we argue that carriage of the primary digital signal is all that the statute, and the Constitution, can withstand as a legal obligation for must-carry stations. Every station will be carried, the signal will be viewable from day one with the right receiving equipment (as half of U.S. cable households already have). Further, the FCC should maintain its current nondiscrimination policy as to signal degradation, lest it trigger an administrative train wreck that would overturn 20 years of compression technology development.

The FCC's context in determining digital must-carry rules derives from Congress's decision, for unrelated but important policy reasons, to move from a market-driven, 85 percent digital penetration transition plan to a hard date of February 17, 2009, unrelated to digital penetration. Cable is desirous of playing an active, constructive role to facilitate the transition for its customers. But it should be remembered at all times that this is a transition driven by a desire to reclaim valuable broadcast spectrum.

Broadcasters, not cable, will have enjoyed nearly a decade of 6 MHz of additional spectrum for services that are not limited to free over-the-air TV. Likewise, broadcasters, not cable, will permanently have spectrum that will be available post-transition for additional

services in addition to providing their primary signal. And broadcasters after February 17, 2009, will continue to enjoy must-carry rights on cable systems for their primary digital signals and will have reduced their operating costs of maintaining two transmitters. As a policy matter, cable should not be handed a higher bill, in terms of its own plant bandwidth or operating costs, because of the broadcaster's digital aspirations. Nor can those aspirations subordinate the expressive rights of operators and programmers further than *Turner* permits – and as the FCC has twice found.

Respectfully submitted,

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APPENDIX A

THE COMMISSION'S PROPOSED DIGITAL CARRIAGE REQUIREMENT WOULD VIOLATE THE CONSTITUTION

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INTRODUCTION

The "must-carry" provisions of the Communications Act of 1934, as amended, require cable operators to distribute the signals of certain local broadcast stations over their cable systems. The Act further requires that commercial broadcast signals that are subject to mandatory carriage must be "viewable via cable on all television receivers" for which a cable operator provides a connection. *See* 47 U.S.C. § 534(b)(7). A similar requirement governs noncommercial broadcast signals. *See id.* at § 535(h).

The Commission has asked for comments on the application of must-carry requirements after the conclusion of the digital television ("DTV") transition on February 17, 2009, particularly as they relate to cable subscribers with legacy, analog-only television sets. *See* Section 614(b)(4)(B) of the Communications Act of 1934, 47 U.S.C. § 534(b)(4)(B); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Further Notice of Proposed Rulemaking, FCC 057-71, at ¶¶ 1-4 (FCC May 4, 2007) ("*Second FNPRM*"). The Commission has proposed that cable operators should be required either: (1) to convert the digital signal to an analog format and redundantly carry the analog signal along with the digital signal to all analog cable subscribers ("the dual-carriage rule"), or (2) if the cable operator's system is "all-digital," to carry the broadcast signal only in digital format, provided that all subscribers have the necessary equipment to view the broadcast content ("the second prong" or the "digital-converter-box" rule). *Id.* ¶¶ 4, 17.

Both of the Commission's alternative proposals raise serious constitutional questions. A dual-carriage rule requiring cable operators to carry each must-carry station in analog as well as digital format would constitute the same type of dual-carriage requirement that the Commission has *twice* previously rejected, in large part because of First Amendment concerns. *See Carriage*

of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, CS Docket No. 98-120, Second Report and Order and First Order on Reconsideration, FCC 05-27, at ¶¶ 28-44 (FCC Feb. 23, 2005) ("*Second Report and Order*"); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 16 FCC Rcd 2598, 2622 (FCC 2001) ("*First Report and Order*"). Furthermore, *any* must-carry regime – whether dual-carriage or even the existing single carriage requirement that was narrowly upheld by the Supreme Court in the *Turner* decisions – is now constitutionally dubious, because changes in markets and technology have undermined *Turner*'s fact-intensive foundation, thereby exposing any must-carry regime to strict First Amendment scrutiny.

A dual-carriage requirement would also work a taking of cable operators' property that would expose the federal Treasury to liability for billions of dollars in just compensation under the Fifth Amendment.[1]

The second prong of the Commission's proposal fares no better. Although converting to an all-digital system (and consequently transmitting must-carry stations only in digital format) is presented as an option by which cable operators can escape the burden of dual-carriage, this alternative is in fact equally unpalatable and equally suspect under the First Amendment, albeit for different reasons. A requirement that cable operators transmit *all* their programming in digital format would trigger First Amendment scrutiny as an unreasonable restriction on the "time, place or manner" of speech. It would be akin to a rule barring newspaper companies from selling papers and requiring them to publish only in digital form on the Internet, or a rule allowing advertisers to place ads on television but not on radio. The second prong is therefore

[1] The Commission did not have occasion to address the takings issues in either its *First Report and Order* or its *Second Report and Order*, in light of its First Amendment conclusion.

hardly a viable alternative to dual carriage – the Commission offers cable companies only the illusory "choice" between two alternatives that both violate the First Amendment. Thus, in addition to its other flaws, the Commission's proposal would likely run afoul of the doctrine of unconstitutional conditions.

In short, the Commission's proposals would raise serious constitutional questions and should therefore be rejected as impermissible interpretations of what the statute requires. *See United States v. X-Citement Video, Inc*., 513 U.S. 64, 68 (1995); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concerning).

I. A "DUAL-CARRIAGE" REQUIREMENT CANNOT WITHSTAND FIRST AMENDMENT SCRUTINY.

A. A "Dual-Carriage" Rule Would Suppress Speech.

The starting point for evaluating the Commission's dual-carriage alternative under the First Amendment is to be found in the Supreme Court's decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*"), where the Court evaluated the congressional requirement that cable operators must carry local broadcast television signals.[2] "By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Turner I*, 512 U.S. at 636-37. A bare majority of the Supreme Court upheld this must-carry regime even though all agreed that it

[2] *See* Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), *codified at* 47 U.S.C. §§ 534 & 535.

substantially infringed the First Amendment rights of both cable operators and cable programmers: "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner I*, 512 U.S. at 641. The must-carry regime invaded the cable companies' constitutionally guaranteed autonomy to choose "what to say and what to leave unsaid." *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion). "Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'seek to communicate messages on a wide variety of topics and in a wide variety of formats.' " *Turner I*, 512 U.S. at 636 (quoting *Los Angeles v. Preferred Comm'ns, Inc.*, 476 U.S. 488, 494 (1986)).

Justice Breyer, who provided the decisive fifth vote to uphold the statute, conceded:

> I do not deny that the compulsory carriage … extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would been their preferred set of programs. This "price" amounts to a "suppression of speech."

Turner II, 520 U.S. at 226 (Breyer, J., concurring).

In proposing to expand the must-carry mandate to require cable operators not only to carry a broadcaster's digital signal, but also to convert that signal to analog format at the cable operator's expense and then carry it (again at the cable operator's expense) to those cable subscribers who still have analog television sets, the Commission proposes to suppress twice as much speech as the current must-carry regime. Such a rule would expand the must-carry mandate to require cable operators to carry *both* a digital programming stream and a six-MHz analog programming stream *per broadcast station*. A dual-carriage rule would thus impose a *greater* burden than the must-carry rules upheld in *Turner*. It would also constitute a *greater*

burden than the multicasting proposals previously rejected by the Commission, which would have forced carriage of all programming streams that broadcasters chose to multicast within the six MHz of broadcast spectrum they occupied under the analog must-carry scheme.

The additional mandated analog transmission would displace speech that the cable operators, in the exercise of their editorial discretion, believe to be "deserving of expression, consideration, and adherence." *Turner I*, 512 U.S. at 641. The Supreme Court held that the must-carry requirements of the 1992 Cable Act "interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations." *Id*. at 643-44. Plainly, the dual-carriage requirement would double the number of broadcast streams a cable operator must carry and thereby constitute a 100% increase in the interference with cable operators' editorial discretion.

Actually, it would be worse than that. Insofar as compulsory analog carriage of a broadcast station already carried digitally would consume 6 MHz of cable spectrum that could otherwise carry multiple digital channels of programming, the Commission's proposed analog-must-carry requirement would not merely double the burden on free speech identified by the Supreme Court in *Turner*, *it would multiply that burden by several times.* The First Amendment prohibits laws "abridging the freedom of speech," not laws regulating the use of electromagnetic spectrum, and the burden on free expression is measured in terms of the amount of speech suppressed, not the number of megahertz consumed by the broadcaster.

The *Turner* Court applied an intermediate level of First Amendment scrutiny, rather than strict scrutiny, in upholding the must-carry requirement of the 1992 Cable Act, and we discuss in detail below why the proposed dual-carriage rule cannot be sustained even under that more forgiving constitutional test. We turn first, however, to the question whether strict First

Amendment scrutiny is now the appropriate standard to apply to *any* form of must-carry obligation, including the Commission's proposed dual-carriage alternative. The state of technology and the state of the multi-channel video programming distribution ("MVPD") market on which the Supreme Court relied in 1994 have changed dramatically in the thirteen years since that decision. The content-neutral purpose found by the *Turner* Court – preservation of broadcast television in the face of a cable bottleneck monopoly – no longer exists and, as a result, no longer provides a justification for must-carry obligations. Rather, must-carry requirements can now be understood only as regulations designed to affect the content of speech. They are therefore subject to the strictest First Amendment scrutiny.

B. A Dual-Carriage Requirement Would Be Subject to Strict Scrutiny Under the First Amendment.

In *Turner I* and *Turner II*¸ a narrow majority of the Court applied intermediate First Amendment scrutiny to the Cable Act's must-carry requirements. *See* 512 U.S. at 661-62; 520 U.S. at 189. The four dissenting Justices would have held that the must-carry regime was a content-based regulation of speech:

> Preferences for diversity of viewpoints, for localism, for educational programming and for news and public affairs all make references to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be benignly motivated. . . . [But they are not] content neutral. . . . The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.

Turner I, 512 U.S. at 677-78 (O'Connor, J., joined by Scalia, Thomas and Ginsburg, JJ., dissenting). Indeed, Congress unabashedly made its promotion of local broadcasting explicit in extensive legislative findings enacted in the body of the statute itself. *See id*. at 676-77, 679-80 (reviewing § 2(a) of the 1992 Cable Act).

Remarkably, the *Turner I* majority conceded most of the dissent's argument: it conceded the significance of these "unusually detailed statutory findings" about the cable industry, 512 U.S. at 646; it conceded that "laws that single out" a particular segment of the communications industry "for special treatment 'pose a particular danger of abuse by the State,' " *id.* at 640; it conceded that "the must-carry provisions impose special obligations upon cable operators and special burdens on cable programmers," *id.* at 641; and it conceded that Congress expressly "acknowledged the local orientation of broadcast programming," *id.* at 648, and underscored " 'Congress' solicitousness [*sic*] for local broadcasters' material,' " *id.*

Nevertheless, the *Turner I* majority held that cable speakers could be constitutionally compelled to carry local broadcasting not because of its local content but because of the "special characteristics of the cable medium: *the bottleneck monopoly power* exercised by cable operators and the dangers this power poses to the viability of broadcast television." 512 U.S. at 661 (emphasis added). This supposed feature of the television market in 1994 was the linchpin of the *Turner I* Court's rejection of strict scrutiny and its decision, by the narrowest of margins, to subject the must-carry rules to merely intermediate First Amendment review. The Court also explicitly rested its holding on a technological feature of television in 1994: "When an individual subscribes to cable, the *physical connection between the television set and the cable network* gives the cable operator *bottleneck*, or gatekeeper, control over most (if not all) the television programming that is channeled into the subscriber's home." *Id.* at 656 (emphasis added). The *Turner I* majority stressed these market and technology characteristics repeatedly. *See, e.g.*, *id.* at 657 ("The potential for abuse of this private power over a central avenue of communication cannot be overlooked."); *id.* at 657 (government's need to ensure "that private interests not restrict, through physical control of a critical pathway of communication, the free

flow of information"); *id.* at 656 ("A cable operator . . . can thus silence the voice of competing speakers with a mere flick of the switch."); *id.* at 649 (need "to prevent cable operators from exploiting their economic power").

In the years since they were handed down, the *Turner* decisions have become unstable precedents for two reasons, entirely apart from the most recent changes in membership of the Supreme Court. First, support for the "bottleneck" rationale that drove the Court's decision in *Turner I* quickly eroded. Less than three years after *Turner I*, the supposed anticompetitive purpose of must-carry no longer commanded a majority of the Court in *Turner II*. Justice Breyer concurred only in part, and while he nodded in the direction of the plurality's metaphor of cable systems – at least "at present" – as a "kind of bottleneck," 520 U.S. at 227 (Breyer, J.), he explicitly refused to embrace the *Turner II* plurality's "anticompetitive rationale." *Id.* at 225. This split within the *Turner I* majority reveals the temporal instability inherent in the Court's analysis and puts *Turner*'s use of intermediate rather than strict First Amendment scrutiny on a countdown to extinction. Justice O'Connor explained:

> I do not read Justice Breyer's opinion – which analyzes the must-carry rules in part as a "speech-enhancing" measure designed to ensure a "rich mix" of over-the-air programming, *see ante*, at [226, 227] – to treat the content of over-the-air programming as irrelevant to whether the Government's interest in promoting it is an important one. The net result appears to be that five Justices of this Court do not view must-carry as a narrowly tailored means of serving a substantial governmental interest in preventing anticompetitive behavior; and that five Justices of this Court do see the significance of the content of over-the-air programming to the Government's and appellees' efforts to defend the law. Under these circumstances, the must-carry provisions should be subject to strict scrutiny, which they surely fail.

520 U.S. at 234-35 (O'Connor, J., joined by Scalia, Thomas and Ginsburg, JJ., dissenting).

Second, the multichannel video programming markets and technology on which *Turner* was founded have changed dramatically. The key to the Court's acceptance of mere

intermediate scrutiny, as the *Turner I* majority noted again and again, was cable operators' supposed monopoly power and bottleneck control of the physical connection betwixt television set and multichannel video network. *See, e.g.*, 512 U.S. at 645, 646, 649, 656, 657, 661, 662. The Court freely acknowledged that actual proof of such market conditions was essential to its decision to apply intermediate rather than strict scrutiny: "the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media." *Turner I*, 512 U.S. at 640. The burden of proving the continuation of cable's supposed "bottleneck monopoly" is one that neither the Commission nor any other party can meet in today's world.

The contemporary market for multi-channel video programming distributors ("MVPDs") bears little resemblance to the market that existed a decade-and-a-half ago when Congress enacted the 1992 Cable Act. The Court's concerns in 1994 about "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television," *Turner I*,, 512 U.S. at 661, have dissipated as a result of two major developments. First, any market power of cable operators has been significantly eroded by the introduction of powerful and ubiquitous Direct Broadcast Satellite ("DBS") providers who directly compete with cable in every market to provide multichannel video programming service. *See Annual Assessment on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, FCC 06-11, at ¶ 13 (FCC Mar. 3, 2006). Satellite service is available to all U.S. television households (usually through more than one DBS provider) and 96% of those households can receive their local broadcast stations via satellite. *Id.* at ¶¶ 5, 13. In one year, DBS subscriptions leapt nearly 13% to encompass almost 28% of all MVPD customers in 2005. Meanwhile, cable subscriptions and market penetration

rates both declined: cable's share of the MVPD market in 2005 dropped to 69%, continuing a decline that has been going on for years. *Id.* at ¶¶ 8, 13, 28.[3] The second and third largest MVPDs are now satellite companies, not cable companies. *Id.*

Furthermore, cable operators now face intermodal competition from established players in a different field – wireline telephone companies. As the Commission reported in 2006, "we are seeing wired competitors to cable trying to enter the market. The Commission should facilitate this entry, not only because it furthers video competition, but also because it promotes the deployment of the broadband networks over which the video services are provided."[4] Phone companies are building fiber-optic networks, and the improvement in broadband speed that fiber-optic technology offers makes MVPD service via fiber a highly competitive alternative to cable and DBS. By the end of 2006, Verizon's FTTP network was operating in ten states,[5] and other phone companies, including AT&T and Qwest, are deploying their own competing video services.[6]

The significance of the entry into the MPVD market of these established, well-capitalized new providers cannot be overstated. Telephone companies, DBS providers, cable operators and

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[3] From 2001 to 2005, the number of cable subscribers as a share of total MVPD subscribers dropped from 77% to 69%. DBS subscriptions in the same period increased from 18% to 28%. *See FCC Open Meeting in Keller, Texas on Annual Assessment of the Status of Competition for the Delivery of Video Programming* (Feb. 10, 2006) (hereafter, "*Keller Hearing*"), Statement of Commissioner Jonathan Adelstein at 1.

[4] *Keller Hearing*, Statement of Chairman Kevin Martin at 1. *See also* Statement of Commissioner Copps at 1; Statement of Commissioner Adelstein at 2.

[5] *Verizon Third Quarter October 2006 8K, available from the SEC archives at www.sec.gov.*

[6] Press Release, FCC News, *FCC Issues 12th Annual Report to Congress on Video Competition* (February 10, 2006) at 3-4.

others now provide consumers with comparable alternatives, eliminating any supposed "bottleneck" concerns that Congress may have entertained fifteen years ago when it mandated must-carry in the Cable Act. Any attempt to justify continued cable must-carry rules in this "rapidly evolving market structure"[7] must consider this increasingly intense competition from other MVPDs using either traditional or new technologies. As the Commission has concluded in other contexts, even *impending* competition dramatically reduces the risk of abuse of market power by incumbent players.[8]

As a result, there can be no serious dispute that cable no longer has the supposed "bottleneck" power over the distribution of over-the-air broadcast programming that drove the *Turner* decisions. Cable operators must respond to consumer demand in making carriage decisions; any attempt to bestow unwarranted favor on affiliated cable programmers would be punished by consumers who now have ready alternatives furnished by telephone companies and two major DBS providers.

In addition, wholly apart from the changes in the MVPD market, technological improvements in television sets have eliminated the supposed cable bottleneck. In *Turner II*, the Court was moved by Congress's 1992 finding that an "A/B switch" did not provide an "enduring or feasible" alternative to must-carry, on the basis of evidence that "A/B switches suffered from technical flaws; viewers might be required to reset channel settings repeatedly in order to view

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[7] *Connecticut Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 850 & n.7 (2d Cir. 1996) (citation and quotation marks omitted) (upholding FCC decision refusing to let state regulate cellular phones and ruling that FCC was correct to consider the alleged need for state regulation in the context of a "forward looking perspective" and the state of "imminent future competition" in the market).

[8] *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd at ¶¶ 148, 174-75.

both UHF and cable channels; and installation and use of the switch with other common video equipment (such as videocassette recorders) could be 'cumbersome or impossible.' " 520 U.S. at 219-20 (internal citations omitted).

But that was fifteen years ago – an epoch in terms of electronic technology. Modern television receivers are universally capable of receiving television signals from multiple sources. Today, a TV viewer armed with a universal remote control need only press a button to switch seamlessly from the signal provided by the cable operator, to the signal from a DVD player or VCR, to a signal broadcast by a local television station, to a DBS signal received from a satellite, to the input from a video-game console. Thus, it is no longer the case that "the physical connection between the television set and the cable network gives the cable operator" control over a hapless viewer's television set. *Turner I*, 512 U.S. at 656. Accordingly, cable operators no longer enjoy any supposed "bottleneck" power even with respect to their own subscribers.

In light of these enormous technological and market changes, a First Amendment challenge to a must-carry regime today would likely be subject to strict scrutiny, which such a requirement could not possibly satisfy. With the supposed "bottleneck" gone, the must-carry regime has now become nothing more than what the four dissenting members of the *Turner* Court always understood it to be: content-based regulation of speech. Indeed, any challenge would not only doom the expansion of must-carry to redundant analog and digital signals, but would also draw into question the existing single-channel must-carry requirement upheld in the *Turner* decisions. While a narrow majority of a bygone day held that the original must-carry requirement advanced an important government objective, it cannot be seriously maintained that it would satisfy strict First Amendment scrutiny – namely, that it is the least restrictive means available to advance a compelling government objective.

In any case, as we now explain, expansion of the must-carry regime to encompass dual analog and digital carriage does not survive even the intermediate scrutiny applied in *Turner II*.

C. The Commission's Proposals Would Not Advance Any Important Governmental Interest And Therefore Could Not Survive Even Intermediate Scrutiny Under the First Amendment.

Even if dual carriage could be viewed as content-neutral, thereby triggering only intermediate scrutiny, the Commission cannot demonstrate that such a mandate "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. The *Turner II* majority held that this standard was satisfied, and thus upheld the limited "suppression of speech" entailed by the requirement that cable operators carry a single programming stream per broadcaster. Specifically, the Court identified two such interests: " '(1) preserving the benefits of free, over-the-air local broadcast television, [and] (2) promoting the widespread dissemination of information from a multiplicity of sources . . . .' " *Id*. (quoting *Turner I*, 512 U.S. at 662).[9] A dual-carriage rule will not advance either of these interests one whit, nor would it advance any other important government interest. By definition, such a

[9] A plurality of the Court also identified a third interest served by must-carry: " 'promoting fair competition in the market for television programming.' " *Turner II*, 520 U.S. at 189 (quoting *Turner I*, 512 U.S. at 662). But a majority of the Court in *Turner II* refused to rely upon this basis for upholding the statute against the First Amendment challenge. *Id*. at 225-26 (Breyer, J., concurring) (expressly refusing to join "the principal opinion's analysis of the statute's efforts to 'promote fair competition' "); *id*. at 235 (O'Connor, J., joined by Scalia, Thomas & Ginsburg, JJ., dissenting) (Government did not show that "the threat of anticompetitive behavior by cable operators supplies a content-neutral basis for sustaining the statute"). In any event, even if preservation of competition had provided a basis for the must-carry restrictions in 1992, the dissipation of cable's bottleneck monopoly power has eliminated that justification today.

requirement would "burden substantially more speech than necessary to further those interests," *id*., and thus would not survive First Amendment review.

1. Preservation of Free Over-the-Air Broadcast Television

The Supreme Court emphasized that the important governmental interest justifying the current must-carry regime was "*not* to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households." *Turner II*, 520 U.S. at 222 (emphasis added).[10] In other words, the governmental interest identified in *Turner* was *not* in ensuring that *every* viewer could watch *every* broadcast station, but simply in ensuring the economic survival of a critical mass of broadcast stations. This interest is fully satisfied by the carriage of broadcast signals in a single format.

In *Turner*, the Court accepted Congress's concern that, absent must-carry, a television broadcast station might not be carried *at all*, in which case it could not be viewed by any cable customers in its local service area, even if they might want to watch it. It was reasonable, the Court held, for Congress to conclude that this inaccessibility to *any* cable customers could pose a threat to the viability of a significant number of broadcasters. But carriage in a single format

[10] It should be noted that the strength of this interest has diminished substantially in the many years since the *Turner* cases were decided. The Court emphasized that the interest in preserving broadcast television was important because "[f]orty percent of American households continue to rely on over-the-air signals for television programming. Despite the growing importance of cable television and alternative technologies, ' "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." ' " *Turner II*, 520 U.S. at 190 (quoting *Turner I*, 512 U.S. at 663 (quoting *United States v. Southwestern Cable Co*., 392 U.S. 157, 177 (1968))). While that may have been true in 1968, and perhaps even in 1992, an ever diminishing number of Americans rely on broadcasting today. Barely 14 percent of the Nation's television households rely on over-the-air broadcasting and, as explained above, cable faces stiff competition in the MVPD market from DBS providers and telephone company fiber-optic networks. *See* Press Release, FCC News, *FCC Issues 12th Annual Report to Congress on Video Competition* (Feb. 10, 2006) at 3 (of the 109.6 million TV households in America as of June 2005, 94.2 million subscribed to an MVPD service).

eliminates this concern, by ensuring that a broadcast station's signal *will* be transmitted on a cable system and will be available to any customer who wishes to view it with the requisite equipment.

Moreover, there is no basis to believe that cable operators, without any bottleneck monopoly power, will not make carriage decisions on the economic merits in the current video marketplace. Cable operators must compete with other MVPD platforms. If significant numbers of customers wish to receive broadcast signals in an analog and/or digital format, cable operators would have every incentive to provide them that way.

Speculation about hypothetical market dysfunction is not enough. "*Turner I* demands that the [government] do more than 'simply "posit the existence of the disease sought to be cured." ' It requires that the [government] draw 'reasonable inferences based on substantial evidence.' " *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (quoting *Turner I*, 512 U.S. at 664, 666) (internal citation omitted). That standard cannot be satisfied here. The displacement of the cable operators' and cable programmers' speech in favor of dual carriage is thus necessarily gratuitous and for that reason fails the narrow tailoring requirement.

2. Multiplicity of Diverse Sources of Information

In the *Turner* cases, the Supreme Court also relied upon the related, but distinct, interest in promoting "the widest possible dissemination of information from diverse and antagonistic sources [which] is essential to the welfare of the public." *Turner II*, 520 U.S. at 192 (internal quotations and citations omitted). Here, the concern is preserving a multiplicity of over-the-air broadcasters (as opposed to over-the-air signals) in order to provide over-the-air viewers with a more diverse set of speakers. This interest is likewise wholly unaffected by a dual-carriage requirement because such a requirement, by definition, does not increase the number of

broadcasters at all; it merely requires a cable operator who is already forced to carry the digital programming stream of each broadcaster to repeat the same programming in analog format.

The Commission recognized as much in the multicasting context, finding that "[a]dding additional channels of the same broadcaster would not enhance source diversity." *Second Report and Order* at ¶ 39. That unimpeachable conclusion is particularly damning here, because a dual-carriage rule would entail the redundant transmission of the very *same* programming. Indeed, the Commission observed that "mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system" by entirely shutting out, or displacing, independent and unaffiliated cable programmers who have no other outlet for their programming. *Id*. In short, a dual-carriage rule would not add to the number of sources of speech; it can only diminish the number of speakers by shutting out sources that would otherwise be granted the additional channels consumed by broadcasters granted a right to dual-carriage.

3. Other Conceivable Interests

Thus, the governmental interests cited by the Supreme Court in upholding the current must-carry regime plainly do not justify a dual-carriage rule. First Amendment scrutiny is not mere rationality review, and the Commission may not manufacture *post hoc* rationalizations for must-carry rules that were never considered by Congress or endorsed by the Supreme Court. *See Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *Board of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-90 (1978). In any event, none of the other interests suggested by broadcasters or the *Second FNPRM* justifies a dual-carriage rule.[11]

[11] Any claim that a dual-carriage rule is necessary to ensure the "viewability" of local or public interest programming must fail as a content-based justification triggering strict scrutiny. That objective was advanced as a justification for the cable must-carry mandate in

The Commission has indicated that the purpose of the proposed dual-carriage rule is the achievement of the supposed congressional goal "that every customer should enjoy the benefits of the digital transition" – "[t]hat is, our policies should advance the goal of transitioning all consumers . . . . to digital." *Second FNPRM* at ¶ 18. The Commission suggests that forcing cable operators to carry both digital and obsolete analog signals after the 2009 DTV transition "is critical to the successful and timely conclusion of the DTV transition." *Id.* at ¶ 16. But these statements ignore the fact that the digital transition mandated by Congress is confined to *broadcast* programming. The February 19, 2009 DTV deadline addresses the government's interest directly (and immediately), and by its terms it does not extend to privately constructed facilities such as cable systems, any more than it extends to the format used by movie theaters to show films. It certainly does not extend to the manner in which cable systems carry programming on their wired facilities.

In any event, the argument advanced in the *Second FNPRM* is incoherent. Cable subscribers who fail to buy digital televisions cannot possibly "enjoy the benefits of the digital transition" when they receive reconverted analog signals, and perpetuating analog subscribers'

Turner II, but the majority resolutely ignored it. The four dissenting Justices pointed out that "the only justification advanced by the parties for furthering this interest [in preserving a multiplicity of broadcast programming sources] is heavily content-based… [A]ppellees emphasize that must-carry rules are necessary to ensure that broadcast stations maintain 'diverse,' 'quality' programming that is 'responsive' to the needs of the local community." *Turner II*, 520 U.S. 233-34 (O'Connor, J., dissenting). The *Turner II* majority clearly shared the dissenters' view, for the majority opinion "goes to great lengths to avoid acknowledging that preferences for 'quality,' 'diverse,' and 'responsive' local programming underlie the must-carry scheme," notwithstanding the Government's invocation of these purposes. *Id*. at 235 (O'Connor, J., dissenting). Even if fostering responsive local programming were a legitimate, content-neutral objective, experience under the Cable Act has proven that cable operators produce substantially more local news and community programming than broadcasters. Thus, a dual-carriage must-carry regime would actually retard, not advance, this interest.

reliance on analog transmissions will delay and thwart, rather than advance, "the successful and timely conclusion of the DTV transition." Thus, even if we assume *arguendo* that bringing the benefits of the DTV transition to all cable subscribers qualifies as an "important governmental interest[] unrelated to the suppression of free speech," *Turner II*, 520 U.S. at 189, the impositions on cable operators proposed by the Commission would retard rather than "advance" that interest. *Id.*

In the multicasting proceeding, the Commission found that the broadcasters had failed to present *any* evidence that a multicasting must carry requirement would somehow advance the transition from analog to digital. *Second Order and Report* at ¶ 40. Similar reasoning is applicable here. The Commission has long recognized that the key to the transition is "[h]igh quality programming in a digital format" that will induce consumers to purchase receivers capable of receiving digital signals. *Id*. Ensuring that digital broadcast signals can be watched on analog sets (whether via analog carriage or digital converter boxes) would only retard, not advance, this objective. In fact, it would reduce the incentive for consumers to purchase digital television technology.

* * *

The requirement that cable operators carry the single analog signal of each local broadcaster survived First Amendment scrutiny by the barest of margins – prevailing in two 5-4 decisions in which the majority recognized the significant First Amendment harms inflicted by the invasion of editorial discretion entailed by must-carry. Indeed, in casting the deciding vote to uphold the restriction, Justice Breyer acknowledged that must-carry "amounts to a 'suppression of speech.' " *Turner II*, 520 U.S. at 226 (Breyer, J., concurring). A dual-carriage

rule imposes a much greater burden on speech, with far less justification, and could not survive constitutional review.

II. A DUAL-CARRIAGE REQUIREMENT WOULD EFFECT A TAKING OF CABLE COMPANIES' PROPERTY, AND THEREBY EXPOSE THE TREASURY TO LIABILITY FOR JUST COMPENSATION.

A dual-carriage rule would, absent the payment of just compensation to the cable companies, violate the Takings Clause of the Fifth Amendment. Such a rule would grant a broadcaster exclusive use of a portion of a cable company's system indefinitely and thereby effect a permanent physical occupation of that property. It would cede to a broadcaster what would amount to an easement to intrude its programming *twice* onto the cable company's transmission equipment and cables. That government-licensed occupation and use of cable company property would strip the cable company of its right to exclude others – perhaps the most fundamental element of the bundle of rights known as "property" – and it would do so *without compensation*, insofar as the law expressly forbids cable companies from receiving compensation from broadcasters for must-carry. *See* 47 U.S.C. § 534(b)(10). This would expose the Federal Treasury to suits by cable companies for just compensation in the Court of Federal Claims. Although the cable industry may, so far, have reluctantly tolerated the less invasive single-channel must-carry requirement enacted in 1992, further uncompensated impositions would raise the Fifth Amendment problem anew.[12]

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[12] Congressional analysis of the taking issue at the time of the 1992 Cable Act was perfunctory and based on outdated cases from the lower federal courts. The House Report devoted just three paragraphs to the issue. *See Cable Television Consumer Protection and Competition Act of 1992*, H.R. REP. NO. 102-628 at 67 (June 29, 1992). The lower court cases relied upon by the Report date to 1932 and 1968, *see id.*, and offer only the most cursory analysis. The Supreme Court decision quoted in the Report was decided in 1906, long before the first stirrings of modern Fifth Amendment doctrine in Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *See Trinity Methodist Church v. Federal Radio Comm'n*, 62 F.2d 850, 853 (D.C. Cir. 1932) (quoting

A. Because a Dual-Carriage Rule Would Entail the Physical Invasion of Cable Operators' Property, It Would Work a *Per Se* Taking.

The controlling case for analyzing must-carry rules is *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982), where the Court applied the Takings Clause to a state law compelling apartment building owners to permit cable operators to place a small cable box and about 30 feet of one-half inch cable on their apartment buildings. *Id.* at 422. Explaining that the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights," *id.* at 435, the Court held that even such a "minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due." *Id.* at 421. This *per se* rule is warranted by the proposition that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436. "An owner is entitled to the absolute and undisturbed possession of every part of his premises. . . ." *Id.* at 436 n.13 (brackets, quotation marks and citation omitted). Therefore, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426.[13]

Chicago, B. & Q. Ry. v. Illinois, 200 U.S. 561, 593 (1906)); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69-70 (8th Cir. 1968) (quoting *Chicago, B. & Q.*).

[13] The Supreme Court adopted the analysis of Professor Michelman:

> The modern day significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, *"regularly" use, or "permanently" occupy*, space or *a thing which theretofore was understood to be under private ownership*.

The Supreme Court specifically rejected the argument that a government-authorized invasion by a private party should be treated differently than a trespass by the government itself. "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." *Loretto*, 458 U.S. at 432 n.9. Indeed, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Id.* at 436 (original emphasis). To force an owner to permit a third party to use and control part of his property "literally adds insult to injury." *Id.* at 436.[14] The proposed law would make the broadcaster "an interloper with a government license," *FCC v. Florida Power Corp.*, 480 U.S. 245, 252-53 (1987), and that in turn makes the law a Fifth Amendment taking.

A rule mandating that a cable operator accept the intrusion of the broadcaster's signal onto the cable operator's property – its transmission equipment and cables – is no mere *regulation* of cable companies' property. A "regulatory taking . . . does not give the government [or its agent] any right to use the property, nor does it dispossess the owner or affect her right to

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Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967) (emphasis added), *quoted in Loretto*, 458 U.S. at 427 n.5. The proposed dual-carriage requirement fits that formula.

[14] Following *Loretto*, the D.C. Circuit in *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), invalidated the FCC's physical co-location rules, which granted competitive telephone providers "the right to exclusive use of a portion of the [local exchange carrier's] central offices." The FCC's rules "directly implicate[d] the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426). The court had no occasion to consider the FCC's virtual co-location rules because it deemed them a mere exception to the physical co-location requirement; it therefore vacated the virtual co-location rules as a matter of severability and did not consider their constitutionality. *Id.* at 1447.

exclude others." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002). In contrast, a forced-carriage requirement does *all* of these things. A must-carry regime constitutes a physical invasion of a cable operator's transmission facilities and a "practical ouster of [its] possession." *Loretto*, 458 U.S. at 428 (citation and quotation marks omitted). It licenses "an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id.* at 431 (citation and quotation marks omitted). The *Loretto* Court stated that a *per se* taking occurs when the government authorizes a third party to " 'regularly' use, or 'permanently' occupy, . . . a thing which theretofore was understood to be under private ownership." *Id*. at 427 n.5 (citation and quotation marks omitted). The must-carry regime strips cable operators of all three primary attributes of property ownership – the "rights 'to possess, use and dispose of it.' " *Id.* at 435 (citation omitted)

Must-carry requirements deprive a cable company of dominion over its own channels: the broadcaster, not the cable system's owner, is given the power to exercise control over the programming on the channels that must-carry allows it to commandeer, and the broadcaster exercises that control to the exclusion of all others. And the broadcaster does not pay the cable company a dime. Must-carry requirements thus effectively grant the broadcaster a usufruct on the cable operator's property. Finally, the cable operator is deprived of the right to dispose of its property: it cannot assign or lease the spectrum occupied by the broadcaster to any other entity for transmission of programming or other uses and, "even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Loretto*, 458 U.S. at 436.

The law recognizes many forms of property – real, personal, intellectual and so on – and the forms of physical encroachment are just as varied. In fact, an invasion need not even physically touch the property in order to "occupy" it: the placement of telephone lines suspended above another's real estate or building or right-of-way constitutes a compensable physical invasion, "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Id.* at 430; *see also id.* at 422 (intruding cable company wires were suspended above rooftop of plaintiff's building); *id*. at 429-30 ("construct[ing] and operat[ing] telegraph lines over a railroad's right of way" would "be a compensable taking"); *id.* at 436 n.13. And the noise and vibration generated by passage overhead of aircraft or artillery shells has been held to constitute the imposition of an avigational easement and therefore to constitute a partial taking for which compensation is owed. *Id.* at 430 (discussing *United States v. Causby*, 328 U.S. 256, 261-65 (1946) (frequent flights above landowner's poultry farm that caused his chickens to fly into buildings and kill themselves constituted a taking)); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922) (firing of artillery over plaintiff's property can constitute imposition of a servitude requiring compensation)).

Obviously, if the government compels a property owner to permit the cable company to run its cables across the owner's land or building, the government has imposed an easement in favor of the cable company, and the landowner is entitled to just compensation. Similarly, if the government compels the cable company to permit a broadcaster to run its signal through those cables, it is no less obvious that the government has compelled a physical occupation of the cable company's property. The portion of the cable system that would be physically invaded and occupied is that part known in telecommunications law as the "transmission path." *See National*

Cable & Telecomms. Ass'n v. Brand X Internet Serv., 125 S. Ct. 2688, 2709, 2715 (2005). That pathway is a "physical connection," *id.* at 2695-96, between broadcasters and the television screens of their audience; it is a "physical transmission pathway," *id.* at 2715 (Scalia, J., dissenting), that the broadcaster would physically occupy by government license. And that is a *per se* taking under *Loretto*.[15]

Although the *Loretto* Court cautioned that its decision was "narrow," 458 U.S. at 441, in a subsequent unanimous opinion the Court explained that what "narrows" the *Loretto per se* rule is the requirement that the invasion of one's property by a third party occur pursuant to government compulsion that overrides the property owner's objection. *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 (1987). "This element of required acquiescence is at the heart of the concept of occupation." *Id.* at 252. Accordingly, the Court in that case rejected a constitutional challenge to the Pole Attachments Act, which authorized the FCC to set reasonable rates that utility companies could charge cable operators for using utility poles to string television cable:

> [W]hile the statute we considered in *Loretto* specifically *required* landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators. . . . The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.

[15] The dissent in *Loretto* made precisely this point, noting that the physical occupation by the interloping cable company there "would remain even if [plaintiff Loretto] herself owned the cable. So long as [the cable company] continuously passed its electronic signal through the cable, a litigant could argue that the second element of the Court's formula – a 'physical touching' by a stranger – was satisfied and that [the state law granting the cable company an easement] therefore worked a taking." *Loretto*, 458 U.S. at 450 (Blackmun, J., dissenting).

Id. at 251-53 (original emphasis).[16] In contrast, the proposed dual-carriage requirement would be, by definition, compulsory, and the law bars any payment by the broadcaster to the cable operator. *See* 47 U.S.C. § 534(b)(10). This imposition would be greater, by many orders of magnitude, than the small boxes and few feet of wire held to be a *per se* taking in *Loretto.* Undoubtedly, the cost to the government of paying just compensation would likewise be commensurately greater.

It is therefore not surprising that the *Loretto* rule gave such pause to the courts in *Turner*, even though the issue of a Fifth Amendment taking was not before them. *See Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 56 (D.D.C. 1993) (Sporkin, J., concurring) ("No challenge has been made under the taking provision of the Fifth Amendment or any other legal provision."). Judge Williams raised the issue in the three-judge district court:

> Because of my conclusions on the First Amendment challenge to the must-carry provisions, I do not reach the contention . . . that those provisions also represent an unconstitutional taking of cablecasters' property in violation of the Fifth Amendment. I do not, however, regard that claim as frivolous. The creation of an entitlement in some parties to use the facilities of another, gratis, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) where the Court struck down a statute entitling cable companies to place equipment in an owner's building so that tenants could receive cable television. The NAB responds that *Loretto* is limited to "physical" occupations of "real property." But the insertion of local stations' programs into a cable operator's line-up presumably is not a metaphysical act, and presumably takes place on real property.

[16] Since *Florida Power* was decided, Congress has amended the statute to grant cable operators the right to require power companies to grant space on their poles, but the statute does not give rise to any problem under the Fifth Amendment because the statute sets forth a scheme under which power companies are compensated for the use of their property. *See* 47 U.S.C. § 224; *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362-64, 1367-71 (11th Cir. 2002). As noted in the text, cable operators receive no compensation whatever for the mandated invasion of their property by broadcasters' signals.

Turner, 819 F. Supp. at 67 n.10 (Williams, J., dissenting) (internal citation omitted). Former Commissioner Furchtgott-Roth voiced the same concern: "It is not unreasonable to argue that, when a broadcast station's signal is mandatorily carried over a cable system, that carriage constitutes a permanent, physical occupation of the cable operator's property – and thus a *per se* taking of that property. . . . [T]here can be no question but that Cablevision's physical plant – *e.g.*, the actual transmission cables, whether fiber optic or metal, that form its delivery 'pipe,' as well as the head end equipment that routes the broadcaster's signal – are Cablevision's sole and private property. Moreover, the must-carry scheme does not just fail to provide compensation for this occupation, but affirmatively prohibits it." *In the Matter of WXTV License P'ship*, 15 FCC Rcd 3308, 3320 (2000) (concurring statement) (internal citations omitted).

B. A Dual-Carriage Requirement Would Also Effect a Regulatory Taking.

Even if the dual-carriage proposal were to be analyzed not under *Loretto* but under the "essentially ad hoc, factual inquir[y]" used for regulatory takings, *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), it would still amount to a taking. Although the Supreme Court has "been unable to develop any 'set formula' " for such regulatory takings, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), it has "identified several factors – such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action – that have particular significance." *Kaiser Aetna*, 444 U.S. at 175.

Starting with the character of the government action, here – as in *Kaiser Aetna* – the challenged action is the government's imposition on the property owner of a servitude or easement allowing others to use the property for free. In *Kaiser Aetna*, the government tried to

impose a navigational servitude that would have allowed the public free access to a private marina over the property owner's objections. 444 U.S. at 169, 178. There, the public – like the broadcasters whose signals must be carried by the cable operators here – was "an interloper with a government license." *Florida Power*, 480 U.S. at 253. The Supreme Court found a taking:

> [W]e hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.

Kaiser Aetna, 444 U.S. at 179-80 (internal citations and footnotes omitted); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (state could not, without paying compensation, require beachfront property owners to grant an easement allowing members of the public to pass across their property). The same result would obtain in this case.

The economic impact of the government-licensed invasion imposed by a dual-carriage rule would be far greater than that of the navigational servitude at issue in *Kaiser Aetna*. There the public would have enjoyed "free access" to the marina "while [the property owners'] agreement with their customers call[ed] for an annual $72 regular fee." 444 U.S. at 180. Under a dual-carriage rule, broadcasters throughout the country would enjoy free use of cable operators' facilities and free access to the cable operators' millions of customers – property rights worth considerably more.

Finally, there are the cable companies' reasonable, investment-backed expectations. Cable operators have invested upwards of $100 billion to upgrade their systems to transmit video signals more efficiently, to carry more high-definition video signals, to provide video-on-demand and digital video recording, and to offer non-video services such as high-speed Internet

and telephone services, all to the end of offering their customers a better product. For the government to take advantage of cable operators' own market-driven improvements to their property to requisition an additional six MHz per channel for an analog signal would upset reasonable, investment-backed expectations and violate basic norms of fairness. The broadcasters have, of course, been seeking precisely that outcome for years, but they have been repeatedly rebuffed by this Commission. *See First Report and Order, Second Report and Order.*

Similarly, the Commission has repeatedly imposed on digital broadcasters the cost of converting their signals to analog if they wish to have their broadcasts viewed by cable subscribers with analog TV sets. As the Commission itself notes in the current NPRM, the 2001 *First Report and Order* gave a "digital-only station mandatory carriage rights . . . coupled with the option to *request* that its digital signal be carried on the cable system for delivery to subscribers in an analog format *at the station's expense* (a mechanism also referred to as 'down-conversion.')." *Second FNPRM* at ¶ 17 n.34 (emphasis added).[17]

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[17] *See also id.* at ¶ 19. *See also WHDT-DT, Channel 59: Petition for Declaratory Ruling that Digital Stations Have Mandatory Rights,* CSR-5562-Z, Memorandum Opinion and Order, 16 FCC Rcd 2692 (2001) at ¶ 5 ("a broadcaster could, in this context and at its own expense, provide its digital signal in an analog format for carriage on cable systems")(citation omitted); *id.* at ¶ 7 & n.27 (digital broadcaster to "provide the necessary conversion equipment to the cable system" at its own expense so that cable operator may convert the digital signal to analog format); *id.* at ¶ 13 (digital broadcaster pays for down-conversion to analog format); *id.* at ¶ 14 ("[A] television station may demand that one of its HDTV or SDTV television signals be carried on the cable system for delivery to subscribers in an analog format. . . . If WHDT elects analog carriage, it must supply to cable operators at its own expense conversion equipment to translate the signal to analog."); *Service Rules for the 746-764 and 776-794 MHz Bands,* Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 00-224, 15 FCC Rcd 20845 (2000) at ¶ 65 ("*700 MHz Order*") ("to facilitate the continuing availability during the transition of the analog signal of a broadcaster . . . a broadcaster could, in this context and at its own expense, provide its broadcast digital signal in an analog format for carriage on cable systems"); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules,* 16 FCC Rcd 2598 (2001) ("*First Report and Order*") at ¶ 7 (same); *id.* at ¶¶ 15, 22.

On this basis that the carriage requirement was limited to a single channel, and that, even for that one channel, conversion of digital to analog was to be paid for by the broadcaster, cable operators have continued to invest millions in upgrading their systems.[18] The point is not that cable operators are entitled to rely on property rights supposedly vested in them by a prior regulatory regime, but rather that the "regulatory regime . . . may also shape legitimate expectations without vesting any kind of development right in the property owner." *Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring). "Courts . . . must attend to those circumstances which are probative of what fairness requires in a given case." *Id.* at 635. Thus the regulatory regime and the expectations it instills in property owners provide part of the context in which the fairness of the regulatory imposition is to be assessed. The same sort of private investment predicated on announced government policy moved the Court in *Kaiser Aetna* to hold that the government could not subsequently compel free public access to the developer's private marina, and would instead have to pay just compensation. 444 U.S. at 169 (rejecting government's argument that petitioners' development of the marina "convert[ed] into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond"); *see also id.* at 167-69, 180 (detailing property owners' reliance on government's prior position).

[18] The congressional appraisal of the cable industry's reasonable, investment-backed expectations in the legislative history of the 1992 Cable Act does not take into account the Supreme Court's analysis in *Kaiser Aetna*. *See* H.R. REP. NO. 102-628, at 67. Moreover, that appraisal was limited to the context of the analog must-carry requirement and preceded by a decade the development of digital cable and this Commission's repeated holdings that the must-carry requirement extended only to a single channel per broadcaster.

C. Separation of Powers Principles Require The Commission To Avoid A Serious Takings Issue.

The Commission should avoid imposing any must-carry rule that would raise serious takings issues. The Constitution vests *Congress* with the exclusive powers of raising revenue and appropriating money from the Treasury. Art. I, § 8, cl. 1; Art. I, § 9, cl. 7. Accordingly, federal executive or administrative action that effects a taking, and thereby triggers the obligation to pay just compensation under the Fifth Amendment, is unlawful unless there is clear congressional authorization in advance for the action. "When there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful because it usurps Congress's constitutionally granted powers of lawmaking and appropriation." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952); *id.* at 598 (Frankfurter, J., concurring); *id.* at 631-32 (Douglas, J., concurring); *id.* at 656-60 (Burton, J., concurring); *id.* at 662-65 (Clark, J., concurring in the judgment).

The same principle extends to administrative action, including regulation by the FCC: "Where administrative interpretation of a statute" effects a taking, "use of a narrowing construction prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds." *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).[19] The Supreme Court has long held that statutes shall not be read to delegate the

[19] In *Bell Atlantic*, which is discussed further in note 14, *supra*, the D.C. Circuit invalidated the Commission's colocation rules requiring local telephone exchange companies to set aside a portion of their central offices for occupation and use by competitive access providers. The court of appeals opined that "[t]he orders raise constitutional questions that override our customary deference to the Commission's interpretation of its own authority,"

congressional power to take property unless they do so "in express terms or by necessary implication." *Western Union Telegraph Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904); *see also Regional Rail Reorganization Act Cases*, 419 U.S. at 127 n.16. That principle implements the general rule that statutes are to be construed where possible to avoid constitutional questions. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); *see also United States v. Security Indus. Bank*, 459 U.S. 70, 78, 82 (1982) (adopting narrowing construction of statute to avert a takings question); *NCTA v. FCC*, 415 U.S. 336, 342 (1974) (holding that the relevant federal statute should be read "narrowly to avoid constitutional problems" – namely, a delegation of the taxing power – raised by a system of fees imposed by the FCC on community antenna television stations); *TCI of North Dakota v. Schriock Holding Co.*, 11 F.3d 812, 815 (8th Cir. 1993) (rejecting interpretation of Cable Act that would raise taking issue).

The deference to administrative action ordinarily afforded under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is entirely inapplicable where administrative action raises Fifth Amendment questions. *See Bell Atlantic*, 24 F.3d at 1445. Hence, it is decisive that the statutory language does not itself *compel* a dual-carriage rule. For if the statute is ambiguous and does not expressly require the Commission to impose a dual-carriage rule, then the requisite clear statement is absent. The Commission, accordingly, should construe the statute in a manner that avoids several serious constitutional problems by refraining from imposing a dual-carriage rule.

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and that "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions." 24 F.3d at 1443, 1445.

III. THE SECOND PRONG OF THE COMMISSION'S PROPOSAL VIOLATES BOTH THE FIRST AMENDMENT AND THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS.

A. The Second Prong Would Violate The First Amendment.

The Commission's alternative proposal would allow cable operators with "all-digital systems" to transmit must-carry broadcast "signals only in digital format, provided that all subscribers with analog television sets have the necessary equipment to view the broadcast content." *Second FNPRM* ¶ 17. Thus, a cable company has the option of escaping the burdens of the Commission's dual-carriage proposal by converting to an all-digital system. But this is an "option" in the same sense that a threat is merely an offer one would rather not receive. The Commission cannot cure the constitutional defects in its dual-carriage proposal by offering cable companies the "choice" of another requirement that would likewise violate cable operators' First Amendment rights. It is one thing for Congress and the Commission to tell *broadcasters* that they must convert to digital transmission by February of 2009, because the government enjoys special latitude in allocating and regulating use of the limited and publicly owned electromagnetic spectrum. But any attempt to impose a similar "all-digital" requirement on proprietary cable transmission systems would constitute a forbidden time, place or manner restriction.

A rule requiring cable operators to transmit all of their programming only in digital format would restrict the manner in which cable companies engage in free expression, and "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). Restrictions on the manner of speech are invalid unless they are "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the

information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see also Thomas*, 534 U.S. at 323 n.3 (to "satisfy [the] requirements of our time, place, and manner jurisprudence," a regulation "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.") (citation and quotation marks omitted); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (law regulating time, place or manner of speech "must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.").

In *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), for example, the Court struck down an ordinance barring the display of signs on lawns by homeowners, and was unmoved by the argument that the homeowners could still convey their messages via "*hand-held* signs, 'letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches and neighborhood or community meetings.'" *Id.* at 56 (original emphasis; citation omitted). Those alternative means of communication – besides bearing, "[e]ven for the affluent, . . . added costs in money or time" – were constitutionally insufficient because they would be less effective in reaching a particular "audience" of "a person who puts up a sign at her residence" – namely, her neighbors. *Id.* at 57. Compelling cable operators to transmit only digital signals would similarly impair their ability to reach a particular target audience: those television households who rely on analog TVs and who do not want converter boxes cluttering up their homes.

A rule compelling cable companies to convert to all-digital systems would also fail the other, independent part of the test – the requirement that a time, place or manner restriction must be "narrowly tailored to serve a significant governmental interest." The Commission identifies the government goal animating the second prong proposal as achieving viewability of must-carry

broadcast stations by analog cable subscribers after the DTV transition. *Second FNPRM* ¶ 17. But compelling cable companies to go all-digital would be regulatory overkill. There is no reason why forcing cable systems to transmit *all* their programming in digital is necessary to facilitate the transition or viewability of digital *broadcasting.* Nor would forcing cable systems to go all-digital even advance the broadcast TV digital transition because, as explained in Part I, *supra*, that will happen by congressional fiat in February 2009 without regard to the format in which cable operators carry signals. Nor is there any public airwave spectrum that would be freed up for other uses if cable operators stopped carrying analog signals on their proprietary cable transmission systems. Therefore, the second prong is not narrowly tailored to the Commission's asserted interest in fostering the digital transition.

The Commission does not suggest that allowing analog transmission to continue on cable systems constitutes a "nuisance," *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) (affirming an ordinance banning loudspeaker sound-trucks), or some other sort of threat to public order or public aesthetics. *See Lovell v. City of Griffin*, 303 U.S. 444, 450-51 (1938) (striking down an ordinance banning distribution of pamphlets and circulars). "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other . . . activities, but be insufficient to justify" restrictions on speech. *Schneider v. Town of Irvington*, 308 U.S. 147, 161 (1939). The second prong of the Commission's regulatory proposal is no more valid than a "legislative preference" that newspapers be published only on the Internet, or only on glossy paper, or only in any other governmentally preferred "manner" of communication. In both cases, the restriction on expressive activities would likely be invalid.[20]

[20] The second prong, like the first, may also present a serious question under the Takings Clause of the Fifth Amendment. Although the *Second FNPRM* does not expressly state that cable operators with all-digital systems would be required to bear the cost of providing digital

B. The Second Prong Would Likely Violate The Unconstitutional Conditions Doctrine.

Even if the second prong of the Commission's proposal were not interpreted as an independent restriction on speech, it would probably still be impermissible. Far from giving cable operators the "option" of avoiding dual carriage, it is a thinly veiled Hobson's choice: (i) comply with an unconstitutional dual-carriage mandate, or (ii) suffer a severe disruption of business. If the Commission intends in the second prong to require cable operators to incur the financial costs of providing customers with digital converter boxes, then the financial burden on cable companies will be immense and may exceed several billion dollars. Even if government regulators allow these costs to be passed on to subscribers, however, cable operators will nevertheless suffer a serious economic burden because, in the increasingly competitive MVPD market, government-mandated increases in the prices for cable service will lead some consumers to switch to other providers of video programming. Furthermore, the loss of business will be

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converter boxes to subscribers with analog TV sets, the Commission's Notice might be read as suggesting that such a course is being contemplated. *See Second FNPRM* ¶¶ 16-20. This is not a realistic option. Any such proposal would strip cable companies of the exclusive rights to possession, use, control and disposition of their property (converter boxes) and transfer those property rights to other parties (analog subscribers). This would plainly constitute a *per se* taking. *See Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 438 n.16 (1982) (law requiring landlords to allow television cable companies to emplace cable facilities on their apartment buildings constituted a taking, even though the facilities occupied merely 1-1/2 cubic feet of the landlords' property); *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003) (rule that took depositors' interest on bank accounts and transferred it to a charitable foundation was a taking *per se*). To order cable companies to provide free converter boxes to reduce the impact of the DTV transition on analog cable subscribers would be to force those companies to bear a burden that should be borne by society at large. Indeed, Congress has recognized as much by creating a coupon program for converter boxes to subsidize the burden that the DTV transition will impose on owners of analog TV sets who rely on broadcast television. The same policy should apply with respect to analog cable subscribers, because "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). *See also Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001) (same).

compounded by the fact that many customers resist using set-top converter boxes. Currently, a large number of analog cable customers are able to receive cable signals – on *all* the TV sets in their houses – simply by connecting a coaxial cable to the back of their television sets and plugging it into a wall jack. Many customers have chosen cable service over other MVPD alternatives (such as DBS) precisely because no set-top converter box is necessary. The second prong would eliminate the ability of these customers to forgo cable converter boxes and would require a digital box on *all* of their analog TV sets. It would cause cable operators to incur a substantial disruption of their business in addition to direct financial costs.

The second prong would therefore allow a cable operator to avoid the constitutional burdens of the dual-carriage rule – but only at a significant price. The second prong thus raises a serious constitutional issue under the "unconstitutional conditions" doctrine. The genesis of that doctrine was *Speiser v. Randall*, 357 U.S. 513, 518 (1958), where the Supreme Court held that California's decision to deny a property tax exemption to veterans who refused to declare that they would not advocate the overthrow of the government constituted an impermissible burden on a protected right. The Court concluded that the denial of the tax exemption, while nominally only a withheld benefit, in fact exerted an impermissibly coercive effect on constitutionally protected freedoms. *See* 357 U.S. at 519 (noting that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of *coercing* the claimants to refrain from the proscribed speech") (emphasis added).

By the same token, the significant costs of the second prong represent a substantial penalty on the First Amendment right of cable operators to refuse the dual-carriage alternative. In fact, the "choice" is no choice at all. In *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926), for example, the Court struck down a state law conditioning use of the

public highways on a private carrier's agreement to abide by certain terms and conditions of doing business: "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool -- an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."

Significantly, the structure of the forced choice here is impermissible regardless of which alternative the cable operator would choose. A penalty on the exercise of a protected right is forbidden regardless of whether the penalty actually changes the behavior of the persons subject to it. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), for example, the Court held that a state rule imposing a one-year residency requirement for welfare payments violated the federal right to travel across state boundaries. *Id*. at 629. Notably, the Court did not insist on proof that the state rule actually deterred interstate travel; to the contrary, in extending the logic of *Shapiro* to a durational residency requirement for voter registration, the Court explained that "*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to penalize the exercise of that right [to travel].' " *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972) (citation omitted). The constitutional violation stemmed simply from the fact that the residency rule penalized those who exercised their right to travel, even if it did not change their behavior. *See also Memorial Hospital v. Maricopa County*, 415 U.S. 259, 257-58 (1974).

The unconstitutional conditions doctrine has been applied in a wide variety of cases, including welfare benefits,[21] unemployment compensation,[22] public employment,[23] bar -

[21] *See Shapiro v. Thompson*, 394 U.S. 618 (1969).

admissions,[24] and property rights.[25] In the latter context – property rights – the Court has articulated a special "nexus" requirement that is particularly relevant here.

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Supreme Court held that a permit to build a larger residence on beachfront property could not be conditioned on the dedication of an easement allowing the public beachfront access through the owner's property. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court held that a permit to expand a store and parking lot could not be conditioned on the dedication of a portion of the relevant property for a "greenway," including a bike/pedestrian path. The Court in *Nollan* held that conditioning a permit was invalid unless the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. 483 U.S. at 838 ("we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes"); *id.* at 838-39 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by

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[22] *Sherbert v. Verner*, 374 U.S. 398 (1963) (striking down unemployment compensation law denying benefits to a Seventh Day Adventist who refused to work on Saturdays).

[23] *See, e.g., Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

[24] *See, e.g., Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schware v. Board of Bar Exam'rs*, 353 U.S. 232 (1957).

[25] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (state may not condition building permit on the property owner's grant of a public easement).

construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes."). The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be " 'rough[ly] proportiona[l]' ... both in nature and extent to the impact of the proposed development." 512 U.S. at 391 (citation omitted).

The nexus test is especially pertinent here because of the absence of *any* fit between the Commission's proposed second prong and its stated objective of advancing the digital transition. It is evident, as noted earlier, that providing converter boxes to subscribers would delay, rather than promote, the digital transition. It would encourage cable subscribers to retain obsolete analog televisions rather than to purchase digital sets, and thus would fail the Supreme Court's nexus requirement. It is not "roughly proportional" to the Government's purpose at all – in fact, it runs directly contrary to that purpose.

CONCLUSION

Both prongs of the Commission's digital carriage proposal would raise serious constitutional questions. The Commission should reject both elements of the proposal.