

**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 TIME WARNER INC.**

Time Warner Inc. ("Time Warner")<sup>1</sup> respectfully submits these comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("NPRM") in the above-captioned docket.<sup>2</sup> The NPRM proposes rules under which, after the transition to digital broadcasting, "must carry" signals would be granted preferential cable carriage rights in both analog and digital format. That proposal should be rejected: any dual carriage requirement would constitute poor policy, would violate the First Amendment rights of cable programmers (who are not favored with preferential carriage rights) as well as cable operators, and is not statutorily compelled. For similar reasons, the Commission should also refrain from revising its "material degradation" rules.

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<sup>1</sup> Time Warner, a leading media and entertainment company, offers both basic cable programming and pay television programming through its wholly owned subsidiaries, Turner Broadcasting Systems, Inc. ("Turner") and Home Box Office Inc. ("HBO"). In addition, Time Warner is the parent company of Time Warner Cable Inc. ("TWC"), the nation's second largest cable operator.

<sup>2</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 07-71, 2007 WL 1306797 (rel. May 4, 2007) ("*NPRM*").

## Background

Congress mandated that, on February 17, 2009, broadcasters — who in the 1990s were given free additional spectrum to broadcast in a digital format as well as an analog format — will be required to turn off their analog signals. This event will have considerable impact on over-the-air viewers: by this date, these viewers will have to have or obtain a digital tuner (in the form of either a digital TV set or a digital-to-analog converter box) or lose access to over-the-air broadcast signals. To mitigate the significant disruption this may cause for over-the-air viewers, Congress has authorized a \$1.5 billion dollar program to subsidize converter boxes for the approximately 15% of Americans who do not subscribe to a multichannel video programming distributor.<sup>3</sup>

Although Congress addressed only the potential disruption to over-the-air viewers, the broadcasters' digital transition also has the potential to significantly impact cable subscribers. Fortunately, cable operators — as matters currently stand — have the tools to avoid substantial disruption for cable subscribers. But, to be able to use those tools, cable operators must retain the flexibility to tailor solutions that will best serve their customers on a system-by-system basis.

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<sup>3</sup> See *id.*, Statement of Chairman Kevin J. Martin (“A lot of attention has appropriately been placed on the estimated 15 percent of Americans that do not subscribe to a multichannel video programming service, such as cable. The federal government has proposed an ambitious and important program to ensure that they are not left behind after the transition.”); Ted Hearn, *Transition Has Cops Really Worried*, Multichannel News, Apr. 23, 2007, at 22, available at <http://www.multichannel.com/article/CA6435408.html> (“In 2006, Congress allocated \$1.5 billion to subsidize consumer access to millions of digital-to-analog converter boxes.”).

The NPRM, however, proposes a combination of rules under which cable operators would be required to carry must-carry stations in both digital and analog formats. If these rules were to take effect, cable subscribers would suffer. As explained in more detail below, any spectrum used for must-carry purposes is necessarily unavailable for other uses, and cable subscribers would lose access to the services that otherwise could have been provided in the spectrum that is so consumed. Moreover, as also shown below, a dual carriage obligation is as unlawful as it is unnecessary.

The proposed rules would allow cable operators that have gone to all-digital distribution to avoid the dual carriage obligation. But, because many customers currently choose not to use set-top boxes on one or more of their television sets, most cable operators have not switched to all-digital distribution and may not do so for some time. Thus, to most cable operators and subscribers, the NPRM's single carriage proposal will be unavailable.<sup>4</sup> Moreover, any requirement by the Commission that cable operators make a switch to all-digital distribution would constitute poor policy and would be unlawful for reasons similar to those that apply to the dual carriage obligation.

In light of intense competition from satellite providers, telephone companies, and others, cable operators have every incentive to bring subscribers what they want to watch. In addition, cable operators remain willing to work with broadcasters to reach sensible solutions

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<sup>4</sup> Turning cable systems into "all-digital" systems would require an enormous investment: every subscriber would have to either buy a digital TV set or lease a digital set-top box. Many subscribers believe that the additional expense is unwarranted, and are content to watch only signals that their cable operator transmits in analog format. Thus, as a practical matter, most cable operators do not have the option of going "all-digital" immediately.

concerning signal carriage. At this time, there simply is no cause for heavy-handed regulatory intervention: cable operators and broadcasters can and will work together to best serve consumers.

### **Argument**

#### **I. A DUAL CARRIAGE REQUIREMENT WOULD NOT SERVE THE PUBLIC INTEREST.**

Under the proposed dual carriage requirement, consumers would lose. Mandated carriage in both analog and digital format of every must-carry station would require allocation of additional cable spectrum. Any spectrum allocated to duplicative must-carry signals is unavailable to other services that consumers may value more highly.

In particular, increasing amounts of cable spectrum have gone to advanced new services, including high-speed data and telephony — each of which has revolutionized its respective industry and has added uncounted billions of dollars in consumer welfare. In addition, cable operators are exploring the roll-out of super-fast Internet access at speeds of as much as 150 Mbps.<sup>5</sup> Finding spectrum for this exciting new service will require multiple downstream channels of 6 MHz each.<sup>6</sup> New spectrum demand from must-carry signals would, therefore, hamper the roll-out of this new service.

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<sup>5</sup> See, e.g., Todd Spangler, *Setting the Table for 'Wideband' Modems*, Multichannel News, June 11, 2007, at 53, available at <http://www.multichannel.com/article/CA6450496.html> (“Getting to 100-Mbps download speeds requires bonding at least three QAM channels, while hitting 160 Mbps takes four. (Each 6-Megahertz channel can, in theory, deliver upward of 40 Mbps.)”); Todd Spangler & Mike Farrell, *Cable's 'Wideband' Card*, Multichannel News, May 14, 2007, at 6, available at <http://www.multichannel.com/article/CA6441536.html> (“The Arris modem was configured to bond four downstream channels together, providing theoretical download speeds up to 160 Mbps, although the speed indicator in the demo showed speeds closer to 150 Mbps.”).

<sup>6</sup> See, e.g., Todd Spangler, *Setting the Table for 'Wideband' Modems*, Multichannel News, June 11, 2007, at 53, available at

On the video front, there are more than 500 national video-programming services and an additional 100 or so regional video-programming services.<sup>7</sup> The average 750 MHz cable system has capacity for only about 80 analog services in the spectrum between 50 and 550 MHz and (accounting for other services) only another 100 or so standard definition services in the digital spectrum between 550 and 750 MHz. Analog channel space is particularly scarce: cable operators in recent years have added very few new services to analog tiers. But channel space in the digital-basic tier is becoming increasingly scarce as well. Thus, cable programmers are locked in a fierce battle for carriage, with many programmers being unable to secure any carriage (analog or digital) for all their services.

The demand for capacity is made all the more acute by the trend toward high-definition programming. For example, HBO recently announced that it will convert all of its programming streams to HD by next year.<sup>8</sup> Many Turner networks either already are

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<http://www.multichannel.com/article/CA6450496.html> (“Getting additional three QAM channels for downstream bonding will require network optimization. . . . It’s not like cable operators have any 6-Mhz channels sitting idle — every single one of them is being used.”); Todd Spangler & Mike Farrell, *Cable’s ‘Wideband’ Card*, Multichannel News, May 14, 2007, at 6, available at <http://www.multichannel.com/article/CA6441536.html> (“The bigger issue, [Comcast CEO Brian] Roberts said, ‘is to find four [analog] TV channels’ to eliminate from the lineup in order to make room for the four channels required to provide 150-Mbps speeds.”).

<sup>7</sup> See *Annual Assessment of the Status of Video Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶¶ 21-22 (2006) (“*Twelfth Annual Report*”).

<sup>8</sup> See, e.g., Telecompetitor.com, *HBO Emboldens Transition to MPEG-4*, June 21, 2007, <http://telecompetitor.com/node/184> (“HBO will distribute a total of 26 channels in HD MPEG-4 by sometime in 2008.”); Brian Santo, *HBO to Go All-Digital, All MPEG-4 in 2008*, Communications, Engineering & Design Magazine, June 20, 2007, <http://www.cedmagazine.com/article.aspx?id=149526>.

available in HD or will be soon.<sup>9</sup> Other programmers are expected to follow suit: HD programming has been extremely popular with consumers. But high-definition services are particularly bandwidth intensive: a single HDTV signal consumes at least 3 MHz, or five times as much bandwidth as a standard-definition digital signal.<sup>10</sup> Any must-carry signal that must be carried in analog will occupy 6 MHz, thereby preempting two non-broadcast programmers from finding carriage for an additional HD signal.

Additional spectrum demand from must-carry signals would be particularly strong in major urban areas, where the number of must-carry stations, particularly from geographically distant areas, is high. Compelled duplicate carriage of such stations would result in no digital carriage, or any carriage at all, for many cable programmers. Likewise, a dual carriage rule would have particularly significant impacts for smaller systems, many of which are in rural areas, where cable systems often are not upgraded to 750 MHz or even transmit only analog signals. The cost of enabling these systems to carry digital broadcast signals will impose an onerous burden.

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<sup>9</sup> See, e.g., James Hibberd, *TBS Launching HD Channel Sept. 1*, TV Week, June 28, 2007, [http://www.tvweek.com/news/2007/06/tbs\\_launching\\_hd\\_channel\\_sept.php](http://www.tvweek.com/news/2007/06/tbs_launching_hd_channel_sept.php) (“Turner Entertainment Networks has set Sept. 1 as the planned launch date for its TBS HD simulcast channel.”); Kent Gibbons, *DirectTV HD News Sends Nets Scrambling*, Multichannel News, Jan. 9, 2007, <http://www.multichannel.com/article/CA6406035.html> (“[A]n HD version of CNN will launch in September. . . . Cartoon and TBS HD versions will also launch in September. And HD TNT is already distributed.”).

<sup>10</sup> See, e.g., Leslie Ellis, *What It Takes To Offer HDTV over Cable*, Aug. 5, 2002, <http://www.translation-please.com/column.cfm?columnid=56> (“‘Standard definition’ means a digitized and compressed version of regular old analog TV. SD, then, is what ‘digital TV’ is today: Multiple channels, usually 10, of digitized and compressed TV, slotted into one, 6 MHz channel. HD is also a digitized signal . . . . The difference is, what’s being compressed contains a lot more information — more than 6x that of a ‘regular’ digital video picture. . . . [T]wo HDTV signals can fit into one 6 MHz channel modulated with 256-QAM . . . .”).

## **II. A DUAL CARRIAGE REQUIREMENT WOULD VIOLATE THE FIRST AMENDMENT.**

“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”<sup>11</sup> “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.”<sup>12</sup> Must-carry requirements are therefore subject to, at a minimum, “intermediate” First Amendment scrutiny.<sup>13</sup> Any must-carry requirement can survive such review only if “it furthers an important or substantial governmental interest,” and if the burden imposed is “no greater than is essential to the furtherance of that interest.”<sup>14</sup> A *de facto* dual carriage requirement cannot meet that standard.

### **A. In *Turner*, the Supreme Court Narrowly Upheld Must Carry on a Rationale Tied to the Preservation of Free Over-the-Air Television.**

In the *Turner* litigation, the Government defended the must-carry requirements of the 1992 Cable Act as furthering “three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market

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<sup>11</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”).

<sup>12</sup> *Id.* at 636-37.

<sup>13</sup> *See id.* at 661-62; *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (“*Turner II*”).

<sup>14</sup> *Turner I*, 512 U.S. at 662 (internal quotation marks omitted); *see Turner II*, 520 U.S. at 189.

for television programming.”<sup>15</sup> The Court, however, did not allow the Government to define its interests at so high a level of abstraction. It found that the Government’s three interests collapsed into a single more specific interest: to “preserve access to free television programming for the 40 percent of Americans without cable.”<sup>16</sup> The Court accordingly required the Government to prove that must carry could be sustained on *that* basis.<sup>17</sup>

The Court agreed with the Government that, as a legal matter, the objective to preserve access to free over-the-air television qualifies as “important” for purposes of intermediate scrutiny.<sup>18</sup> But the Court deemed abstract importance alone insufficient, and required the Government to show that access to free, over-the-air television was in actual jeopardy.<sup>19</sup> As Justice Kennedy’s lead opinion put it: “When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>20</sup>

Attempting to meet this burden, the Government asserted that the problem sought to be cured was a threat of economic injury to free, over-the-air television resulting from cable operators’ refusal to carry broadcast signals. The Government’s theory was that cable

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<sup>15</sup> *Turner I*, 512 U.S. at 662.

<sup>16</sup> *Id.* at 646; *see also id.* at 664-65 (plurality).

<sup>17</sup> *Id.* at 664 (“That the Government’s asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests.”).

<sup>18</sup> *See id.* at 662-63.

<sup>19</sup> *See id.* at 664-65 (plurality).

<sup>20</sup> *Id.* at 664 (internal quotation marks and citation omitted).

operators had an economic incentive to drop broadcast signals to make room for non-broadcast video-programming services — supposedly because cable operators can sell advertising on cable-programming services but not on broadcast programming.<sup>21</sup> The Government argued that cable operators faced no competition and that they could therefore drop broadcast signals with impunity.<sup>22</sup> The Government further contended that television viewers usually discontinue reception of over-the-air stations after subscribing to cable; that dropped stations would therefore suffer loss of audience (and thus of advertising revenue); and that, in the end, consumers unable or unwilling to subscribe to cable would be left with fewer (or less well-financed) over-the-air television signals.<sup>23</sup>

The Court held that this rationale called for a factual showing “that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry.”<sup>24</sup> This, the Court recognized, in turn depended “on two essential propositions: (1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether.”<sup>25</sup> Because there was insufficient evidence to support these propositions, the Court remanded the case for further development of the record.<sup>26</sup>

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<sup>21</sup> *See id.* at 633, 646.

<sup>22</sup> *See id.* at 633.

<sup>23</sup> *See id.* at 633-34, 646-47.

<sup>24</sup> *Id.* at 664-65.

<sup>25</sup> *Id.* at 666 (plurality).

<sup>26</sup> *See id.* at 667-68 (plurality).

After remand, the Court narrowly sustained the statute by a five-to-four vote.<sup>27</sup> In considering whether the problem sought to be addressed was “real,” the Court felt constrained to accord deference to congressional findings.<sup>28</sup> Thus, the Court phrased the question presented as not whether the asserted problem *was* real, but merely whether Congress *could have found* that it was real — by “draw[ing] reasonable inferences based on substantial evidence.”<sup>29</sup> The Court found that standard satisfied, holding that the record developed on remand contained substantial evidence to support predictions that, without must carry, cable operators would drop substantial numbers of broadcast stations,<sup>30</sup> and that this would cause broadcasters significant injury.<sup>31</sup>

**B. A Dual Carriage Requirement Cannot Be Sustained Under the *Turner* Rationale or Any Other Rationale.**

To justify a dual carriage requirement under the *Turner* rationale, the Commission must shoulder the burden of showing that carriage of a single signal would cause broadcast stations to deteriorate or fail altogether. The Commission — which is not entitled to the deference due Congress<sup>32</sup> — could not make such a showing to the satisfaction of a reviewing court. Numerous cable programmers not blessed with preferential carriage rights are carried only on digital tiers, yet they have thrived. Digital tiers now have on average more than

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<sup>27</sup> See *Turner II*, 520 U.S. 180.

<sup>28</sup> See *id.* at 195-96.

<sup>29</sup> *Id.* at 195 (internal quotation marks omitted).

<sup>30</sup> See *id.* at 196-208 (plurality); *id.* at 226 (Breyer, J., concurring in part).

<sup>31</sup> See *id.* at 208-13.

<sup>32</sup> See *id.* at 195 (congressional judgments are “to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency”).

50% penetration,<sup>33</sup> and penetration is growing rapidly. Thus, the required showing is becoming more difficult to muster with each passing day.

Even if broadcasters could make a claim to analog carriage, they could not demand carriage in *two* formats (analog and digital). There is no evidence that cable subscribers who have access to digital programming stop watching analog programming. In the decade during which this docket has been open, broadcasters have been invited on more than one occasion to submit evidence to that effect.<sup>34</sup> They have never done so — presumably because there is no such evidence.

The NPRM now suggests an alternate rationale: that dual carriage would “ensure that cable subscribers with analog television sets are able to continue to view all must-carry stations after the end of the DTV transition.”<sup>35</sup> By its terms, that objective reflects an “effort to exercise content control over what subscribers view on cable television”<sup>36</sup> — *i.e.*, an effort to ensure that cable subscribers have access to programming of a particular nature. In the *Turner* case, the Supreme Court went to great lengths to show that the must-carry statute did not constitute such an effort, acknowledging that any such effort would trigger strict scrutiny.<sup>37</sup> That is not surprising: any regulation whose stated justification is to “improve”

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<sup>33</sup> See NCTA’s Website, <http://www.ncta.com/ContentView.aspx?contentId=54> (52%).

<sup>34</sup> See, e.g., *Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission’s Rules*, Comments of Time Warner Cable, CS Docket No. 98-120 (filed Oct. 13, 1998), at 21.

<sup>35</sup> NPRM ¶ 4; see also *id.* ¶ 5 (“The requirement that cable operators make must-carry stations viewable by all cable subscribers ensures that analog cable subscribers . . . do not lose access to those stations as a result of the switch to digital-only broadcasting.”).

<sup>36</sup> *Turner I*, 512 U.S. at 652.

<sup>37</sup> See *id.* at 647-52.

the mix of speech available within a particular medium is content-based and therefore triggers strict scrutiny.<sup>38</sup> And no one could credibly argue that a dual carriage regime could survive review that exacting.<sup>39</sup>

Finally, the NPRM hints at an interest in “transitioning all consumers — including cable consumers — to digital.”<sup>40</sup> The interests of the Government in setting a hard deadline to reclaim the spectrum used by *broadcasters* for their analog transmissions are clearly important: they reflect the need to enhance communications options for public safety and make available new spectrum for advanced services. It is unclear, however, why the Government has any interest in influencing the pace of the transition from analog to digital on *cable systems*, which would not result in the return of any spectrum for other uses and

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<sup>38</sup> See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 577 (1995) (“[t]he Government’s interest in *Turner Broadcasting* was not the alteration of speech”); see also *Pacific Gas & Elec. Co. v. Public Utils. Comm’n*, 475 U.S. 1, 14, 20 (1986) (plurality opinion) (“the State’s asserted interest in exposing appellant’s customers to a variety of viewpoints is not — and does not purport to be — content neutral”); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (governmental attempt to restrict the voices of some in order to “‘enhance the relative voices’” of less influential speakers “contradicts basic tenets of First Amendment jurisprudence”); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) (“the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”).

<sup>39</sup> Even if the alternate rationale — to “ensure that cable subscribers with analog television sets are able to continue to view all must-carry stations after the end of the DTV transition” — did not trigger strict scrutiny, it could not sustain a dual carriage requirement even under intermediate scrutiny: even assuming the interest were sufficiently weighty to be deemed “important” for purposes of intermediate First Amendment scrutiny, the interest could be promoted in numerous ways that are far less harmful to free speech. In particular, the goal of ensuring that cable subscribers with analog television sets are able to continue viewing must-carry stations after the end of the DTV transition could be fully achieved by providing digital set-top boxes to subscribers who want one.

<sup>40</sup> NPRM ¶ 18.

would be disruptive for many consumers. A switch to all-digital distribution might make sense in some cable systems, particularly in ones where digital penetration is high. But such decisions are better left to cable operators, operating in a competitive environment, where their goal must be to best satisfy consumers' demands, rather than pursuant to one-size-fits-all regulatory fiat. Any policy preference for digital cable transmission thus could not qualify as an "important governmental interest" for purposes of intermediate First Amendment scrutiny.

And, even if it did, the interest would be undermined — not promoted — by requiring carriage in an analog format. If the Government's objective is to encourage digital transmission, it should encourage consumers to obtain digital tuners, an objective that might be furthered by moving as many video services as possible to digital tiers. Requiring programming to be placed on analog tiers, on the other hand, would not further the objective but retard it: the availability of such programming to subscribers without a digital tuner would make it less necessary to obtain digital tuners. Thus, a dual carriage requirement would not be tailored to promote any interest in hastening a transition to all-digital cable systems.

**C. Even If Dual Carriage Would Further an Important Governmental Interest, Any Benefits Would Be Outweighed by the Burdens Imposed.**

Under *Turner*, a must-carry requirement not only must further an important governmental interest, but also must not "burden substantially more speech than is necessary to further [that] interest[]." <sup>41</sup> The burden imposed by a dual carriage requirement would

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<sup>41</sup> *Turner I*, 512 U.S. at 662 (internal quotation marks omitted).

dwarf the burden found permissible in the *Turner* cases, further undermining the likelihood that a dual carriage requirement would be upheld on appeal.

When must carry went into effect in 1993, the Supreme Court determined that most must-carry stations had already been carried voluntarily.<sup>42</sup> Thus, the Court found that, although broadcasters occupied as many as 30,000 cable channels nationwide, broadcast stations gained carriage as a result of must carry on only about 6,000 cable channels<sup>43</sup> — or, on roughly 12,000 cable systems, less than half of one channel per system.<sup>44</sup> Accordingly, the Court concluded that must carry's burden was “modest.”<sup>45</sup>

If the NPRM's proposal was to take effect, the burden would be vastly heavier. If, as the *Turner* Court found, some must-carry signals are carried voluntarily, must-carry signals are never carried voluntarily *in two formats*. Thus, if the Supreme Court was correct in finding that the original must-carry requirements made only half a channel per system unavailable to cable programmers, the NPRM's proposal would make unavailable a whole channel for each and every must-carry signal carried. The burden would therefore increase from half a channel to half a channel plus the number of must-carry signals on a system.

Under the NPRM's regime, then, the impact on cable programmers would jump sharply: in a system where there are five must-carry signals, the new regime would deny cable programmers access to 5.5 channels — 11 times the number of channels denied by

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<sup>42</sup> *Turner II*, 520 U.S. at 215 (“the vast majority of those channels would continue to be carried in the absence of any legal obligation to do so”).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 214 (“the 11,628 cable systems nationwide”).

<sup>45</sup> *See id.* (“the actual effects are modest”).

must carry's original iteration (0.5 channel). Likewise, cable operators' editorial discretion would be overridden not merely twice as often as under the must-carry regime that the Supreme Court approved but 11 times as often. Given that the original must-carry regime was approved by the narrowest margin possible, it is unlikely that this much more burdensome regime would find favor in the eyes of reviewing courts.

Indeed, the Commission itself has previously so held — twice. In 2001, the Commission concluded that “a dual carriage requirement appears to burden cable operators’ First Amendment interests substantially more than is necessary.”<sup>46</sup> In 2005, the Commission again concluded that “the burden that mandatory dual carriage places on cable operators’ speech appears to be greater than is necessary to achieve the interests that must carry was meant to serve.”<sup>47</sup> Those conclusions were right then, and they are right now.

**D. The Constitutional Justification for Must Carry Has Been Eroded by Marketplace Changes.**

Courts are particularly unlikely to approve a more burdensome must-carry regime because, since the decisions in the *Turner* case, the constitutional justification for must carry has only weakened. *First*, the *Turner* rationale vitally depended on the assertion that cable operators were not subject to effective competition from other MVPDs.<sup>48</sup> In 1992, cable

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<sup>46</sup> *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶ 3 (2001) (“*2001 Order*”).

<sup>47</sup> *Carriage of Digital Television Broadcast Signals*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, ¶ 15 (2005) (“*2005 Order*”).

<sup>48</sup> *See, e.g., Turner I*, 512 U.S. at 656 (characterizing cable as a “bottleneck”); *id.* at 661 (“the bottleneck monopoly power exercised by cable operators”).

operators accounted for well over 95% of MVPD subscribers.<sup>49</sup> Today, cable accounts for only 67%,<sup>50</sup> and virtually every cable subscriber has a choice between more than one MVPD.<sup>51</sup> In light of the present level of competition, it is simply implausible that cable operators could profitably act on any supposedly anticompetitive incentive. If a cable operator, intent on increasing its advertising revenue by replacing a broadcaster with a cable programmer, impaired the attractiveness of its multichannel video package, subscriber losses would make the strategy unrewarding.<sup>52</sup> This is no doubt why, nowadays, the vast majority of broadcasters opt for retransmission-consent status.<sup>53</sup> The failure of the few stations that opt for must-carry status has nothing to do with supposed anticompetitive practices. To give these stations not only free broadcast spectrum but also preferential carriage rights vis-à-vis non-broadcast video-programming services simply makes no sense.

*Second*, if cable operators could ever divert any broadcaster's audience, they no longer can today: it is easy for cable subscribers to receive digital signals off-air. At the time the 1992 Cable Act was passed, available input-selection switches were cumbersome, technically flawed devices that were rarely used.<sup>54</sup> Today, they are sophisticated electronic

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<sup>49</sup> See *Annual Assessment of the Status of Video Competition in the Market for the Delivery of Video Programming*, First Annual Report, 9 FCC Rcd 7442, Table 5-1 (1994).

<sup>50</sup> See NCTA's Website, <http://www.ncta.com/ContentView.aspx?contentId=54>.

<sup>51</sup> See *Twelfth Annual Report* ¶ 5 ("We find that almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers.").

<sup>52</sup> See *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1133-34 (D.C. Cir. 2001); see also *id.* at 1138-39.

<sup>53</sup> See, e.g., *Most TV Stations Go for Retransmission Consent Over Must-Carry*, Warren's Cable Regulation Monitor, Oct. 7, 2002, available at 2002 WLNR 6273092.

<sup>54</sup> See *Turner II*, 520 U.S. at 220-21.

switches built into digital TV sets.<sup>55</sup> Moreover, digital broadcasting was chosen in part because of its superior reception characteristics,<sup>56</sup> digital tuners are required to be built into every TV set,<sup>57</sup> and digital antennas have now become so compact that they can be built into set-top boxes.<sup>58</sup> Any notion that cable subscribers would not access attractive broadcast programming off-air is therefore untenable.

Finally, the *Turner* rationale — based on “access to free television programming for the 40 percent of Americans without cable”<sup>59</sup> — has weakened as the number of Americans without MVPD service has dwindled. Whereas the number stood at 40% in the days of *Turner*, it stands well below 15% today.<sup>60</sup> There clearly comes a point where the number of TV households without MVPD service has declined so much that any interest in preserving access to free over-the-air television loses its status as an important governmental interest for purposes of intermediate First Amendment scrutiny.

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<sup>55</sup> See Time Warner Cable’s 1998 Comments, Large Aff.; see also *Amendment of Part 76 of the Commission’s Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, Report and Order, 1 FCC Rcd 864, ¶ 167 (1986) (concerns about the efficacy of A/B switches “may become moot if television receivers begin to be manufactured with switching or interface devices built in”).

<sup>56</sup> See, e.g., *Advanced Television Systems and Their Impact Upon The Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, ¶ 87 (1997) (“the superior performance characteristics of the ATSC DTV system” should allow for “DTV coverage that is equal or superior in coverage to today’s NTSC service”).

<sup>57</sup> See 47 C.F.R. § 15.117(i).

<sup>58</sup> See Todd Spangler, *Motorola To Demo Set-Tops With Antennas*, Multichannel News, Apr. 30, 2007, at 6, available at <http://www.multichannel.com/article/CA6437758.html>; Todd Spangler, *Trying To Beat Broadcast Over the Ears*, Multichannel News, Mar. 12, 2007, at 6, available at <http://www.multichannel.com/article/CA6423301.html>.

<sup>59</sup> *Turner I*, 512 U.S. at 646.

<sup>60</sup> See NCTA’s Website, <http://www.ncta.com/ContentView.aspx?contentId=54> (12% in December 2006); see also *Twelfth Annual Report*, Table B-1 (14% in June 2005).

### III. A DUAL CARRIAGE REQUIREMENT IS NOT COMPELLED BY THE COMMUNICATIONS ACT.

According to the NPRM, the Communications Act leaves the Commission no choice but to impose a dual carriage requirement. The NPRM suggests that digital carriage of digital broadcast signals is required by the prohibition on “material degradation.”<sup>61</sup> As for analog carriage, the NPRM suggests that it is required by Section 614(b)(7).<sup>62</sup> Whatever may be of the Commission’s view that digital broadcast signals must be carried in cable in digital format,<sup>63</sup> the NPRM is plainly wrong in suggesting that Section 614(b)(7) requires analog carriage.

#### A. Section 614(b)(7) Is Not a Requirement To Carry Signals in a Particular Fashion.

Section 614(b)(7) states:

[1] Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. [2] 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. [3] 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 543(b)(3) of this title.<sup>64</sup>

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<sup>61</sup> See NPRM ¶¶ 10-15.

<sup>62</sup> *Id.* ¶ 17.

<sup>63</sup> The Commission first adopted that view in its *2001 Order*. Because Time Warner Cable’s petition for reconsideration of that order remains pending, it has not yet been able to seek review. See, e.g., *BellSouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) (“once a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party”).

<sup>64</sup> 47 U.S.C. § 534(b)(7).

The NPRM reads the analog carriage requirement into the second sentence, which requires that must-carry signals be “viewable” on all TV sets connected by cable operators.<sup>65</sup>

But the legislative history makes clear that the statutory concern with viewability was tied to unique facts prevailing at the time: in the early 1990s, many television receivers were not “cable ready,” and thus could not tune to cable channels above channel 13.<sup>66</sup> Section 614(b)(7)’s second sentence was apparently intended to make clear that, if a cable operator connected a TV set that was not “cable-ready,” and if any must-carry signals were carried on a channel above 13, the cable operator was to furnish the subscriber with a converter box. The third sentence confirms that viewability is about signals that cannot be “*viewed* via cable without a converter box.” Thus, Section 614(b)(7) at most imposes a duty to provide equipment — not a duty to carry signals in any particular way.

Reading Section 614(b)(7) as a manner of carriage requirement would also be inconsistent with the Commission’s own precedent. When it first interpreted the provision in the early 1990s, the Commission expressed concern about “situations where a converter box supplied by a cable operator does not contain the necessary channel capacity to permit a subscriber to access a UHF must-carry signal through the converter. For example, a

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<sup>65</sup> *Id.*

<sup>66</sup> See S. Rep. No. 102-92, at 44 (1991) (“The first twelve channels (2-13) get through to all cable-connected sets. However, the higher channel numbers (14 and above) are not *viewable* on cable-connected sets that are not ‘cable ready.’”) (emphasis added); H.R. Rep. No. 102-628, at 55 (1992) (“[I]n multiple set homes, in apartment complexes and in hotels, many television sets connected to the cable do not have converter boxes. These sets can only receive channels 2 through 13 via cable. Local stations shifted into the UHF band are not *viewable* via cable on these television sets.”) (internal quotation marks omitted, emphasis added).

converter may supply channels 2-36 while the must-carry station is on channel 55.”<sup>67</sup> In those situations, the Commission stated, “the cable operator must make provision for a converter which is capable of providing these signals.”<sup>68</sup> The Commission never suggested that, in this example, Section 614(b)(7) would require (or even permit) the cable operator to carry the UHF signal on a channel that all TV sets could receive.

In sum, Section 614(b)(7)’s second sentence was enacted as a measure requiring cable operators to furnish boxes in a specific and limited context. It has never been read to require cable operators to carry signals on different channels or in different formats. And, if there was any doubt about the matter, the Commission should err on the side of caution. As already explained above, a dual carriage requirement would violate cable programmers’ and cable operators’ rights under the First Amendment. “It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question,” one “should prefer the interpretation which avoids the constitutional issue.”<sup>69</sup>

**B. The Commission Should Also Not Read Section 614(b)(7) as Requiring Cable Operators To Provide Digital Tuners or Go “All Digital.”**

Although cast in general terms, Section 614(b)(7) was crafted to deal with a specific problem that was slight and disappearing. The incidence of TV sets that were not “cable-ready” was declining quickly, as newer TV sets came to dominate the installed base. Section 614(b)(7) was implicated, therefore, only in cases where subscribers had sets that could not

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<sup>67</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, ¶ 16 (1994).

<sup>68</sup> *Id.*

<sup>69</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

tune above channel 13. And most subscribers with these old sets were no doubt happy to have a converter box, given the limited number of services they could access without one. Thus, requiring cable operators to provide such subscribers with an analog converter box caused little disruption.

In contrast, reading Section 614(b)(7) to require cable operators to provide digital tuners to all subscribers would cause significant disruption. With more than 30 million analog-only cable subscribers and boxes costing at least \$50, a conservative estimate of the cost comes to \$1.5 billion. Moreover, many subscribers simply do not want a digital box: they prefer not to have to pay for additional equipment and are satisfied with analog service.<sup>70</sup> Thus, in its *2001 Order*, the Commission recognized that Section 614(b)(7), which had been drafted to solve a very different problem at a very different time, could not have been intended to compel this massive disruption.<sup>71</sup> That conclusion remains correct today.

It is true, as the *NPRM* points out,<sup>72</sup> that the Commission's 2001 conclusion reflected in part that subscribers would merely "receive duplicate analog programming when the

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<sup>70</sup> See *NPRM*, Statement of Chairman Kevin J. Martin ("Many consumers do not want the expense or hassle of having to get a set-top box.").

<sup>71</sup> See *2001 Order* ¶ 79 ("We will not require a cable operator to provide subscribers with a set top box capable of processing digital signals for display on analog sets. We recognize that if we were to impose such a requirement, all subscribers would be forced to pay for equipment that converts digital programming that may be identical in content to the analog programming to which they already have access without a set top box. The result would be that subscribers without the capability of viewing digital signals and who will receive duplicate analog programming when the Commission's simulcasting requirements commence in 2003, would be required to pay for a converter box to receive duplicate digital signals. We do not believe that this result is what Congress intended in enacting section 614(b)(7).").

<sup>72</sup> See *NPRM* ¶ 20.

Commission's simulcasting requirements commence in 2003."<sup>73</sup> But it remains the case that the disruption that would result from a requirement to provide digital tuners to all cable subscribers would be out of any reasonable proportion with the end to be served. If the Commission could read the statute in 2001 to avoid a plainly unwarranted result, then the same remains true today. Although after the transition the issue of duplication will become moot, that hardly means that the Commission must reach a result that remains plainly unwarranted.

Moreover, Section 614(b)(7) was enacted in 1992, before Section 629 was enacted in 1996. The Commission has read Section 629 as requiring that, insofar as digital set-top boxes are concerned, cable operators must separate out the conditional-access function so that navigation devices can be supplied competitively.<sup>74</sup> If cable operators were required to provide their subscribers with digital set-top boxes, there would be little incentive for those subscribers to adopt competitive retail devices, which would dramatically undercut the Commission's efforts in this area. Indeed, this was why, in its *2001 Order*, the Commission found that requiring cable operators to furnish digital set-top boxes to all subscribers would contravene Section 629's express goals.<sup>75</sup> Thus, Section 629's adoption in 1996 effectively supersedes any obligation that could be read into Section 614(b)(7) with respect to digital set-top boxes.

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<sup>73</sup> See *2001 Order* ¶ 79; see also *NPRM* ¶ 20.

<sup>74</sup> See 47 C.F.R. § 76.1204(a)(1).

<sup>75</sup> See *2001 Order* ¶ 80 ("to now require cable operators to make such equipment available to subscribers would impede the overarching goal of the Navigation Devices proceeding, that is to assure competition in the availability of set-top boxes and other customer premises equipment").

Even if the Commission were to read Section 614(b)(7) expansively, as requiring cable operators to furnish subscribers with digital boxes, the Commission cannot interpret that provision's second sentence to mean that cable operators must force digital tuners onto unwilling subscribers. There is no evidence that Section 614(b)(7) was ever read to require cable operators to force boxes on unwilling recipients. That is not surprising, because the term "viewable" plainly need not be read that way — no more than it must be read to require cable operators to come to subscribers' homes to fix broken TV sets. Must-carry signals plainly are viewable (*i.e.*, "capable of being viewed"<sup>76</sup>) when they can be received with the help of a set-top box — even if the consumer declines to accept that box.

Finally, regardless of whether Section 614(b)(7) requires cable operators to furnish set-top boxes, it cannot — as the NPRM hints<sup>77</sup> — require cable operators to turn their systems into "all digital" systems (presumably meaning that they cease transmitting analog signals). By its terms, Section 614(b)(7)'s second sentence requires nothing more than the furnishing of equipment, and the third sentence makes clear that even that is not required for additional outlets.<sup>78</sup> Thus, under any plausible reading of Section 614(b)(7), a cable operator

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<sup>76</sup> *Random House Webster's Unabridged Dictionary* 2121 (2001).

<sup>77</sup> *See NPRM* ¶ 17 ("To achieve compliance with the viewability requirement of Sections 614(b)(7) and 615(h) after the end of the DTV transition, we propose that, in order to ensure that subscribers with analog television sets remain able to view all local broadcast television stations electing mandatory carriage, cable operators 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.") (emphasis added).

<sup>78</sup> *See S. Rep. No. 102-92*, at 86 (1991) ("If the cable operator installs wires for connection to a television set or provides materials to connect a television set to the cable system, it must ensure that all must-carry signals can be viewed on that set. If, however, the cable system authorizes subscribers to connect additional receivers, but neither provides the

would be in compliance if it furnished equipment in connection with the outlets mentioned in the second sentence — even if it continued to provide analog service.

#### **IV. THE COMMISSION SHOULD NOT REVISE ITS MATERIAL DEGRADATION RULES.**

Section 614(b)(4)(A) provides that must-carry signals must be carried “without material degradation,” and calls on the Commission to adopt standards ensuring that must-carry signals’ “quality of carriage” is “no less than that provided by the system for carriage of any other type of signal.”<sup>79</sup> The NPRM asks whether the Commission should revise the standards that it has adopted.<sup>80</sup> The answer is no.

When the Commission first interpreted Section 614(b)(4)(A), it declined to adopt carriage-quality requirements beyond the technical standards that apply “for all classes of cable channels, including broadcast channels.”<sup>81</sup> The Commission recognized that “additional regulations in this area may have the unwarranted effect of impeding

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connections nor the equipment or material needed for such connections, its only obligation is to notify subscribers of any broadcast stations carried on the cable system which cannot be viewed via cable without a converter box, and to offer to sell or lease such a converter at reasonable rates.”); H.R. Rep. No. 102-628, at 95 (1992) (“If the cable operator installs wiring for several television stations within a household, it must ensure that all of the must carry signals can be viewed on each set so connected. If, however, the cable operator does not provide a subscriber with additional connections to the cable system, but merely authorizes subscribers to install such connections themselves, it is only obligated to inform such subscribers which broadcast stations carried on the cable system cannot be viewed without a converter and to offer to sell or lease a converter in accordance with the rates established in section 623(b)(1)(B).”).

<sup>79</sup> 47 U.S.C. § 534(b)(4)(A).

<sup>80</sup> See *NPRM* ¶¶ 10-15.

<sup>81</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 98 (1993).

technological advances and experimentation by the cable industry (*e.g.*, signal compression and 500 channel technology).”<sup>82</sup>

In 2001, the Commission revisited Section 614(b)(4)(A) to address that provision’s application to digital broadcast signals. The Commission determined that “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 cable programming, other broadcast digital program, *etc.*) carried on the cable system . . . .”<sup>83</sup> The Commission recognized that “the fundamental concern of the prohibition against material degradation” is “about the picture quality the consumer receives and is capable of perceiving and not about the number of bits transmitted by the broadcaster if the difference is not really perceptible to the viewer.”<sup>84</sup>

The Commission gave a number of specific reasons. Among other things, the Commission stated that its interpretation was “consistent with the language of the Act, which applies to material degradation, not merely technical changes in the signals.”<sup>85</sup> The Commission also explained that, “whenever a digital signal is remodulated for carriage on a cable system, fewer bits are needed than to transmit the signal over the air. Thus, it is inappropriate to use 19.4 mbps, or any specific number of bits, to denote what constitutes a

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<sup>82</sup> *Id.*

<sup>83</sup> 2001 Order ¶¶ 72, 73.

<sup>84</sup> *Id.* ¶ 72.

<sup>85</sup> *Id.* ¶ 74.

degraded signal. The number of bits appropriate for mandatory carriage will vary based on the programming and service choices of each broadcaster.”<sup>86</sup>

Despite this body of prior explanation and gloss, the NPRM now proposes “to move from a subjective to objective measure,” asking whether the Commission “should require that all primary video and program-related content bits transmitted by the broadcaster . . . be carried.”<sup>87</sup> But the NPRM nowhere explains what is wrong with the existing standard. The NPRM does not point to a single instance in which a broadcaster complained that a cable operator’s digital signal failed to meet the existing standard — much less any instance in which the existing standard proved inadequate. Any change in policy without an explanation of the need for change would be arbitrary and capricious.<sup>88</sup>

It would be particularly inappropriate to adopt a “content bits” rule. As the Commission explained in 2001, “whenever a digital signal is remodulated for carriage on a cable system, fewer bits are needed than to transmit the signal over the air.”<sup>89</sup> Stymieing efficiency-improving transmission methods would hurt consumers: it would require cable operators to set aside large amounts of additional spectrum to transmit broadcast video, even when the additional spectrum does not improve transmission quality. Moreover, programmers and broadcasters are now transmitting various kinds of non-content bits

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<sup>86</sup> *Id.* ¶ 72.

<sup>87</sup> *NPRM* ¶ 12.

<sup>88</sup> *See, e.g., Telephone & Data Sys. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) (“The Commission may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside.”); *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1053 (7th Cir. 1992) (“[An agency] can reject its previous decisions. But it must explain why it is doing so.”).

<sup>89</sup> *2001 Order* ¶ 72.

(including watermarks, content-protection signals, rights-assertion marks, and audience-measurement marks) that, alone or in combination, could potentially disrupt cable service as well as harm cable plant. The potential for harm and disruption to subscribers here is so serious that cable operators and programmers spend a great deal of time negotiating the terms of carriage of such bits. Thus, a rule presumptively requiring carriage of all bits could be not only unnecessary, but also harmful.

For the reasons set forth above with respect to the proposed dual carriage requirement, a “content bits” rule would also violate the rights of cable programmers and cable operators under the First Amendment. A “content bits” approach would allow must-carry signals to consume more bandwidth to provide the same picture quality. Clearly, such an approach would fail the tailoring requirement of intermediate scrutiny: that the burden imposed be “no greater than is essential to the furtherance of [the Government’s] interest.”<sup>90</sup>

Nor is a “content bits” rule statutorily compelled. Section 614(b)(4)(A) provides that must-carry signals’ “quality of signal processing and carriage” must be “no less than that provided by the system for carriage of any other type of signal.”<sup>91</sup> Cable operators do not pass through “all content bits” for non-broadcast video-programming services: as the NPRM recognizes, cable operators commonly use “bandwidth-conserving techniques . . . to improve efficiency.”<sup>92</sup> Thus, the consequence of the proposed rule would be to afford broadcasters carriage of greater quality than non-broadcast programmers, when the statute requires only

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<sup>90</sup> *Turner I*, 512 U.S. at 662 (internal quotation marks omitted).

<sup>91</sup> 47 U.S.C. § 534(b)(4)(A).

<sup>92</sup> *NPRM* ¶ 14.

carriage that is equal in quality. Even if there was doubt, the First Amendment would require the Commission to err on the side of prudence.

Separately, the Commission seeks comment on “whether . . . a cable operator that wishes to reduce the number of content bits in a digital broadcast signal first must demonstrate to the broadcaster that such reduction will not result in material degradation.”<sup>93</sup> Specifically, the Commission asks: “how might the cable operator demonstrate that, although not all of the content bits are being carried, the content will not be degraded in a material way”; whether it would be “necessary and/or sufficient for the cable operator to demonstrate that the broadcast station’s digital signal carriage does not differ from other broadcast or non-broadcast programmers”; whether “the cable operator must continue to pass through all of the content bits until an agreement has been reached with the broadcast station to permit the reduction in the number of bits”; and whether “the cable operator must pass through all of the content bits during the pendency of [a] complaint.”<sup>94</sup>

None of these proposals should be adopted: the Commission should not require pass-through of all content bits. Moreover, allowing individual broadcasters to decide whether cable operators’ transmissions are adequate would be unworkable. This approach would add heavy transaction costs: cable operators would have to bargain with each must-carry station in addition to each retransmission-consent station. More importantly, the proposed rules would give must-carry stations no incentive to accept less than “all bits” transmission —

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<sup>93</sup> *Id.* ¶ 15.

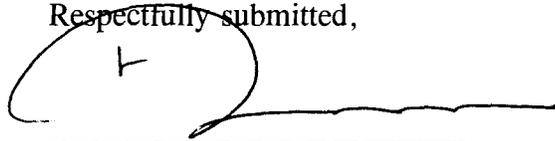
<sup>94</sup> *Id.*

since they are guaranteed carriage no matter what, broadcasters would always insist on “all bits” transmission.

**Conclusion**

The Commission should reject the proposed amendments to its rules.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'H' followed by a horizontal line extending to the right.

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