

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Carriage of Digital Television Broadcast
Signals: Amendments to Part 76 of the
Commission's Rules

Docket No. 98-120

To: The Commission

REPLY COMMENTS OF THE WEATHER CHANNEL, INC.

THE WEATHER CHANNEL, INC.

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August 16, 2007

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The Weather Channel, Inc. hereby responds to the Second Further Notice of Proposed Rulemaking and initial comments submitted by other parties in the captioned proceeding.¹

I. INTRODUCTION

The Weather Channel, Inc. ("TWCI") owns and operates The Weather Channel[®] ("TWC"), the preeminent television network that focuses on weather information, and Weatherscan[®] ("Weatherscan"), which provides local weather information to its viewers. In September 2007, TWCI will launch The Weather Channel HD ("TWC-HD"), a new high-definition network. TWCI is not affiliated with any MVPD.

Launched in 1982, TWC currently serves approximately 92 million homes in the United States, primarily through expanded basic cable analog tiers. TWC provides comprehensive forecasts, special segments highlighting the impact of weather on everyday life, seasonal reports, and other weather-related features. Among the vital services provided by TWC are its coverage of severe weather conditions and the immediate real-time relay to cable systems of severe

¹ *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Further Notice of Proposed Rulemaking, FCC 07-71, 2007 FCC LEXIS 3651 (rel. May 4, 2007) (hereinafter "NPRM").*

weather watches and warnings from the National Weather Service. TWC consistently ranks among the top non-broadcast networks in satisfaction and importance to MVPD subscribers, and most recently ranked in a national survey as number one in importance and number three in viewer satisfaction among cable television viewers.² In 2008, TWC in partnership with MVPDs will introduce OpenCable OCAP technology to allow viewers to interact with TWC and receive weather and related information, including severe weather alerts for thousands of cities.

In 1998, TWCI launched Weatherscan, a 24-hour, all-local weather information service. This service is carried primarily on the digital tiers of cable systems and currently serves approximately eleven million homes. Based on the particular needs of each community, Weatherscan is customized on a market-by-market basis to provide a combination of local weather information, severe weather alerts, and relevant lifestyle information such as boat and beach conditions, ski reports, golf conditions and health reports.

TWCI has embraced the transition to digital television through Weatherscan, the development of interactive applications that overlay TWC and provide local weather information, weather alerts, travel and other relevant information, and most recently its development of TWC-HD, which will debut on one of the major DBS providers and systems owned by a major cable MSO in the Fall of 2007. With an investment of more than \$60 million, including the construction of a new state-of-the-art digital studio, TWC-HD will deliver high-definition weather programming, including live field coverage.

TWCI has a significant interest in the outcome of this proceeding, as the proposed dual must-carry requirement, in improperly reversing prior Commission rulings on which TWCI relied in investing tens of millions of dollars in its networks' digital/HD transition, would

² 2006 Beta Research Study (December 2006).

undermine that investment and interfere with the ability of TWC, Weatherscan and TWC-HD to continue to serve the needs of the consumer.

II. THE COMMISSION SHOULD NOT IMPOSE DUAL MUST-CARRY

In the *NPRM*, the Commission proposes that “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 ...”³ Given that very few cable systems will be all-digital for a number of years to come, the Commission’s second “option” is illusory. In fact, the proposed new “viewability” rule is little more than a thinly-disguised resurrection of prior, failed dual must-carry proposals.⁴

As a practical matter, the Commission’s proposal means that, beginning in February 2009, each must-carry broadcaster would be given, at a minimum, 6 MHz (and possibly 9 MHz) *more* cable system bandwidth than it would otherwise be entitled to occupy under currently applicable regulations. Yet cable system channel capacity is a zero-sum game: every additional MHz of bandwidth that is conscripted to a broadcaster is one less MHz of capacity that is available to a cable network. Put another way, and even more telling, every additional 6 to 9 MHz that is drafted to carry a broadcaster’s duplicative signal represents at least 6 to 9 fewer digital cable channels that otherwise would be available to use for TWC’s interactive services or to carry Weatherscan, TWC-HD or any of the many other cable networks that are competing on their merits for carriage on the nation’s cable systems.⁵ In practical effect, dual must-carry means that *duplicative* broadcast must-carry channels would displace innovative non-broadcast services, creating an unconscionable waste of scarce and enormously valuable cable system bandwidth, jeopardizing millions of dollars of cable network investments, depriving consumers

³ *NPRM* at ¶ 17.

⁴ See NCTA Comments at 4 - 7.

⁵ See Comcast Comments at 29 - 30.

of services they actually want to receive, and reducing the program source diversity that the Commission is legally obliged to protect and promote.

A. Dual Must-Carry Would Be Unlawful

Invoking a slightly new rationale – substituting “preserving viewability” for “promoting the digital transition” – the Commission’s proposal relies on “viewability” as a bootstrap for dual must-carry. Yet that rationale fails for multiple reasons. First, Section 614(b)(7) makes clear that digital broadcast signals are deemed viewable so long as a cable operator offers a converter box for sale or lease, and thus a plain reading of the statute does not support the Commission’s leap to a dual must-carry requirement.⁶ Second, preserving viewability through *dual* must-carry was never considered or discussed by Congress in enacting Section 614, and therefore dual must-carry is beyond the reach of the statute and the Commission’s statutory authority. Third, because preserving viewability through *dual* must-carry was not identified by Congress as a governmental purpose of Section 614, and the Commission is not free to substitute a *post hoc* rationalization, dual must-carry would fail First Amendment scrutiny as it would burden cable networks’ and cable operators’ protected speech in pursuit of a governmental interest not sanctioned by Congress and, in any event, more restrictively than necessary to achieve the claimed objective.⁷

If adopted, the Commission’s new dual must-carry mandate inevitably would be judicially invalidated, a process that would add unnecessary regulatory uncertainty to the DTV transition.

⁶ See 47 U.S.C. § 534(b)(7); Comcast Comments at 21 - 25.

⁷ See, e.g., NCTA Comments at 16 – 22.

B. Dual Must-Carry Would Be Unfair and Would Impose a Substantial Burden on TWC, Weatherscan and TWC-HD

1. The Commission's Reversal of its Prior Dual Must-Carry Rulings Would Unfairly Punish Cable Networks

Twice before, in 2001 and as recently as 2005, the Commission rejected dual must-carry.⁸ In reliance on those rulings, TWCI is investing more than \$60 million to launch in HD the cable network that viewers find number one in importance to enjoyment of cable and more valuable than any other network.

The Commission's *NPRM* ignores, and effectively would *reverse*, those prior rulings by imposing a dual must-carry mandate of indefinite duration. If enacted, the proposal would pull the rug out from under TWCI's massive investments. Moreover, the Commission's action would impact the entire television programming industry, which like TWCI has been investing countless millions in development of HD channels and other enhancements for the move to digital television, investments that were undertaken in reliance on the Commission's successive rejections of dual must-carry and that would be substantially devalued if cable bandwidth were to be co-opted by the proposed dual must-carry requirement. TWCI respectfully submits that federal agencies should respect the need of industry, including the television industry, for predictability in regulatory treatment if companies are to make the investments necessary to modernize their facilities, expand their services and serve the public.

It has taken TWC twenty-five years to obtain nearly ubiquitous nationwide distribution – twenty-five years of investment, innovation, competition, risk-taking and excellence. The development and launch of Weatherscan, tailored to serve the unique needs of local markets,

⁸ *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, First Report and Order, 16 FCC Rcd. 2598 at ¶ 3 (2001); *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd. 4516 at ¶¶ 9 - 27 (2005).

exemplifies TWC's commitment to continue to provide valuable, high-quality service to the public – without government carriage guarantees or other subsidies. Over the past nine years, Weatherscan has obtained distribution by going from cable system to cable system demonstrating the value it delivers. TWCI now is on the verge of launching TWC-HD, which represents a major initiative to integrate the benefits of high definition programming into its operations, and again is going from cable system to cable system to gain carriage of its HD service. The Commission's proposal could not come at a worse time because a looming dual must-carry mandate will make it even more difficult to secure essential carriage on cable systems.

2. Lack of Bandwidth on Cable Systems, Already a Major Problem, Would Be Made Exponentially Worse by Dual Must-Carry

Although the *NPRM* makes no mention of the cable bandwidth issue, dual must-carry unquestionably would consume vast amounts of cable system bandwidth, which already is in very limited supply. The National Association of Broadcasters asserts that “any cable capacity issues ... are long a thing of the past.”⁹ In TWC's experience, this is absolutely not the case, and NAB's theoretical analysis of current and future cable capacity has no basis in reality.

A significant amount of cable system capacity already is unavailable to non-broadcast networks because of government mandates and other uses. Broadcast channels already consume an inordinate amount of channel capacity on cable systems. In addition to the large chunks of cable bandwidth currently occupied by carriage of broadcasters' analog signals, many broadcasters have used retransmission consent negotiating leverage to secure cable carriage of their digital and multicast signals. In addition, the major broadcast networks have used retransmission consent leverage to require cable operators' carriage of multichannel networks

⁹ NAB Comments at 13.

owned by the broadcast networks (who, in this manner, have become major owners of cable networks). Indeed, Weatherscan's primary competitor, NBC Weather Plus (launched in 2004), obtained widespread carriage in only a few short years largely because of retransmission consent. Further, a number of government-imposed carriage obligations, such as PEG and leased access channels, consume even more bandwidth. Of course, cable operators themselves have many other compelling needs for their bandwidth besides linear cable networks, including video-on-demand programming, high-speed Internet access, VoIP services, other non-video services such as remote health care monitoring applications,¹⁰ and emerging applications such as ultra-high speed Internet access using wideband modems.¹¹

All of these bandwidth constraints have resulted in cable programmers being "locked in a fierce battle for carriage."¹² The lack of cable system capacity has limited the ability of Weatherscan to obtain widespread carriage, despite the fact that the network is the *third highest* ranked emerging network in terms of interest among cable subscribers.¹³ Many cable operators have told TWCI that they would like to carry Weatherscan, but simply do not have the capacity to do so. Moreover, over the past few years, several major cable systems have dropped Weatherscan altogether or moved the network to a less widely distributed programming tier due to capacity constraints.

Even established networks that have been fixtures of cable system line-ups for decades are not immune from the consequences of bandwidth scarcity. TWC recently was moved to digital tiers on major cable systems in Augusta, Georgia and Sacramento, California. Likewise, since April 2007, C-SPAN2 has been forced to share a channel with a new regional sports

¹⁰ See Comcast Comments at 4.

¹¹ See Time Warner Comments at 4.

¹² Time Warner Comments at 5.

¹³ 2007 Beta Research Cable Subscriber Study – Interest in Emerging/Mid-Sized Networks (Aug. 2007).

network because of bandwidth limitations on Comcast's Washington, D.C. cable system.¹⁴ In short, in TWCI's experience, cable system capacity already is severely constrained. The Commission should not make this bad situation exponentially worse by imposing an unnecessary, ill-advised and illegal dual must-carry mandate.

3. TWC and Weatherscan Provide an Abundance of *Local* Television Programming

In their initial comments, broadcasters repeatedly touted their local content,¹⁵ but TWCI reminds the Commission that non-broadcast networks such as TWC and Weatherscan provide an abundance of unique and vital *local* programming. TWC has invested tens of millions of dollars to create its "Local On the Eights" feature, which gives local round-the-clock weather reports. Weatherscan's programming is *entirely* local – a statement that very few supposedly "local" broadcast stations can make. And during hurricanes and other weather emergencies, Weatherscan switches to content that provides round-the-clock, emergency-related local programming, including up-to-the minute storm reports, updates on road closures, evacuation information, shelter information, and other vital details from local emergency management agencies. This is the kind of unique, high-value programming that would be displaced by duplicative broadcast channels should the Commission implement its dual must-carry proposal. Could that possibly serve the public interest?

4. Dual Must-Carry Would Impede the Transition to Digital TV

Even in the absence of a dual must-carry mandate, February 17, 2009 will be a non-event for cable subscribers. Those consumers will not be "disenfranchised" because cable operators have strong market incentives to ensure a seamless transition once broadcasters (finally) are

¹⁴ Ted Hearn, *Comcast Makes C-SPAN2, MASN Share*, Multichannel News, March 26, 2007.

¹⁵ See, e.g., Religious Voices in Broadcasting Comments at 4 ("We are proud of the local services we provide ..."); United Communications Corp. Comments at 3 ("the stations are noted for their commitment to local service.").

required to relinquish their analog spectrum. An important question for the Commission to consider is what kind of channel line-up will better advance the transition to digital TV: one that is cluttered with duplicative broadcast channels or one that includes a variety of innovative, market-driven digital programming, such as TWC-HD?

TWCI's pending launch of TWC-HD demonstrates its strong commitment to digital and high-definition programming. Other non-broadcast networks similarly are making massive investments in digital TV and, unlike broadcasters, are doing so without a government-guaranteed right of carriage.¹⁶ Networks like TWC-HD will deliver HD programming and give consumers strong *market-based* incentives to invest in digital television sets. By contrast, the Commission's dual must-carry proposal would give consumers precisely the wrong incentive – to retain outdated analog sets – by forcing cable operators to transmit broadcast signals in both analog and digital at the expense of innovative new digital networks such as TWC-HD.

III. CONCLUSION

The goal of furthering the transition to digital broadcasting can, and will, be met by existing marketplace and regulatory forces. Dual must-carry, if enacted, would hinder the digital transition and needlessly squander enormous amounts of scarce cable system bandwidth. The Weather Channel, Inc. respectfully submits that the Commission should reject its tentative proposal to adopt a dual must-carry requirement.

¹⁶ See, e.g., Discovery Communications Comments at 6 – 9.

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