

**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

CS Docket No. 98-120

**REPLY COMMENTS OF
CEQUEL COMMUNICATIONS, LLC D/B/A
SUDDENLINK COMMUNICATIONS**

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Cequel Communications, LLC d/b/a Suddenlink Communications ("Suddenlink" or the "Company"), by its attorneys, hereby submits these Reply Comments in the above-referenced proceeding. Suddenlink is particularly troubled by the Comments submitted jointly by the National Association of Broadcasters and the Association for Maximum Service Television, Inc. (together, "NAB"). NAB clearly seeks a regulatory regime that favors broadcasters at the expense of cable operators, cable programmers, and the viewing public. The NAB Comments ignore serious First Amendment concerns and the already precarious underpinnings of the existing "must carry" regime. Significantly, NAB no longer even pretends to be worried about cable operators discriminating *against* broadcasters. Its objective now seems to be maximizing the available distribution *advantage* of each and every broadcast station. Suddenlink respectfully submits that the expansive regulatory regime espoused by NAB is unwarranted, unconstitutional, and counter to the public interest.

I. SUDDENLINK'S ACCOMMODATION OF THE DIGITAL BROADCAST TRANSITION WILL BE DICTATED LARGELY BY MARKETPLACE CONSIDERATIONS.

Suddenlink serves approximately 1,300,000 cable customers in 16 states. Its cable systems range from as few as 12 video customers to as many as 93,000. Over half of Suddenlink's systems operate at 550 MHz or less. Many Suddenlink systems offer advanced services, including telephony, broadband, and HDTV. At the current time, however, a significant portion of Suddenlink's systems do not yet offer HDTV. Suddenlink actively promotes digital services, but subscription to Suddenlink's digital service is far from universal. The Company's current digital penetration rate is approximately 34%.

Although Suddenlink's cable systems vary in their characteristics, each of them faces rigorous competition. Any suggestion that Suddenlink operates "bottleneck" video facilities ignores reality. At a minimum, each Suddenlink customer has a choice of two aggressive DBS competitors. As a result, the Company actively competes on a daily basis for customers. Not surprisingly, Suddenlink's carriage decisions are dictated by the competitive marketplace.

Suddenlink has no ownership interest in any cable network, and it has absolutely no bias against carrying local broadcast signals. In fact, in an era of increasing programming costs and rapidly rising retransmission consent fees, Suddenlink is anxious to secure quality programming (including broadcasting programming) for which the supplier seeks no carriage fee. Suddenlink has no interest in impeding its customers' access to quality must carry signals.

The broadcast industry's transition from analog to digital poses a difficult operational challenge for Suddenlink. Bandwidth constraints remain a serious issue. Cable systems, after all, provide a much broader array of services today than when must carry was adopted in 1992. The number of attractive cable programming networks continues to proliferate, and a range of

exciting new services (including telephony, broadband, and HDTV) demand additional bandwidth.

Notwithstanding this fundamental restraint, the Company is committed to easing the digital transition for its customers for the simple reason that the competitive marketplace demands it. In some instances, this accommodation means that broadcast signals will be offered simultaneously on multiple platforms (*i.e.*, analog, SDTV, and HDTV). At the same time, Suddenlink will continue its gradual migration towards an all-digital environment. Despite NAB's dire warnings, Suddenlink has no desire to "disenfranchise" either its customers or local broadcasters. Given the robust competition in the video marketplace today, Suddenlink does not want to raise uncertainty over the digital transition which could encourage either existing or potential customers to use a different video provider. Indeed, there is nothing in the record of this proceeding suggesting that today's cable industry has a desire to do anything but ease the pending transition for its customers.

Left to its own devices, Suddenlink's approach to the end of analog broadcasting (like its approach to many other operational issues) would almost certainly vary among its divergent cable systems. The particular path Suddenlink pursues would depend on a panoply of factors, and would likely shift over time. It is precisely for this reason that Suddenlink is afraid that the Commission may adopt a regulatory regime that unreasonably burdens cable systems, preempts operational flexibility, and frustrates customer preference.

Surely the Commission recognizes that the two regulatory options offered in the *NPRM* (and espoused by NAB) do not represent a *bona fide* choice for most cable operators. Even if they did, they hardly provide the sort of flexibility necessary to achieve their stated objectives. Under the Commission's proposal, a system that goes "*all digital*" would avoid the obligation to

carry broadcast signals in analog, but it would also force digital equipment on customers who have otherwise resisted deploying such equipment. In contrast, a system required to carry *all* broadcast signals in analog would lose a useful tool in encouraging the migration to digital. In truth, there is no need to foist either draconian option upon the cable industry.

The suggestion in the *NPRM* that cable operators might be required to carry every single digital bit of every digital broadcast is particularly alarming to Suddenlink. This “objective” requirement would impede critical efforts to compress transmission data to balance signal quality with efficient use of bandwidth, as is done today by all video providers. This far-reaching requirement has no credible justification. In fifteen years operating under the current must carry regime, there is no evidence whatsoever of cable operators materially degrading broadcast signals. Ever-increasing competition makes it even less likely that such degradation will occur in the future. Suddenlink certainly has no interest in degrading broadcast signals (or any other cable programming) in a manner that leaves customers dissatisfied or makes Suddenlink’s pictures appear less than the highest quality, especially as compared to its competitors. At the same time, Suddenlink has a vital interest in securing the advantages inherent to digital compression.

II. THE DIGITAL TRANSITION DOES NOT JUSTIFY A DRAMATIC EXPANSION IN MUST CARRY OBLIGATIONS.

Suddenlink is not advocating for the elimination of “must carry” in this proceeding. The Company is not disputing here the existing requirement to retransmit the primary video signal of each must carry station, nor is it disputing that it must make equipment available to its customers so they can receive this must carry programming. Suddenlink’s objections revolve entirely around proposals to vastly expand the existing must carry regime at a time when the competitive marketplace points in the exact opposite direction.

NAB is not fighting in this proceeding for continued access to local cable customers. If that is all NAB were seeking, a few straightforward safeguards would be adequate to accomplish that objective. A cable system simply would be required to: (a) carry each must carry signal in *some* format; (b) not discriminate *against* must carry signals in the particular means of delivery; and (c) *educate* customers about the equipment needed to continue viewing each must carry signal.

The problem with NAB's much broader demands is that they stretch must carry far beyond the purposes for which it was adopted. Must carry resulted from a concern that the cable industry might abuse its "bottleneck" facilities to undermine the viability of over-the-air broadcasting. NAB is now trying to transform must carry into a vehicle for curing the delivery problems associated with the broadcast industry's own digital transition. Although NAB blithely suggests that the duplicative carriage obligations it seeks to impose on the cable industry are consistent with Congressional objectives, nowhere does NAB explain how carrying multiple versions of exactly the same broadcast programming will enhance programming diversity. Common sense suggests the exact opposite result.¹

When all is said and done, it seems that NAB is using the digital transition as a pretense to ensure that each and every broadcaster has superior carriage rights. Under NAB's approach, Suddenlink's cable systems generally would be forced to carry not one, not two, but three versions of the same broadcast signal. Moreover, it would no longer be sufficient for Suddenlink to deliver these broadcast signals in the same quality as cable programming, given NAB's renewed demand for enhanced technical guarantees. NAB's advocacy is based on a concern that somehow, somewhere, some broadcaster might find itself in a less than ideal carriage situation.

¹ The existing statute expressly exempts cable systems from being required to carry "duplicate" programming. 47 U.S.C. § 534(b)(5).

But that extreme position was neither Congress' concern in adopting must carry in 1992, nor was it the Supreme Court's reasoning in narrowly upholding must carry.²

III. NAB'S INTERPRETATION OF THE "SIGNAL AVAILABILITY" REQUIREMENT IS UNREASONABLE.

NAB argues unconvincingly that the two operational options proposed in the *NPRM* minimize the regulatory burden associated with must carry by maximizing operator flexibility. NAB asserts, "By maximizing the flexibility given cable operators..., the Commission's proposal ... would minimize the burden on any particular cable operator."³ Unfortunately, NAB's espousal of operator flexibility is disingenuous. The *NPRM* may provide two alternative compliance options, but both options impose substantial burdens on cable operations. Indeed, as several cable commenters already pointed out, the "all digital" option is not realistic for most cable systems.⁴ And the Commission has already considered and sensibly rejected the multiple carriage obligations proposed again in the *NPRM*. To make matters worse, NAB is committed to making the new regulatory regime as *inflexible* as possible. NAB is adamant that the options must be followed on an "all or nothing" basis. Indeed, regulatory rigidity lies at the heart of NAB's Comments.

NAB insists that if a cable operator carries even a single local broadcast station in analog, it must carry every other broadcast station in analog. It unequivocally rejects "[a]ny alternative

² See *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S.180, 222 (1997)(the 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.")(emphasis added).

³ NAB Comments at 10.

⁴ See, e.g., Comcast Comments at 5; Time Warner Comments at 3.

that would permit cable operators to pick and choose among local signals for differing treatment.”⁵

NAB argues that the “signal availability” provision set forth at Section 614(b)(7) of the Act⁶ requires that cable customers who lack digital equipment must be provided with an analog version of every must carry signal. The argument ultimately collapses under its own weight. NAB, after all, has no objection to the Commission’s “all digital” option that is premised on must carry signals being made “available” through digital equipment. A must carry signal is no less “available” through digital equipment simply because other signals happen to be transmitted in analog.

The fact that a particular customer in a hybrid cable system might chose not to deploy digital equipment does not mean that the digital signal is not available to that customer. Surely a cable operator has fulfilled its obligations under this provision as long as it *carries* the signal and *offers* the necessary digital equipment to its customers. Indeed, Section 614(b)(7) expressly recognizes that a cable operator’s “signal availability” obligation is satisfied when the operator: (1) advises customers that they might need extra equipment to receive certain broadcast signals; and (2) makes that equipment available.

The FCC directly addressed the “signal availability” question soon after the new must carry rules went into place in *WLIG-TV v. Cablevision Systems Corporation*, 74 RR 2d 208 (1993). In the *WLIG* case, the Commission agreed with the broadcaster that the cable operator had violated the “signal availability” rule by deploying converters that were not capable of

⁵ NAB Comments at 9. *See also id.* (the operator “must apply that choice across the board with respect to all local must-carry broadcast stations”); at 5 (“A critical part of encouraging innovative digital programming is ensuring that cable operators not be allowed, if they choose to downconvert broadcasters’ digital signals to analog, to convert only certain stations that they deem more ‘desirable,’ and carry the remaining stations only in digital.”)

⁶ 47 U.S.C. § 534(b)(7).

receiving a particular must carry station. Significantly, the Commission did *not* say that the operator was prohibited from relying on converters to make the signal available, nor did it say that the operator must ensure that every customer has the necessary converter. Cablevision's sole regulatory error was in discriminatorily placing a broadcast signal on a channel that the operator's own converter equipment was incapable of receiving.

The Commission noted in the *WLIG* case:

We ... explained in the *Report and Order* that cable operators are not required to provide converter boxes to their subscribers, or to provide all cable connections for their subscribers, but they must notify all their subscribers of the broadcast stations they cannot receive without a converter box. [Citations deleted.] However in a situation such as that now before us, where a cable operator chooses to provide subscribers with signals entitled to mandatory carriage through converter boxes supplied by the cable system, those converters must be capable of transmitting all the signals entitled to mandatory carriage on the basic tier of the cable system, not just some of them.⁷

NAB's expansive reading of Section 614(b)(7) cannot be reconciled with the far less burdensome interpretation of that provision set forth in *WLIG*.⁸ Nor can NAB's reading be reconciled with the business and legal restraints under which cable operators now operate. As a practical matter, cable operators *cannot* force customers to use a particular piece of equipment. Even if an operator required deployment of digital equipment at the time it connects a customer to the system, there is little the operator can do if the customer subsequently chooses to remove the digital equipment. This risk, of course, exists as long as the cable operator transmits any signals in analog, which (at least for the near-term) is generally recognized as a consumer-friendly option. Indeed, the Commission previously recognized that it should not be the entity

⁷ 78 RR 2d. 208 at ¶ 5.

⁸ NAB's expansive reading is functionally equivalent to requiring a cable operator to place all analog broadcast signals on channels 2 - 13 so that customers lacking cable-ready sets have easy access to those signals. Significantly, neither Congress nor the Commission ever imposed that conversion requirement on the cable industry.

mandating customers acquire digital equipment. NAB fails to explain why the Commission should now reverse course and effectively mandate the cable industry's deployment of digital converters.

As a legal matter, cable operators are directly and deliberately prohibited from forcing cable customers to lease digital converters. When Congress imposed must carry on cable operators in 1992, it simultaneously imposed a rate regulation regime that mandated the financial "unbundling" of equipment and service rates and affirmatively required cable operators to offer equipment and service separate from each other.⁹ This straightforward provision precludes cable operators from mandating that a customer obtain cable equipment from the cable operator in order to receive cable service.

Congress went even further in 1996, when it adopted Section 629 of the Communications Act to ensure the "Competitive Availability of Navigational Devices."¹⁰ The FCC's implementing regulations under Section 629 not only preclude cable operators from mandating use of cable-provided equipment, they affirmatively require cable operators to deploy security systems (*i.e.*, CableCards) to ensure that customers have complete control over the selection of navigational devices.¹¹ These regulations (and the significant financial and operational burdens they impose on cable operators) cannot be reconciled with NAB's insistence that the cable operator must either guarantee that each and every customer has the digital equipment necessary to receive a digital must carry signal or deliver each and every must carry signal in analog.

Suddenlink is prepared to make available the digital equipment necessary to receive digital broadcast signals, and it is prepared to educate customers about the need for such

⁹ 47 U.S.C. § 543.

¹⁰ 47 U.S.C. § 549.

¹¹ *See* 47 U.S.C. § 76.1200 *et seq.*

equipment, but it clearly cannot force customers to lease company-provided digital converters. Indeed, such action would run directly afoul of the letter and spirit of Section 629.

In any event, there are far less intrusive means to minimize the viewer disruptions inherent to the broadcast digital transition. The Commission's recently released *DTV Consumer Education Initiative NPRM*¹² recognizes the importance of various communications entities explaining to consumers how the digital transition will impact their television viewing options. It implicitly confirms that consumer education is the preferable means of ensuring that cable customers continue to have access to available broadcast signals. It certainly presents a less burdensome approach than the approach advocated by NAB in this proceeding.

IV. NAB'S INTERPRETATION OF THE "MATERIAL DEGRADATION" PROHIBITION IS UNREASONABLE.

NAB reveals its true colors in arguing for a change in the "subjective" signal quality test that has operated successfully for 15 years. In advocating adoption of a rigid "objective" signal test, NAB contends that cable operators should *not* be allowed to degrade broadcast programming, "simply because they degrade the quality of non-broadcast programming."¹³ In so advocating, NAB turns must carry on its head. NAB appears to be transforming a regime designed to ensure that cable operators are not discriminating *against* broadcasters into one in which broadcasters are guaranteed *superior* delivery. NAB never answers the very logical question, if a certain delivery quality suffices for cable programming, why is it inadequate for broadcast programming?

¹² FCC 07-148, MB Docket No. 07-148 (July 30, 2007).

¹³ NAB Comments at 22.

NAB ultimately argues that all signal quality decisions affecting broadcast signals should be removed from the operator's discretion.¹⁴ There is no evidence that this dramatic usurpation of operator discretion is necessary to protect either broadcasters or the viewing public. To the contrary, in an era where cable competitors regularly extol their own purported signal quality advantages, it makes far more sense to leave signal quality issues to the marketplace, rather than to the self-interest of a particular broadcaster. The Commission otherwise risks a broadcaster overreaching and insisting on a signal delivery standard that frustrates the technical mechanisms a cable operator might deploy to maximize customer satisfaction. A broadcaster advancing such demands, after all, lacks the market accountability of its cable counterpart.

For its part, Suddenlink works very hard to deliver high quality signals to its customers. The competitive marketplace demands nothing less. Suddenlink respectfully submits that the rigid signal quality standards advanced by NAB are anything but "pro-consumer." Their adoption would risk compromising technological advances while providing no discernable benefit for cable customers.

Perhaps most importantly, NAB's position is at odds with the governing statutory language. Section 614(b)(4)(A) requires must carry signals be carried "without *material* degradation."¹⁵ NAB would essentially write the critical "materiality" qualifier out of the statute. NAB asserts that "the loss of content bits in a DTV signal inherently causes material degradation,"¹⁶ but that simply is not true. In fact, the loss of a single content bit presumably would not be "material," as it surely would not be perceived by cable customers. If customers cannot perceive technical degradation, it cannot be "material." Materiality must be viewed from

¹⁴ *Id.* at 25.

¹⁵ 47 U.S.C. § 544(b)(4)(A) (emphasis added).

¹⁶ NAB Comments at 27.

the perspective of the consumer, not the broadcaster. Suddenlink urges the Commission to continue to apply the “manner of carriage” rules as it does today – a regime which has neither engendered customer complaints nor led to inferior treatment of broadcast signals by cable systems.

V. APPLICATION OF ANY NEW DIGITAL MUST CARRY REQUIREMENTS SHOULD RESPECT THE OPERATIONAL RESTRAINTS OF SMALLER CABLE SYSTEMS

Finally, as an operator with numerous smaller systems, Suddenlink reiterates two concerns identified in the Comments submitted by the American Cable Association. First, the Commission should make it clear that a cable operator will *not* be obligated to deliver a broadcast signal in HDTV if the system at issue does not yet deliver any signals in HDTV. Although consumer demands and competitive pressure are encouraging Suddenlink to deploy HDTV capability as quickly as possible, the costs and transmission capacity associated with HDTV operations pose serious obstacles in certain small systems. Many of these systems are already struggling for survival. Suddenlink respectfully submits that this is yet another area where the “material degradation” standard applicable to the carriage of broadcast stations should be governed by the standard applicable to the carriage of cable programming. As long as a cable system is not discriminating *against* broadcasters (by carrying only cable programming in HDTV), it should not be required to carry broadcasters in HDTV. The marketplace, rather than the Commission, is the best means of ensuring that cable operators deploy HDTV wherever it is economically viable to do so.

Second, if the Commission does adopt a regulatory regime that effectively requires a cable operator to downconvert a digital broadcast signal to analog, the Commission should make it clear that the associated engineering costs should be borne by the broadcaster, not the cable operator. In this scenario, the additional technical costs would *not* be the result of a system

constraint, but the fact that the broadcaster itself is no longer transmitting in analog. If the broadcaster decides that the extra engineering costs associated with the down-conversion do not warrant the expense, there is absolutely no reason why that cost should be imposed on the cable operator and its subscribers. While the operator might voluntarily bear the costs in certain cases, it should not be required to do so.

CONCLUSION

The *NPRM* (as espoused by NAB) proposes a dramatic increase in the burdens associated with must carry at a time when a dynamic marketplace suggests that even the most limited form of must carry is unnecessary. The Commission should resist the efforts of NAB to needlessly expand the scope of must carry to the detriment of cable customers and cable operators. The Commission should abandon the *NPRM* and focus its attention on the far less intrusive *DTV Consumer Education Initiative*.

Respectfully submitted,

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