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

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

REPLY COMMENTS OF
GSN TV

Game Show Network, LLC ("GSN") submits these Reply Comments to describe the severe impact that adoption of the Commission's dual carriage proposal would have on programming diversity. In the context of today's limited bandwidth, duplicative carriage of the same broadcast channels will foreclose independent programmers from additional distribution opportunities for their networks and deprive viewers of networks about which they are passionate.

GSN TV is the premier television network for games, featuring challenging word games, high intensity casino programs, live participation shows, and reality series, as well as traditional classic game shows. GSN TV's programming includes family-friendly original game series, such as "Grand Slam," "Camouflage" and "Lingo," and classic game shows such as "Jeopardy" and "Pyramid."

GSN TV was launched in 1994 and now reaches more than 64 million homes. GSN is well aware of the "fierce battle for carriage" which cable operators report in this proceeding. *See* Comments of Time Warner Inc. ("Time Warner Comments") at 5. GSN distribution personnel are constantly working to obtain additional launches, improve existing distribution and maintain favorable packaging through regular meetings with cable operators, both at the

headquarters and system levels. System bandwidth shortages are the problem most frequently identified by cable system personnel as limiting their carriage options.

GSN already faces intense competition for distribution from multiple other programming services, and cable operators increasingly are using their finite cable bandwidth to provide broadband and telecommunications services. Some cable operators are reclaiming analog bandwidth previously used for video in order to use that capacity for these and other non-video uses. *See* Comments of The National Cable & Telecommunications Association ("NCTA Comments") at 19.[1] GSN is aware that cable operators have altered the carriage of several well-penetrated cable networks in various systems to lesser penetrated tiers because of bandwidth shortages.

The Commission's current proposal to require cable operators to carry broadcast signals in both analog and digital formats will result in substantial additional constraints on available bandwidth. Independent programmers (and viewers of their programming) will suffer as a result, as their programming is displaced to make room for the carriage of duplicative broadcast signals mandated by the government -- carriage in a format that the government itself has determined is no longer worthy of any spectrum.[2]

The Commission's proposal is contrary to decades of precedent establishing that the public interest is served by ensuring that viewers have access to a diversity of viewpoints. Over the past six years, the Commission twice has analyzed the public interest benefits and

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[1] *See also* Time Warner Comments at 4-5. As Time Warner explains, "[I]ncreasing amounts of cable spectrum have gone to advanced new services, including high-speed data and telephony...." Consequently, "[a]nalog channel space is particularly scarce...[b]ut channel space in the digital basic tier is becoming increasingly scarce as well."

[2] *See* Time Warner Comments at 6 ("Compelled duplicate carriage of such [broadcast] stations would result in no digital carriage, or any carriage at all, for many cable programmers."); Comments of Comcast Corporation at 34 ("forced occupancy of cable bandwidth by must-carry signals necessarily forecloses the use of that bandwidth for other programming...[and] necessarily imposes an enormous burden on cable operators' editorial discretion and cable programmers' ability to gain carriage").

burdens of mandatory dual carriage and has concluded that requiring such carriage would be unconstitutional. In 2001, the Commission "tentatively conclude[d]" that:

> [B]ased on the existing record evidence, a dual carriage requirement appears to burden cable operators' First Amendment interests substantially more than is necessary to further the government's substantial interests of preserving the benefits of free over-the-air local broadcast television; promoting the widespread dissemination of information from a multiplicity of sources; and promoting fair competition in the market for television programming.

First Report and Order, 16 FCC Rcd. 2598 (2001) at ¶3. After developing a factual record over the next four years, the Commission concluded in 2005 that "mandatory dual carriage would....substantially increase the burdens on free speech beyond those upheld" by the Supreme Court in *Turner*. Based upon its analysis of the governmental interests and policy issues, the Commission definitively concluded that:

> [T]here has not been an adequate showing that dual carriage is necessary to achieve any valid governmental interest. Therefore, in the absence of a clear statutory requirement for dual carriage, we decline to impose this burden on cable operators.

Second Report and Order and First Order On Reconsideration, 20 FCC Rcd. 4516 (2005) at ¶27.[3]

Neither the Commission's Notice nor the record in this proceeding provides any basis to justify the constitutional burdens or reversal of the Commission's earlier decisions rejecting

[3] The fact that the Commission has coupled the mandatory dual carriage proposal with an "alternative," *i.e.* that the cable operator may carry the digital broadcast signals only, but must provide the subscriber with a decoder to allow the digital signals to be viewed on an analog television set, does not cure this constitutional infirmity. First, the Commission already has concluded that requiring cable operators to provide such decoders is not "what Congress intended in enacting section 614(b)(7)" and "might be inconsistent with section 629 of the Act." *See First Report and Order* at ¶¶79-80. In addition, several cable commenters have demonstrated that this "option" is "a fantasy," given the financial and other requirements implicit in the digital only alternative. NCTA Comments at 5-6; Time Warner Comments at 20-22.

dual carriage during the digital transition.[4] Contrary to the Commission's suggestion in the Notice at ¶4, there is no clear "statutory requirement" for dual carriage. Section 614(b) surely does not require such carriage. The "viewability provision" in Section 614(b)(7) upon which the Commission relies expressly contemplates the installation of "additional receiver connections" and the alternative that subscribers may have to lease or purchase a "converter box." Moreover, although the Commission states that "it is eminently reasonable to conclude" that analog-only television sets will continue to qualify as "television receivers" under Section 614(b)(7) after the transition, there appears to be no basis for that conclusion when the analog "receiver" will be admittedly incapable of receiving any post-transition broadcast signals.

In addition, the Commission's conclusion is unfounded that "analog cable subscribers (currently about 50% of all cable subscribers, or approximately 32 million households) would no longer be able to view commercial must-carry stations or non-commercial stations after February 17, 2009" without mandatory dual carriage. *Second Further Notice* at ¶4. First, millions of additional cable subscribers will convert to digital television sets as they have over the last three years. Second, the record in this proceeding shows that digital/analog converter boxes will be available for purchase by viewers at a cost of between $50 and $100. *See* Time Warner Comments at 21 (converter "boxes costing at least $50") and NAB/MSTV Comments at 11, n.11 ("digital/analog converters are expected to be available to consumers before the transition for less than 100 dollars"). Thus, the comments indicate that a cable subscriber who desires to continue to use an analog television set after the digital transition can lease or purchase such converters.

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[4] *See Fox Television Stations Inc. v. FCC*, 2007 U.S. App. LEXIS 12868, at *36 (2d Cir., June 4, 2007) ("such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute as well or better than the old rule").

There simply is no factual or legal basis for government-mandated carriage requirements that violate the constitutional rights of cable operators, programmers and viewers, particularly when there is a readily available marketplace solution provided by digital-to-analog decoders or conversion to a different type of service. Duplicative carriage of the same broadcast channels to accommodate a dwindling number of analog television sets will not facilitate the digital transition. Indeed, it will achieve the opposite result by eliminating or limiting the distribution of a variety of innovative and diverse cable programming services delivered digitally. The Commission's proposal effectively would punish independent programmers and viewers of their programming who are participating in and facilitating the digital transition. The Commission's proposal is: (1) an impermissible infringement of programmers' constitutional rights; (2) an unnecessary and ineffective tool to accomplish the Commission's goal of promoting the digital transition; and (3) punitive to innocent parties. It should be abandoned.

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Respectfully submitted,

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