National Association of NAB BROADCASTERS

Jerianne Timmerman
Senior Vice President and Deputy General Counsel
1771 N Street, NW • Washington DC 20036-2800
(202) 775-2994 • Fax: (202) 775-3526
jtimmerman@nab.org

September 7, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: **Notice of Ex Parte Communication**
CS Docket No. 98-120

Dear Ms. Dortch:

Yesterday, Jane Mago and the undersigned of NAB, and David Donovan of the Association for Maximum Service Television, Inc., met with Rick Chessen to discuss the carriage of digital television signals and the material degradation of digital broadcast signals. We expressed our support for, and the legal basis for, the Commission's "viewability" proposal, which will ensure that analog cable subscribers will have access to must-carry broadcast signals after the end of analog broadcasting. We also supported the Commission's proposal to adopt an objective standard for measuring material degradation and the need for, and advantages of, such a standard in the digital environment. In particular, we stressed the consumer benefits of these proposals.

At this meeting, the attached handouts were also distributed. Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,

Jerianne Timmerman

Attachments

cc: Rick Chessen

Must Carry Signals Must Be Viewable on all Receivers

- The Act requires that must carry signals be provided to every cable subscriber.
    - Section 614(b)(7) of the Act says that must carry signals "shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection."
    - Cable points to a later provision which allows cable operators to notify subscribers of the need for a converter box, but that provision applies only to "additional receiver connections" which the operator does not connect and for which it does not supply any materials. Cable wants this narrow exception to the viewability requirement to swallow the rule.
    - Analog television sets will continue to be "television receivers" after the transition. Cable operators argue they should be able to deliver video programming to analog sets, but that those sets should be read out of the broadcast must carry law. No statutory language supports their argument and it flies in the face of Congress' effort to ease the transition for consumers.
- NTIA, in establishing the DTV converter coupon program, assumes – and tells consumers on its web site – that cable subscribers will be able to see all their broadcast signals after the transition without a converter. The Commission's website similarly tells consumers that [a]nalog-only TVs should continue to work as before with cable and satellite TV services." Indeed, NCTA's own website says that "[c]able or satellite subscribers with televisions connected to a set-top box or otherwise wired to video services can continue to watch their favorite channels without interruption."
- Cable proposals will not ensure that consumers are not disenfranchised by the digital transition.
    - Comcast says (Reply Comments at 5): "There is no evidence that cable operators will not provide what their customers need to view broadcast signals."
        - But on the next page, Comcast says that both of the FCC's alternatives – providing converters or carrying signals in analog to analog sets – are too burdensome.
        - Effectively, what cable wants to do is carry some local signals in analog, but require subscribers with analog receivers to acquire a digital converter (or perhaps to subscribe to a digital tier) to see others. *See* NCTA Reply Comments at 3, 7-8.
    - NCTA's arguments are just like Echostar's contention that it could put some local must carry signals on a different satellite, requiring an additional dish. The FCC at first found that Echostar could split the signals if it acted to prevent discrimination.

Congress later specifically barred this discrimination among local signals, and the Commission recently agreed that "our initial decision was flawed insofar as it held out the possibility that such . . . carriage could be lawful and effective to remedy the discrimination."

- NCTA does not even shrink from its claim that cable operators can treat must carry signals differently. But the must carry law was adopted to remedy cable discrimination. The Supreme Court concluded that cable operators have "systemic reasons for seeking to disadvantage broadcast stations," and that Congress reasonably concluded that "cable systems would drop broadcasters." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 201 (1997). Ensuring subscriber access to local broadcast signals is exactly what must carry requires.

- NCTA says "[c]able operators are in the best position to assess the interests of their customers and should be able to choose to provide broadcast signals post-transition in the formats that make the most sense for their customers, just as they have during the pre-transition period." NCTA Reply Comments at 8.

    - This is the same argument cable has always made against must carry. But Congress found that cable operators would discriminate against some local stations and that would harm consumers.

    - Cable systems do now carry some local signals in digital formats, but they carry *all* local signals in analog and thus they can be seen on all receivers. It is not the Commission that wants to change the system; it is cable that wants to resurrect the right to discriminate.

- The Commission should be skeptical of cable arguments that transitioning to all-digital systems (thus eliminating the need to carry must carry signals in analog) is not feasible.

    - Many small cable systems have committed to all-digital operation by the end of the transition and received waivers of the integrated set-top box rules. Cable does not explain why larger cable operators cannot do the same thing.

- Cable's constitutional arguments are incorrect.

    - The Fourth Circuit upheld the "carry one, carry all" requirement for DBS operators because it gave operators a choice. The satellite carriers' choice of carrying all local broadcast signals in a market or offering no local service in that market was found consistent with the First Amendment. *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001).

        - The Commission's post-transition carriage rule offers cable operators a similar choice – the benefits of operating an all-digital operation or for cable systems retaining analog tiers, providing must carry signals in a way that all subscribers can view them.

        - An obligation that a cable operator can avoid raises no constitutional questions.

    - Cable tries to rewrite the *Turner* decisions.

        - Must carry was upheld in *Turner* because "the burden imposed by must carry is congruent to the benefit it affords." 520 U.S. at 215. Cable systems would not be harmed because their capacity was already so great that programming would only be minimally affected.

        - As one of the district judges who examined the evidence in the *Turner* remand concluded, "if the burden to the cable industry [from must-carry] were much smaller, then the First Amendment would not even be implicated." Thus, cable capacity – as the FCC has recognized – is central to any discussion of must carry.

        - Cable now argues that any restriction of operator choice raises First Amendment issues, but the Supreme Court rejected similar "forced speech" arguments and time and repetition have not improved them.

    - The proposed rule would not affect cable programming choices for cable has ample capacity.

        - Despite claims of capacity shortage, the cable comments offered no specific evidence of harm if cable operators choose to continue to carry must carry signals in analog.

        - As NCTA acknowledges, cable systems *voluntarily* carry nearly 1000 local broadcast signals in *both* analog and digital formats. And those signals are all carried under retransmission consent. The Commission's proposal, by contrast, would apply *only to must carry signals* and involve far less capacity than cable systems now provide.

    - Cable's constitutional arguments are not limited to the Commission's limited post-transition carriage proposal, but would equally apply to any carriage requirement. And the Commission cannot consider the constitutionality of its governing statute.

- The Cable Act requires that must carry signals be "viewable" on all sets connected by a cable operator. Cable operators now want to change that requirement to "could be made viewable." That is not what the statute requires, and cable operators provide no assurance to the Commission that consumers will not lose access to local broadcast signals.

PROTECTING CONSUMERS FROM MATERIAL DEGRADATION OF DIGITAL BROADCAST SIGNALS

The Communications Act requires effective protections against material degradation.

- Section 614(b)(4)(A) of the Communications Act flatly prohibits cable operators from materially degrading the signals of "local commercial television stations" carried on their systems. The FCC held in 1993 that this provision "appl[ies] to all local commercial television stations carried by a cable system, and not just to must carry stations."
- Congress directed the FCC to adopt material degradation standards and to update those standards for digital television. Because it was not possible in 1992 to quantify material degradation, Congress also established a floor for the FCC's carriage rules, specifying a level below which broadcast signal carriage could never fall.
- While there may have been no better standard for analog, the technology now exists to objectively assure that the statute's prohibition on material degradation is enforced for digital broadcast signals.

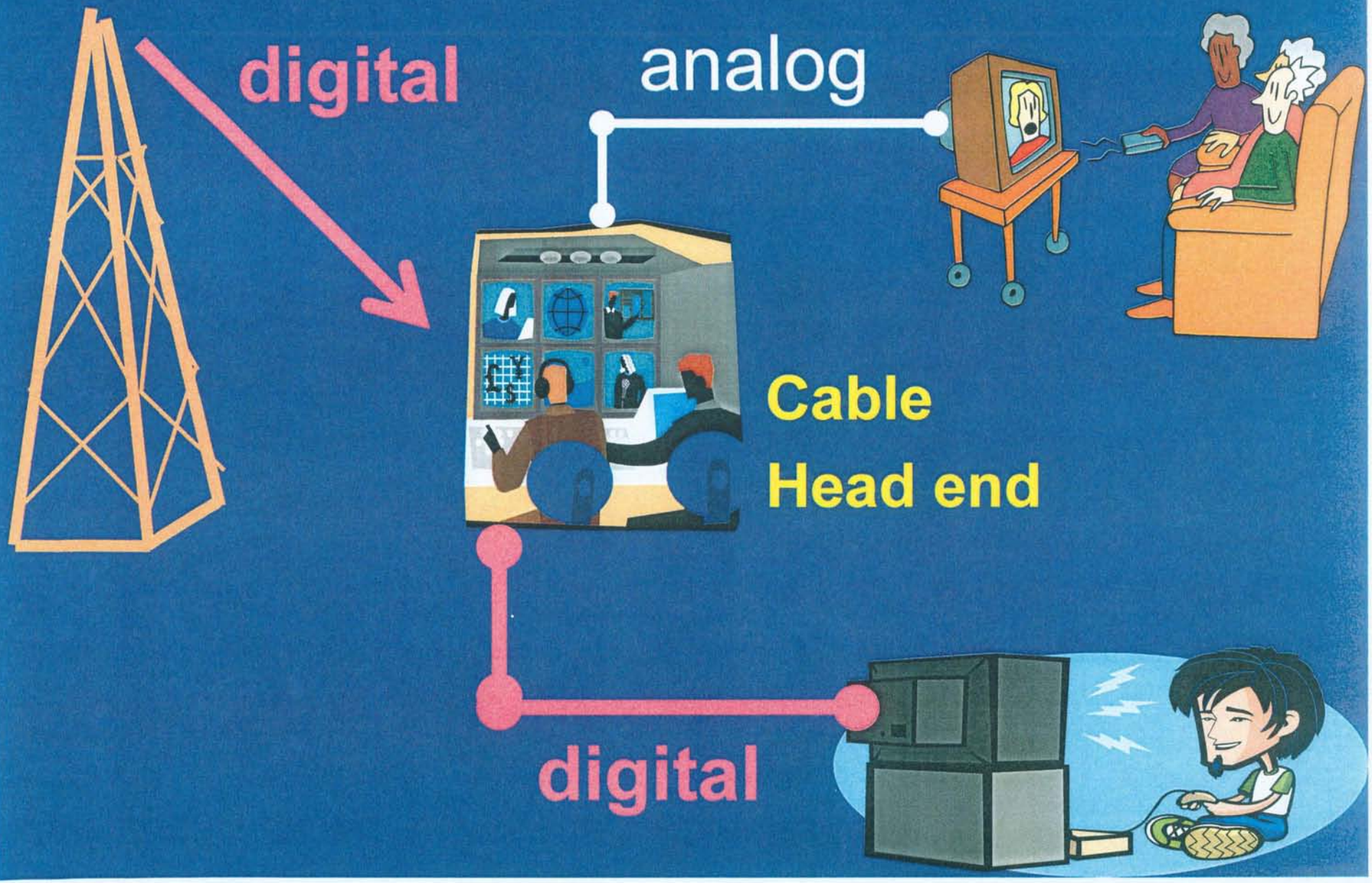
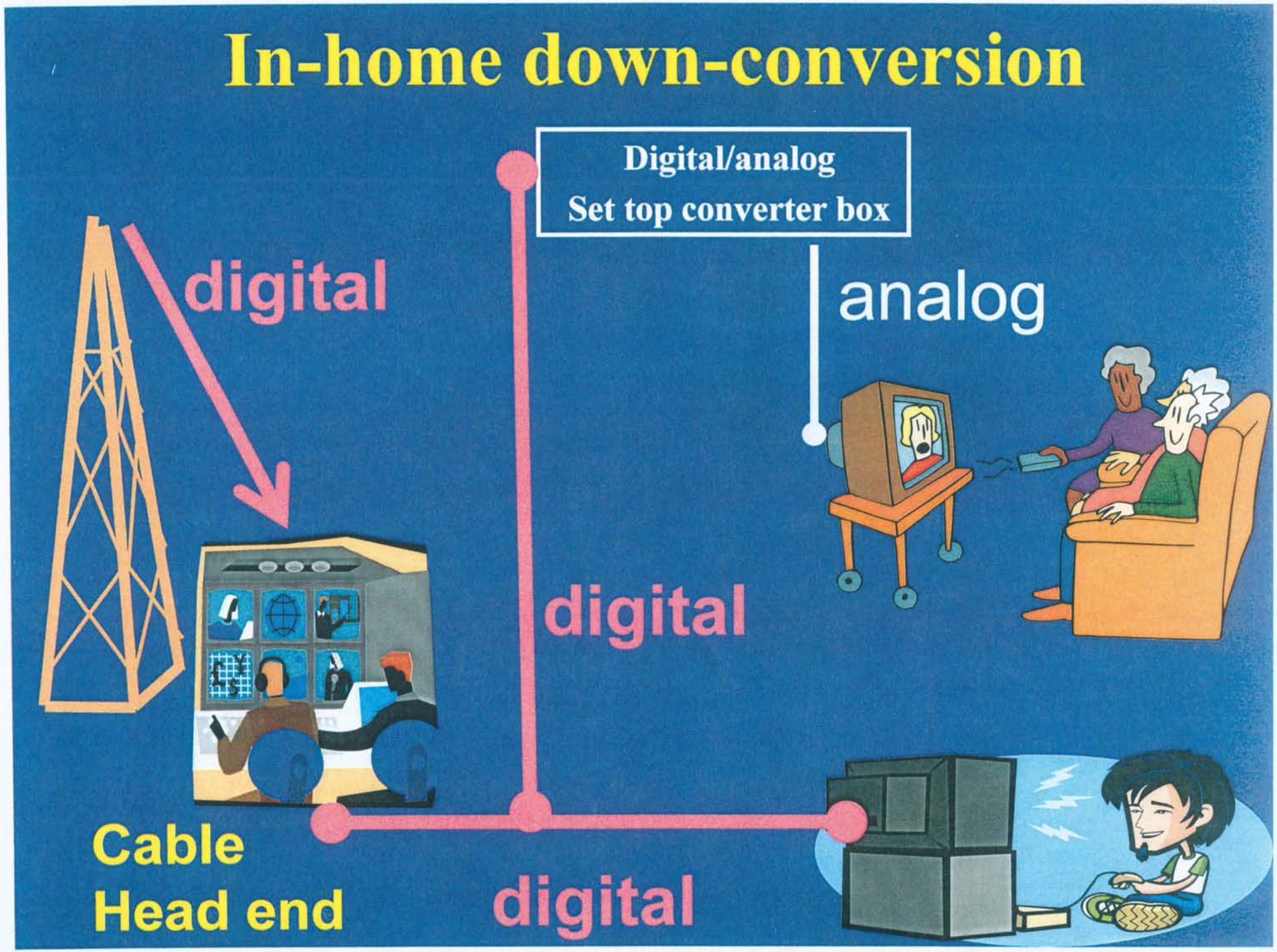
The existing subjective standard is insufficient to ensure that DTV signals are not materially degraded.

- With digital broadcasting, signal quality is even more important, and an objective and effective material degradation standard is therefore more crucial than ever.
- The existing subjective standard fails to ensure that broadcast signals are not materially degraded in violation of the statute. An objective standard is superior because it promotes certainty and ensures that digital broadcast signals cannot be degraded simply because a cable operator degrades other signals it carries.
- The FCC should prohibit cable operators from failing to pass through all of the content bits in a broadcaster's digital signal. Technology now exists to measure this digital bit degradation but to exclude from the calculation so-called "null bits."
- Cable operators' claim that they can strip bits from a broadcast signal without material degradation is entirely unsupported. To the contrary, one video provider conceded that the loss of 1% of a signal's content bits "could result in a seriously degraded picture," depending on which bits were removed.

Cable operators should be prohibited from materially degrading digital signals when they are downconverted for analog customers.

- Downconversion of digital signals within analog homes should comply with standards adopted for the NTIA-administered converter box program.
- Downconversion at cable headends should result in an ITU Grade 4-compliant analog signal that satisfies the FCC's existing signal-to-noise ratio and analog comparative degradation standards.
- In each case, broadcasters or viewers should control the format of downconverted programming.

Head end down-conversion



In-home down-conversion