

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

SECOND REPORT AND ORDER
AND FIRST ORDER ON RECONSIDERATION

Adopted: February 10, 2005

Released: February 23, 2005

By the Commission: Chairman Powell, Commissioners Abernathy and Adelstein issuing separate
statements; Commissioner Copps concurring and issuing a separate statement;
Commissioner Martin approving in part, dissenting in part and issuing a separate
statement.

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I. INTRODUCTION

1. In this Second Report and Order and First Order on Reconsideration, we consider several
petitions for reconsideration of the Commission's First Report and Order and the various comments
submitted in response to the Further Notice of Proposed Rulemaking in the above-captioned proceeding.

1 See 47 C.F.R. § 1.429 (setting forth basis for granting petitions for reconsideration).

2 See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, etc., 16
FCC Rcd 2598 (2001) (hereinafter "First Report and Order" or "Further Notice") (both the First Report and Order
(continued....))

The actions taken in this order are limited to two significant issues, the resolution of which are essential to the Commission's ongoing efforts to complete the transition from analog to digital television.³ In the interest of providing certainty on these significant issues at this time, we are deferring resolution of the other issues raised on reconsideration and in the *Further Notice* to a future order.⁴ The two issues resolved in this order are: (1) whether cable operators are required to carry both the digital and analog signals of a station during the transition when television stations are still broadcasting analog signals (also generally referred to as the "dual carriage" issue); and (2) how to construe the "primary video" carriage limitation under Sections 614(b)(3)(A) (for commercial stations) and 615(g)(1) (for noncommercial

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and *Further Notice* were issued in a single order). A list of the parties that submitted comments and replies in response to the *Further Notice* appear in Appendices A and B, respectively, *infra*.

³ Since release of the *First Report and Order* and *Further Notice*, the Commission has issued several Orders to further facilitate the transition from analog to digital television:

- On August 8, 2002, the Commission released an Order establishing digital broadcast tuner requirements. *See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 17 FCC Rcd 15978 ("*Digital Tuner Second Report and Order*"). The Order requires that all TV receivers manufactured or shipped in the U.S. with screen sizes greater than 13 inches must be capable of receiving DTV signals over-the-air no later than July 1, 2007. This requirement is phased in, beginning with the largest sets in 2004.
- On October 9, 2003, the Commission released an Order establishing rules for digital "plug and play" cable compatibility. *See Implementation of Section 304 of the Telecommunications Act of 1996 -- Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 20885 ("*Plug-and-Play Cable Compatibility Second Report and Order*"). The Order adopts the proposed technical, labeling, and encoding rules contained in the Memorandum of Understanding between the cable and consumer electronics industries with certain modifications. Resolution of issues raised for comment in a Second *Further Notice* in this proceeding is pending. Additionally, petitions for reconsideration of the Order are pending before the Commission, and related appeals have been filed and remain pending with the U.S. Court of Appeals for the District of Columbia Circuit (docket No. 04-1033 (D.C. Cir. Jan. 27, 2004)).
- On November 4, 2003, the Commission established a redistribution control content protection system for digital broadcast television. *See Digital Broadcast Content Protection*, 18 FCC Rcd 23550 ("*Broadcast Flag Order*"). Petitions for reconsideration of this order are pending before the Commission, and related appeals have been filed and remain pending with the U.S. Court of Appeals for the District of Columbia Circuit (docket No. 04-1037 (D.C. Cir. Jan. 30, 2004)).
- On September 7, 2004, the Commission established the procedures for channel elections, set deadlines for replication and maximization, required broadcasters to use PSIP (program and system information protocol), and took other actions necessary to continue the progress towards completing the digital transition. *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279 ("*Second DTV Periodic Review*").
- On September 30, 2004, the Commission released an Order establishing technical and operational rules for digital LPTV and digital TV translator stations and modified certain rules applicable to Class A TV stations. *See Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, 19 FCC Rcd 19331 ("*Digital LPTV Report and Order*").

⁴ The petitions also request reconsideration or clarification of the *First Report and Order* with respect to the Commission's decisions on PSIP carriage and channel numbering, carriage of program-related material, material degradation, and down-conversion of digital-only stations, in addition to other issues. A list of the parties that filed petitions, oppositions, and other comments in the reconsideration proceeding appear in Appendix C, *infra*.

stations) under the Act if a broadcaster chooses to broadcast multiple digital television streams (this issue is generally referred to as the mandatory multicast carriage issue).⁵

2. With respect to the dual carriage issue, we determined in the *First Report and Order* that the statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station's digital and analog signals.⁶ Furthermore, we tentatively concluded that, based on the available record evidence, a dual carriage requirement would likely violate the cable operator's First Amendment rights.⁷ In order to evaluate the issue more fully, we adopted the *Further Notice* to solicit comment on the constitutionality of imposing a dual carriage requirement.⁸ Several members of the broadcast industry seek reconsideration of the Commission's statutory interpretation on this issue, and urge us to conclude that the Act mandates dual carriage. For the reasons provided in this order, we are denying the petitions on this issue and affirm our tentative decision not to impose a dual carriage requirement.

3. With respect to the mandatory multicast carriage issue, the Commission, in the *First Report and Order*, interpreted the statutory term "primary video" to mean only a single programming stream.⁹ As a result, if a digital broadcaster elects to divide its digital spectrum into several separate, independent, and unrelated programming streams, the Commission found that only one of these streams is considered primary and entitled to mandatory carriage. Several members of the broadcast industry seek reconsideration of our statutory interpretation. For the reasons provided below, we are also denying the petitions on this issue and thereby affirm our decision in the *First Report and Order*.

II. BACKGROUND

4. Sections 614 and 615 of the Act govern mandatory carriage for cable operators. Section 614(b)(4)(B) requires:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.¹⁰

⁵ See 47 U.S.C. §§ 534(b)(3)(A), 535(g)(1).

⁶ See 16 FCC Rcd at 2600.

⁷ See *id.*

⁸ See *id.* at 2649-50. The *Further Notice* also solicited comment on other carriage issues, including outstanding issues initially raised in the *Digital Must Carry NPRM*, 13 FCC Rcd 15092 (1998), such as: the definition of substantial duplication in the digital television context, the tier placement of digital broadcast signals, retransmission consent agreements between broadcasters and small cable operators, satellite carriage requirements, and other relevant carriage issues. See *Further Notice*, 16 FCC Rcd at 2647-49, 2651-58.

⁹ See 16 FCC Rcd at 2622.

¹⁰ 47 U.S.C. § 534(b)(4)(B). The limited discussion of this provision in the Act's legislative history states that "when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this section." H.R. Rep. No. 102-862, 102d Cong., 2d Sess. at 67 (1992). See H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 94 (1992); S. Rep. No. 102-92, 102d Cong., 1st Sess. at 85 (1991).

5. Our task in this ongoing proceeding is to determine how to implement and apply the statute to digital signals during the transition as well as after the transition is completed. Our approach is guided by Title VI of the Act, which states, in part, that “cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”¹¹ In addition, we are directed to “promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.”¹²

6. The law governing retransmission consent generally prohibits cable operators and other multichannel video programming distributors, such as satellite carriers, from retransmitting the signal of a commercial television station, unless the station whose signal is being transmitted consents or chooses mandatory carriage.¹³ Generally, every three years, commercial television stations must elect to either grant retransmission consent or pursue their mandatory carriage rights.¹⁴

7. Under Section 614 of the Act, and the implementing rules adopted by the Commission, a commercial television broadcast station is entitled to request mandatory carriage, if it does not elect retransmission consent, on cable systems located within the station’s market.¹⁵ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.¹⁶ Systems with more than 12 usable activated channels must carry local commercial television stations “up to one-third of the aggregate number of usable activated channels of such system[s].”¹⁷ Beyond this requirement, the carriage of additional television stations is at the discretion of the cable operator. In addition, Section 615 of the Act requires cable systems to carry local noncommercial educational television stations (“NCE” stations) according to a different formula, and based upon a cable system’s number of usable activated channels.¹⁸ Carriage of NCE stations are in addition to the one-third cap that applies to full power

¹¹ 47 U.S.C. § 521(4). *See Associated Press v. United States*, 326 U.S. 1, 20 (1945) (In a free speech challenge to the Sherman Act’s application to the print media, the Court held that the “[First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”); *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (“*Turner I*”) (In upholding the 1992 Cable Act carriage provisions, the Supreme Court held that access to a multiplicity of information sources, from broadcast stations and others, promotes values central to the First Amendment.).

¹² 47 U.S.C. § 521(6).

¹³ *See* 47 U.S.C. §§ 325(b)(1)(A) and (B).

¹⁴ *See* 47 C.F.R. § 76.64(f).

¹⁵ *See* 47 U.S.C. § 534; *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 (1993) (“*Cable Must Carry Order*”). *See also Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723 (1994) (“*Cable Must Carry Reconsideration Order*”).

¹⁶ A DMA is a geographic market designation that defines each television market exclusive of others based on measured viewing patterns.

¹⁷ 47 U.S.C. § 534(b)(1)(B); *see* 47 C.F.R. § 76.56(b)(2). The Act requires that, in general, “[a] cable operator of a cable system with 12 or fewer usable activated channels must carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.” 47 U.S.C. § 534(b)(1)(A); *see* 47 C.F.R. § 76.56(b)(1) (same).

¹⁸ Noncommercial television stations are considered qualified, and may request carriage if: (1) they are licensed to a community within 50 miles of the principal headend of the cable system; or (2) place a Grade B contour over the cable operator’s principal headend. Cable systems with: (1) 12 or fewer usable activated channels are required to carry the signal of one qualified local noncommercial educational station; (2) 13-36 usable activated channels are required to carry no more than three qualified local noncommercial educational stations; and (3) more than 36 usable activated channels shall carry at least three qualified local noncommercial educational stations. *See* 47 U.S.C. §§ 535(b) and (e); 47 C.F.R. § 76.56(a).

commercial stations.¹⁹ Low power television stations, including Class A stations, may request carriage if they meet six statutory criteria.²⁰ Among these criteria are that the low power TV station meets all of the Commission's requirements that are applicable to full power TV stations with respect to certain types of programming, such as children's and political programming, and "the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license."²¹

8. Cable operators are required to carry local analog television stations on a tier of service provided to every subscriber²² and on certain channel positions designated in the Act.²³ Cable operators are prohibited from degrading a television station's signal,²⁴ but are not required to carry duplicative signals²⁵ or video that is not considered primary.²⁶ Television stations may file complaints with the Commission against cable operators for non-compliance with Sections 614 and 615.²⁷ In addition, cable operators and television stations alike may file petitions to either expand or contract a commercial television station's market for broadcast signal carriage purposes.²⁸ These statutory requirements were implemented by the Commission in 1993,²⁹ and are reflected in Sections 76.56 to 76.64 of the Commission's rules.³⁰

III. CARRIAGE OF DIGITAL BROADCAST SIGNALS

A. Stations Broadcasting in Analog and Digital

9. A fundamental issue addressed in the *First Report and Order* and in the *Further Notice* is whether cable operators are required to carry both the analog and digital signals of a station during the transition when television stations are broadcasting analog and digital signals.³¹ We said therein that if the Commission requires carriage of both analog and digital signals (*i.e.*, "dual carriage"), cable operators could be required to carry double the number of television signals, many of which contain duplicative

¹⁹ See 47 U.S.C. § 535(a).

²⁰ See 47 U.S.C. §§ 534(c)(1) and (h)(2); 47 C.F.R. § 76.55(d). A cable operator, however, cannot carry a low power television station in lieu of a full power television station. See 47 U.S.C. §§ 534(b)(1)(A) and (h)(2); 47 C.F.R. §§ 76.56(b)(1) and (b)(4)(i).

²¹ 47 U.S.C. § 534(h)(2)(B).

²² See 47 U.S.C. § 534(b)(7); 47 U.S.C. § 535(h).

²³ See 47 U.S.C. § 534(b)(6); 47 U.S.C. § 535(g)(5).

²⁴ See 47 U.S.C. § 534(b)(4)(A); 47 U.S.C. § 535(g)(2).

²⁵ See 47 U.S.C. § 534(b)(5); 47 U.S.C. § 535(b)(3)(C).

²⁶ See 47 U.S.C. § 534(b)(3)(A); 47 U.S.C. § 535(g).

²⁷ See 47 U.S.C. §§ 534(d), 535(j). See also 47 C.F.R. § 76.61.

²⁸ See 47 U.S.C. § 534(h)(1)(C). See also 47 C.F.R. § 76.59.

²⁹ See *Cable Must Carry Order*, 8 FCC Rcd 2965, *supra* note 15.

³⁰ See generally 47 C.F.R. §§ 76.56 to 76.64.

³¹ See 16 FCC Rcd at 2603-09, 2649-52.

content, while having to drop or forego carriage of varied cable programming services where channel capacity is limited.³²

10. In the *First Report and Order*, we examined our authority to impose a dual carriage requirement and determined, after extensive review of Sections 614 and 615 of the Act and the accompanying legislative history, that “the statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station’s digital and analog signals.”³³ It is precisely the ambiguity of the statute that has driven contentious policy debate on this issue. In order to weigh the constitutional questions inherent in a statutory construction that would permit dual carriage, we determined that it was appropriate and necessary to more fully develop the record in this regard. It was our tentative conclusion, however, that a dual carriage requirement would burden cable operators’ First Amendment rights substantially more than necessary to further the government’s substantial interests.³⁴ We issued a *Further Notice* addressing several critical questions concerning the constitutionality of dual carriage, including: (1) whether a cable operator will have the channel capacity to carry the digital television signal of a station, in addition to the analog signal of that same station, without displacing other cable programming or services³⁵; (2) whether market forces, through retransmission consent, will provide cable subscribers access to digital television signals; and (3) how the resolution of the carriage issues would impact the digital transition process.³⁶ Before considering the additional record and finally determining the dual carriage question, we first address the petitions for reconsideration of our preliminary decision on the statutory issue in the *First Report and Order*.

1. Statutory Analysis

11. Several members of the broadcast industry seek reconsideration of the Commission’s statutory interpretation on this issue, and urge us to conclude that the Act mandates dual carriage.³⁷ Commercial Broadcasters specifically argue that Section 614(a) of the Act makes no distinction between qualifying analog and digital signals, so therefore all local television station signals must be carried.³⁸

³² *See id.*

³³ *Id.* at 2600.

³⁴ *See id.*

³⁵ The *Further Notice* sought information on current usable cable channel capacity and forecasts for capacity growth in the future, and also surveyed 16 cable operators. *See id.* at 2652. The results of the surveys indicate that the majority of cable subscribers are connected to systems with at least 750 MHz capacity, and that operators continue to build out their facilities. It is also clear from the results of the survey and other record evidence that large cable operators have not reached the statutory one-third usable capacity limit for the carriage of local commercial stations’ analog signals, and it is unlikely that they will reach the one-third limit, in most instances, even if dual carriage were mandated.

³⁶ *See id.* at 2600, 2647-54.

³⁷ *See, e.g.,* Commercial Broadcasters Petition (*i.e.*, joint filing from the National Association of Broadcasters, the Association of Local Television Stations, and Association for Maximum Service Television, Inc.) at 6-9; Broadcast Group Petition (*i.e.*, joint filing from Arizona State University, Benedek Broadcasting Corporation, Midwest Television, Inc., and Raycom Media, Inc.) at 2-4; Noncommercial Broadcasters Petition (*i.e.*, joint filing from Association of America’s Public Television Stations, the Public Broadcasting Service, and the Corporation of Public Broadcasting) at 14-18; Paxson Petition at 3-8; Fox Affiliates Comments at 2-4; Tribune Comments at 2.

³⁸ *See* Commercial Broadcasters Petition at 6-9. *See also* Broadcast Group Petition at 2-3; Commercial Broadcasters Reply at 3-5.

They point out that Section 614(h)(1)(A),³⁹ which defines the term “local commercial television station,” does not expressly exclude DTV signals from carriage during the time that the companion analog signal would be carried.⁴⁰ They state that “Section 614 applies to the signals of any full power commercial television station licensed and operating on a channel regularly assigned to its community by the Commission, not otherwise excluded by the terms of Section 614.”⁴¹ Furthermore, they assert that the new DTV signals of full power television broadcast stations at issue here were, at the time of the 1992 Cable Act, anticipated to be “licensed and operating on a channel regularly assigned to its community by the Commission.”⁴² They surmise that if Congress intended to exclude these DTV signals from carriage requirements during the transitional period, it would have so indicated in Section 614.⁴³ In their view, “[b]ecause the statutory mandate to carry broadcasters’ DTV signals is clear, the Commission lacks discretion to water down or modify the express requirement that cable operators carry DTV signals.”⁴⁴

12. Cable operators and non-broadcast programmers, on the other hand, ask the Commission to deny petitioners’ request for reconsideration of this issue.⁴⁵ NCTA argues that, in the absence of a clear statutory directive for dual carriage, the Commission must read the statute to err on the side of avoiding constitutional infirmities.⁴⁶ Cable programmer A&E states that if Congress had intended for the Commission to greatly expand the cable industry’s carriage burden during the DTV transition, it would have done so much more plainly and explicitly.⁴⁷ A&E points out that subsequent congressional actions and relevant legislative histories in the Telecommunications Act of 1996, the Balanced Budget Act of 1997, and the Satellite Home Viewer Improvement Act of 1999, demonstrate that Congress did not intend to compel dual carriage through Section 614(b)(4)(B).⁴⁸

13. The arguments that the parties have presented in support of a statutory reading to require dual carriage essentially are no different from those that have previously been submitted, considered, and rejected in the *First Report and Order*.⁴⁹ We therefore affirm our earlier conclusion that the Act is ambiguous on the issue of dual carriage. The statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station’s digital and analog signals.⁵⁰ Further, we do not

³⁹ Section 614(h)(1)(A) of the Act, 47 U.S.C. § 534(h)(1)(A), states:

For purposes of this section, the term “local television station” means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 615(l)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

⁴⁰ See Commercial Broadcasters Petition at 7.

⁴¹ *Id.* (emphasis in original omitted).

⁴² *Id.*

⁴³ See *id.* at 7-8. See also Broadcast Group Petition at 14.

⁴⁴ Commercial Broadcasters Petition at 8.

⁴⁵ See, e.g., NCTA Opposition at 5-8; Time Warner Opposition at 3-11; A&E Comments at 1, 7-9.

⁴⁶ See NCTA Opposition at 5-8.

⁴⁷ See A&E Comments at 4.

⁴⁸ See *id.* at 5.

⁴⁹ See 16 FCC Rcd at 2603-09.

⁵⁰ See *id.* at 2600.

believe that mandating dual carriage is necessary either to advance the governmental interests identified by Congress in enacting Sections 614 and 615 and upheld in *Turner II* or to effectuate the DTV transition. Since no evidence or arguments submitted on reconsideration gives us any reason to question our original judgment, we deny the petitions for reconsideration on this point.

2. Constitutional Analysis

14. As indicated above, the *First Report and Order* held that the Act was ambiguous as to the question of dual carriage and that further fact-finding was necessary to determine the appropriate statutory interpretation.⁵¹ We rely on several constitutional principles and cases, in particular the Supreme Court's decisions in *Turner I* and *Turner II*, in addressing the constitutionality of mandatory dual carriage.⁵² The Supreme Court has recognized that mandatory carriage directly interferes with the free speech rights of cable operators and cable programmers.⁵³ Nevertheless, the *Turner II* Court upheld the constitutionality of Sections 614 and 615 under an intermediate scrutiny analysis. A majority of the Court found that the mandatory carriage provisions of the Act furthered two governmental interests: (1) preserving the benefits of free, over-the-air local broadcast television for viewers; and (2) promoting the widespread dissemination of information from a multiplicity of sources.⁵⁴ Significantly, the Court found that mandatory carriage was narrowly tailored because the burden imposed at that time was congruent to the benefits obtained.⁵⁵ A plurality of the Court also concluded that Sections 614 and 615 furthered a third governmental interest -- Justice Breyer, whose vote was necessary to sustain the requirement, however, did not believe that must carry was necessary to promote "fair competition," as did the other justices in the majority.⁵⁶

15. In the *First Report and Order*, we recognized that any type of dual carriage rule must satisfy the *Turner* factors and pass the *O'Brien* test⁵⁷ for determining whether a content-neutral rule or regulation violates the Constitution.⁵⁸ Under the *O'Brien* test, a content-neutral regulation would be upheld if: (1) it furthered an important or substantial governmental interest; (2) the government interest was unrelated to the suppression of free expression; and (3) the incidental restriction on First Amendment freedoms was no greater than is essential to the furtherance of that interest.⁵⁹ In sum, under the *O'Brien* test, a regulation must not burden substantially more speech than is necessary to further the government's legitimate interests. We invited commenters that support a dual carriage requirement to submit evidence to show how mandatory dual carriage would satisfy the constitutional requirements of both *Turner* and *O'Brien*. After close examination of the information submitted, we find nothing in the record that would allow us to conclude that mandatory dual carriage is necessary to further the governmental interests

⁵¹ See *id.* at 2648.

⁵² See *Turner I*, 512 U.S. 622, *supra* note 11; *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997) (hereinafter "*Turner II*"). See also *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

⁵³ See *Turner II*, 520 U.S. at 214, citing *Turner I*, 512 U.S. at 637.

⁵⁴ See *Turner II*, 520 U.S. at 189, citing *Turner I*, 512 U.S. at 662.

⁵⁵ See *Turner II*, 520 U.S. at 215.

⁵⁶ See *id.* at 225-30 (Breyer, J., concurring in part).

⁵⁷ See *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

⁵⁸ See 16 FCC Rcd at 2648.

⁵⁹ See *O'Brien*, 391 U.S. at 377.

identified in *Turner*, or other potential governmental interests put forward by commenters. In addition, even if it could be shown that dual carriage could further any of the governmental interests based on the current record, 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. Mandatory dual carriage would essentially double the carriage rights and substantially increase the burdens on free speech beyond those upheld in *Turner*. As noted, *Turner II* found the benefits and burdens of must carry to be congruent, such that must carry is narrowly tailored to preserve the multiplicity of broadcast stations for households that do not subscribe to cable.⁶⁰

16. ***Preserving the benefits of free over-the-air television for viewers.*** The first governmental interest identified in *Turner* to support mandatory carriage is the preservation of the benefits of free over-the-air television for non-subscribers.⁶¹ The broadcast industry argues that a slow DTV transition places preservation of over-the-air broadcasting at risk. Commercial Broadcasters assert that the entire premise of the digital transition is for digital signals to replace analog signals. They argue that if viewers are unable to receive digital signals, digital cannot replace analog, and broadcasters will be forced to sustain the operation of two facilities at considerable expense, without any additional revenue.⁶² Noncommercial Broadcasters assert that the costs of dual transmissions are overwhelming for smaller television stations.⁶³

17. NCTA contends that the broadcast industry sought a second channel of spectrum to provide digital programming, prior to which there was no apparent threat to the preservation of broadcast stations for over-the-air viewers, given that cable operators were required to carry virtually all existing analog stations.⁶⁴ International Channel asserts that analog carriage, by itself, serves the government interest in preserving the benefits of free over-the-air television.⁶⁵ A&E states that the only reason the Court upheld the analog carriage requirements is that Congress found cable carriage to be necessary to promote the continued availability of free television programming, "especially for viewers who are unable to afford other means of receiving programming."⁶⁶

18. Despite the broadcast parties' assertions, the record as a whole does not demonstrate that television stations would face undue hardship in the absence of dual carriage that would, in turn, threaten

⁶⁰ See *Turner II*, 520 U.S. at 218.

⁶¹ See *id.* at 222.

⁶² See Commercial Broadcasters FNPRM Comments at 13.

⁶³ See Noncommercial Broadcasters FNPRM Comments at 21. See also STC Broadcast FNPRM Comments at 1 (\$1.7 million required for the equipment necessary for DTV rollout at its stations in Texas).

⁶⁴ See NCTA FNPRM Reply Comments at 9.

⁶⁵ See International Channel FNPRM Comments at 7. Ovation, Inc. points out that television broadcast stations have already received: (1) free spectrum for their analog operations; (2) guaranteed cable carriage of their analog signals; (3) free spectrum for the DTV transition; (4) guaranteed carriage for DTV (upon electing to surrender their analog spectrum); (5) protection from having to pay for cable carriage; (6) guaranteed access to the basic service tier with preferred channel placement; (7) retransmission consent rights that can be leveraged into additional carriage for commonly owned digital and non-broadcast offerings; and (8) the right to use DTV allotments for revenue producing ancillary and supplemental services. Ovation argues that, despite these governmentally-bestowed benefits, broadcasters improperly assert that such regulatory largess is insufficient, and they demand dual carriage to guarantee them a mass audience. See Ovation FNPRM Reply Comments at 2.

⁶⁶ A&E FNPRM Comments at 9, citing *Turner I*, 512 U.S. at 646.

the ability of broadcasters to provide service to non-cable households.⁶⁷ The critical governmental interest, reflected in the Act, was described by the Supreme Court as the preservation of over-the-air broadcasting.⁶⁸ More specifically, the congressionally-adopted governmental interest identified in *Turner* was the protection of the interests of over-the-air television viewers -- *i.e.*, viewers whose interests were not reflected in the carriage decisions of cable operators nor in the viewing options available to cable subscribers.⁶⁹ Thus, the focus of the government interest in *Turner* is not the economic health of broadcasting per se, but the benefits that broadcasting provides to consumers.⁷⁰ In sum, the critical factor in interpreting the intent of the statute and in the constitutional analysis of it is that it is designed “to provide over-the-air viewers who *lack* cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate” and to assure the over-the-air public “access to a multiplicity of information sources.”⁷¹ With respect to mandatory dual carriage, all broadcast stations are required to build a digital facility and broadcast a digital signal.⁷² Thus, cable carriage is not needed to ensure that non-cable, over-the-air viewers have access to digital broadcast signals. Broadcasters advocating mandatory dual carriage have not demonstrated that non-cable households would benefit from more or better broadcast programming if stations have mandatory dual carriage.⁷³ Local analog broadcasters are already carried today – either pursuant to must carry or retransmission consent – on virtually every cable system in their market.⁷⁴ We have no evidence that the absence of a dual carriage requirement will substantially diminish the availability or quality of broadcast signals available to non-cable subscribers. A small number of broadcasters that have demonstrated legitimate financial hardship if they were required to build their digital facilities have been granted extensions, but the hardship is not due to lack of cable carriage.⁷⁵ The absence of a dual carriage requirement might in fact encourage broadcasters to produce a “rich mix of

⁶⁷ See discussion of harm to local broadcast stations identified by Congress in *Turner II*, 520 U.S. at 209-14 (referring to Congress’s concern that the harm to stations denied carriage was “serious risk of financial difficulty,” that they would “deteriorate to a substantial degree or fail altogether,” and that “the viability of a broadcast station depends to a material extent on its ability to secure cable carriage”); see also *id.* at 222 (“Must carry is intended not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to non-cable households.”).

⁶⁸ See *id.* at 194, 197.

⁶⁹ See *id.* at 222 (“Mandatory carriage is intended not to guarantee the financial health of all broadcasters, but to ensure that a base number of broadcasters survive to provide service to noncable households.”).

⁷⁰ *Id.* (emphasis added).

⁷¹ *Id.*, quoting *Turner I*, 512 U.S. at 663.

⁷² See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809 (1997). See also *DTV Build-Out*, 18 FCC Rcd 22705 (2003). As of February 3, 2005, 86.4% of stations nationwide are on the air in digital. See FCC website information at <http://www.fcc.gov/mb/video/files/dtvonairsum.html> (last viewed Feb. 9, 2005).

⁷³ We note that Congress has recently enacted a dual carriage requirement under very limited circumstances. The Satellite Home Viewer Extension Reauthorization Act (“SHVERA”), Pub. L. No. 108-447, § 210, 118 Stat. 2809, 3393 (2004), requires a phase-in of mandatory dual carriage only in Alaska and Hawaii by satellite carriers with more than five million subscribers. Congress may, of course, decide to impose a dual carriage requirement in situations in which it finds it necessary to further an important governmental interest. By imposing a dual carriage requirement in only two states, Congress implicitly determined that the benefits and burdens of dual carriage in Alaska and Hawaii with respect to satellite carriers are different from those in the contiguous United States.

⁷⁴ See NCTA Comments at 8.

⁷⁵ See *DTV Build-Out*, 18 FCC Rcd 22705, *supra* note 72.

over-the-air programming” in order to convince cable operators to voluntarily carry their digital signal. Furthermore, the goal of the DTV transition is not to support the ongoing existence of two 6 MHz channels for each broadcast licensee, but rather to transition from one 6 MHz analog allocation to one 6 MHz digital allocation, with the anticipated return of one 6 MHz allocation.

19. ***Promoting the widespread dissemination of information from a multiplicity of sources.***

The second of the three interrelated governmental interests identified in *Turner* is “promoting the widespread dissemination of information from a multiplicity of sources.”⁷⁶ Discovery argues that if the Commission were to mandate dual carriage, it would allow a single broadcaster to use up to 12 MHz of cable capacity.⁷⁷ Discovery comments that the second 6 MHz channel requested by broadcasters could instead be used by a cable operator to provide as many as a dozen diverse non-broadcast programming services offered on a compressed digital basis.⁷⁸ Cable industry commenters also argue that most broadcast stations are upconverting analog signals to a standard definition digital format, and that such duplicative broadcast programming does not contribute to program diversity.⁷⁹ On the other hand, CEA argues that dual carriage assures broadcasters and programmers of carriage for digital programming, thus motivating them to produce original digital programming, that will, in turn, provide consumers with incentive to purchase digital receivers.⁸⁰ On balance, we find that the current record fails to demonstrate that dual carriage is needed to further this governmental interest because program diversity is not promoted under a dual carriage requirement, given that it would not result in additional sources of programming and that digital programming largely simulcasts analog programming.

20. ***Promoting fair competition in the market for television programming.*** The third important governmental interest identified in *Turner* is promoting fair competition in the market for television programming. While a majority of the Court agreed that this is an important governmental interest, only four justices found that this interest was achieved by the must carry statutory requirements.⁸¹ Based on our previous conclusions – *i.e.*, that dual carriage is not needed to further the governmental interests found by a majority of the Court, it is unnecessary to consider this third interest in great detail. The anti-competitive concerns cited by Congress and the Supreme Court stemmed from the increasing vertical integration and penetration of the cable industry in 1992.⁸² Commercial Broadcasters

⁷⁶ *Turner II*, 520 U.S. at 189-90 (also identifying a governmental purpose of the highest order in ensuring public access to a multiplicity of information sources). See *Turner I*, 512 U.S. at 663.

⁷⁷ See Discovery FNPRM Comments at 5.

⁷⁸ See *id.*

⁷⁹ See, e.g., NCTA FNPRM Comments at 10-11 (compelling digital programming would attract viewers and cable operators). See also A&E FNPRM Comments at 3-4; 16, citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)) (capacity occupied by dual carriage reduces capacity available for non-broadcast programming services).

⁸⁰ See CEA FNPRM Comments at 4; see also KSLN FNPRM Comments at 3. Noncommercial Broadcasters state that NCE stations plan to air: (1) local educational interactive services; (2) coverage of state and local government activities; and (3) programming geared to minority audiences. See Noncommercial Broadcasters FNPRM Comments at Appendix 4-6; and Maranatha FNPRM Comments at 7.

⁸¹ See *Turner II*, 520 U.S. at 225-29 (Breyer, J., concurring in part).

⁸² See *id.* at 197 (“Cable served at least 60 percent of American households in 1992, . . . and evidence indicated cable market penetration was projected to grow beyond 70 percent.”). See also *id.* at 198 (“In the late 1980s, 64 percent of new cable programmers were held in vertical ownership.”).

claim that cable operators still act as gatekeepers as they serve nearly 70% of American households,⁸³ and compete with local broadcast stations for advertising dollars. They contend that the enhanced services that DTV makes possible directly compete with cable services, resulting in greater disincentives for cable to afford digital broadcasters access to their audience.⁸⁴ Cable operators and programmers counter that such concerns about competition for local advertising are misplaced.⁸⁵

21. Court TV urges the Commission to recognize the central premise of broadcasting -- *i.e.*, that the medium has the inherent ability to reach viewers over-the-air independent of cable carriage.⁸⁶ HBO adds that broadcasters use analog retransmission consent/must carry rights to secure cable channel capacity for their affiliated cable networks.⁸⁷ The Filipino Channel argues that dual carriage, even for a limited period of time, would foreclose carriage options for many cable networks.⁸⁸

22. In many respects, competition in the MVPD market has increased since 1992, although the market for the delivery of video programming to households continues to be characterized by substantial barriers to entry.⁸⁹ The record, however, does not evidence a connection between mandating dual carriage and remedying any allegations of cable operators' anti-competitive action against local broadcast stations. Because operators must carry local broadcaster's analog signal, there is no obvious need for cable operators to carry two signals for each local station, and it has not been proven necessary to guarantee such access for both analog and digital signals to ensure fair competition. We believe the burden is on the advocates of dual carriage to prove this competitive necessity and that speculative allegations in this regard are inadequate in light of the burden on cable operators and cable programmers competing for cable access.

23. ***Advancing the Digital Transition.*** Broadcast commenters state that a rapid transition from analog to digital broadcast signals is an important governmental interest that can justify burdening speech protected by the First Amendment. They contend that dual carriage is necessary to achieve a swift

⁸³ See Commercial Broadcasters Comments, Appendix A ("Implications of the Adoption of Digital Must-Carry on the Speed of the Broadcast DTV Transition: A Scenario Analysis," prepared by Dr. Joseph S. Kraemer & Richard O. Levine, LECG Consulting) (hereinafter "Kraemer Analysis") at 29-31.

⁸⁴ See Commercial Broadcasters at 18. See also Noncommercial Broadcasters at 22; and Commercial Broadcasters FNPRM Reply Comments at 20.

⁸⁵ See AT&T FNPRM Reply Comments at 14, citing *Turner II*, 520 U.S. at 225. Hereinafter, all references to AT&T's comments are those submitted by that entity prior to its eventual merger with Comcast.

⁸⁶ See Court TV FNPRM Reply Comments at 9.

⁸⁷ See HBO FNPRM Comments at 4. See also SBCA FNPRM Comments at 3.

⁸⁸ See Filipino Channel FNPRM Comments at 29. According to the Filipino Channel, some cable programming networks have been placed on waiting lists, in which they have been promised carriage by cable operators as capacity becomes available. See *id.*

⁸⁹ See *Annual Assessment on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, Eleventh Annual Report, FCC 05-13, at ¶ 7 (rel. Feb. 4, 2005) (most subscribers continue to receive their video programming from a franchised cable operator, although cable's market share continues to decline as other MVPDs, most notably DBS, have increased their share of the total number of MVPD subscribers). See also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124, 12143-44 (2002) ("Program Access Report & Order") (market conditions still warrant prohibition on exclusive contracts for vertically integrated programmers and affiliated cable operators). But see Comcast Ex Parte in CS Docket No. 98-120 (filed Oct. 16, 2003) (citing growth of competition to cable and cable's diminished role as gatekeeper).

and successful DTV transition.⁹⁰ NCTA counters that Congress never expressed that hastening the end of the transition is a governmental interest, and nor has the Supreme Court “embraced any such interest” in upholding must carry requirements.⁹¹ CEA, on the other hand, states that some form of dual carriage is necessary for public acceptance of digital television technology because it will spur broadcasters to produce digital television programming, which, in turn, will convince consumers to purchase DTV receivers.⁹² Maranatha argues that consumers will not have the incentive to buy DTV receivers until they can actually receive digital broadcast programming through their local cable systems.⁹³ AT&T and others in the cable industry counter that dual carriage provides no incentive for consumers to purchase digital television sets, particularly when broadcasters are creating little or no original content.⁹⁴

24. A swift digital television transition and the return of the analog spectrum for other uses are important governmental concerns.⁹⁵ We find that the imposition of a dual carriage requirement, however, is not necessary to complete the transition. Many factors are necessary for the transition to be successful, such as consumer acceptance of a new type of television service and rapid digital receiver penetration.⁹⁶ The top ten cable operators (representing more than 85% of cable subscribers nationwide) have committed to deploying high-definition services and are fulfilling that commitment.⁹⁷ More recently, NCTA reports that the HDTV carriage data reflect that more and more cable households are receiving HDTV programming: (1) the number of local TV markets in which consumers can now receive a package of HDTV services from their cable operator has grown to 184 (out of 210), including all of the top 100 DMAs; (2) the number of local digital broadcast stations being carried voluntarily by cable systems increased to 504, up from 304 in December 2003; (3) of the 108 million U.S. TV households

⁹⁰ See Commercial Broadcasters FNPRM Comments at 8; Noncommercial Broadcasters FNPRM Comments at 22; Univision FNPRM Comments at 5.

⁹¹ See NCTA FNPRM Comments at 8-9.

⁹² See CEA FNPRM Comments at 6.

⁹³ See Maranatha FNPRM Comments at 5.

⁹⁴ See AT&T FNPRM Reply Comments at 16; Time Warner FNPRM Comments at 13-18; NCTA FNPRM Comments at 10-14.

⁹⁵ See Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (specifying conditions under which the transition to digital would be completed by the end of 2006); Congressional Budget Office, “Completing the Transition to Digital Television,” at 8-11 (Sept. 1999). In an effort to promote the digital television transition, the Commission adopted DTV tuner requirements in 2002, which was designed to facilitate the transition to digital television by promoting the availability of reception equipment, as well as to protect consumers by ensuring that their television sets continue to work in the digital world just as they do today. See *DTV Tuner Second Report and Order*, 17 FCC Rcd 15978, *supra* note 3. In addition, the Commission adopted last year a redistribution control system, also known as the “broadcast flag,” for digital broadcast television, which is intended to prevent the mass indiscriminate redistribution of digital television in order to foster the transition to digital TV and the digital age. See *Broadcast Flag Order*, 18 FCC Rcd 23550, *supra* note 3.

⁹⁶ See *Congressional Budget Office September 1999 Report* at ix-xi. To ensure that new television receivers include a DTV tuner on a schedule as close as economically feasible to the December 31, 2006, target completion date for the DTV transition, the Commission adopted an Order requiring that all TV receivers manufactured in the U.S. with screen sizes greater than 13 inches, and all TV receiving equipment, such as VCRs and DTV players/recorders, have the capability of receiving DTV signals after July 1, 2007. See *Digital Tuner Second Report and Order*, 17 FCC Rcd 15978, *supra* note 3.

⁹⁷ See Letter from Robert Sachs, President and CEO of NCTA, to FCC Chairman Michael Powell (May 1, 2002). See NCTA Comments in MB Docket No. 02-145, at 33-35 (filed July 29, 2002). See also *HDTV at a Glance*, Multichannel News, Special Report on HDTV, June 9, 2003, at 8A-9A.

today, 92 million are now passed by a cable system that offers a package of HDTV programming; and (4) 18 cable networks now offer HD programming during some or all of their network schedules, in broad genres reflecting movies, sports, and general interest.⁹⁸

25. The voluntary carriage of network television stations by these operators, as well as carriage of high definition digital programming from non-broadcast sources like HBO, are more likely to spur the sale of digital television equipment (thereby, facilitating the transition) than the forced dual carriage of all television stations.⁹⁹ We thus decline to impose dual carriage requirements that burden speech in the absence of record evidence showing dual carriage is necessary for a timely completion of the transition.¹⁰⁰

26. ***Fifth Amendment Argument.*** NCTA argues that dual carriage would constitute an uncompensated taking of private property in violation of the Fifth Amendment to the Constitution, especially where, as here, Congress has not clearly authorized such a requirement.¹⁰¹ NAB responds, in part, that the mere fact that a dual carriage rule might exact some financial toll from cable operators would not render mandatory dual carriage a taking.¹⁰² Given that we have declined to impose dual carriage on other grounds, we need not address the cable industry's Fifth Amendment argument.¹⁰³

⁹⁸ See NCTA Ex Parte in CS Docket No. 98-120, at 2 (filed Feb. 3, 2005); NCTA Ex Parte in CS Docket No. 98-120, at 1 (filed Jan. 26, 2005). See also NCTA Ex Parte in CS Docket No. 98-120 (filed Feb. 2, 2005) ("The recently-concluded public television digital cable carriage agreement is further evidence that voluntar[y] carriage of digital stations will only increase over time."); Comcast Ex Parte in CS Docket No. 98-120, at 1 (filed Feb. 1, 2005) ("Comcast is now providing high-definition television service in 62 markets. Comcast currently has digital carriage agreements with public broadcasters in 45 markets.").

⁹⁹ See *First Report and Order*, 16 FCC Rcd at 2605 ("[B]roadcast stations operating only with digital signals are entitled to mandatory carriage under the Act.").

¹⁰⁰ In the *Digital Must Carry NPRM*, we also sought comment on whether the availability of better antennas affects the necessity of mandatory dual carriage. See 13 FCC Rcd at 15132. To the extent that some consumers can and would take advantage of the advances in antennas and A/B switches, the availability of such technology would also weigh against the imposition of a dual carriage requirement. Consistent with past Congressional findings and *Turner*, however, antennas and A/B switches alone cannot satisfy the governmental interests at stake or replace the need for mandatory carriage. See *Turner II*, 520 U.S. at 220-21.

¹⁰¹ See NCTA NPRM Comments at 32-33; NCTA FNPRM Comments at 22; NCTA Ex Parte Letter in CS Docket No. 98-120 (filed July 9, 2002) (submitting Professor Laurence H. Tribe's Fifth Amendment analysis of issue, see *infra* note 127).

¹⁰² See NAB Ex Parte Letter in CS Docket No. 98-120 (filed Aug. 5, 2002) (submitting a rebuttal to Professor Tribe's contentions, see *infra* note 127).

¹⁰³ Similarly, the courts have declined to address the constitutionality of cable must carry under the Fifth Amendment when the First Amendment issue is controlling. See, e.g., *Quincy Cable TV*, 768 F.2d 1434, *supra* note 52 (Court did not address operator's Fifth Amendment contentions because it found that the Commission's must carry rules were infirm under the First Amendment); *Turner v. FCC*, 910 F. Supp. 734, 746 (D.C.D.C. 1995) (district court dismissed takings claims of cable operators without prejudice stating that, "[a]fter the constitutionality of sections 4 and 5 are definitively resolved, Plaintiffs may reassert their takings claim before the appropriate forum." In this instance, the District Court did not want to dilute the issues the Supreme Court asked it to address on remand.). But see *Satellite Broadcasting and Communications Ass'n v. FCC*, 275 F.3d 337 (2001), *cert. denied*, 536 U.S. 922 (2002) (Section 338's carry-one, carry-all mandate "merely places conditions on their use" of the statutory license and does not involve "required acquiescence"; therefore the provision does not effect a taking of private property under the Fifth Amendment.).

27. **Conclusion.** We have analyzed the governmental interests identified in *Turner*, additional governmental interests proposed by the broadcast industry, and policy concerns. We find that there 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.

B. Primary Video/Multicast Carriage

28. In the *First Report and Order*, the Commission examined how to apply the “primary video” carriage limitation if a broadcaster chooses to broadcast multiple standard definition digital television streams, or a mixture of high definition and standard definition digital television streams.¹⁰⁴ Section 614(b)(3)(A) states:

A cable operator shall carry in its entirety, on the cable system of that operator, the *primary video*, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking [interval] or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.¹⁰⁵

Largely parallel provisions are contained in Section 615(g)(1) for noncommercial stations.¹⁰⁶

29. In the *First Report and Order*, the Commission recognized that “the terms ‘primary video’ as used in sections 614(b)(3) and 615(g)(1) are susceptible to different interpretations,”¹⁰⁷ and that “[t]he legislative history does not definitively resolve the ambiguity regarding the intended application of the term ‘primary video’ as used in [the multicasting] context.”¹⁰⁸ The Commission thus analyzed the term within its statutory context, considered the legislative history, and examined the technological developments at the time the must carry provisions were enacted.¹⁰⁹ As a result of dictionary definitions and legislative history indicating that “must carry provisions were not intended to cover all uses of a signal,” the Commission stated that “[b]ased on the record currently before us, we conclude that ‘primary video’ means a single programming stream and other program-related content.”¹¹⁰ As a result, the Commission held that if a digital broadcaster elects to divide its digital spectrum into several separate, independent, and unrelated programming streams, only one of these streams is considered primary and

¹⁰⁴ See 16 FCC Rcd at 2620-22. In addition to being able to broadcast one, and under some circumstances two, high definition digital television programs, the Advanced Television Systems Committee (“ATSC”) DTV standard allows for multiple streams, or “multicasting,” of standard definition digital television programming at a visual quality better than the current analog standard.

¹⁰⁵ 47 U.S.C. § 534(b)(3) (emphasis added).

¹⁰⁶ See 47 U.S.C. § 535(g)(1).

¹⁰⁷ 16 FCC Rcd at 2620.

¹⁰⁸ *Id.* at 2621.

¹⁰⁹ See *id.* at 2620-22.

¹¹⁰ *Id.* at 2620-21.

entitled to mandatory carriage.¹¹¹ Under this determination, the broadcaster elects which programming stream is its primary video, and the cable operator is required to provide mandatory carriage only of that designated stream.¹¹²

30. Several commercial and noncommercial broadcasters seek reconsideration of our interpretation of the term “primary video.”¹¹³ They contend that we wrongly concluded that when a digital signal becomes eligible for mandatory carriage, cable operators are only required to carry a single video stream. In the view of some broadcast petitioners, “primary video” means all video that is included in a broadcaster’s digital signal.¹¹⁴ Other broadcast petitioners suggest that since all video contained in analog broadcast signals has been available free to over-the-air viewers, the “primary video” of a digital signal should be deemed to include video programming that is available “free of charge.”¹¹⁵ Disney specifically asks us to adopt a definition of “primary video” that requires “full carriage of the entire 19.4 Mbps bit stream of a local broadcaster’s digital signal, except for those ancillary and supplementary services expressly excluded by statute.”¹¹⁶ Disney asserts that such a standard will impose no greater burden on cable operators than that created by the existing analog must carry requirements, or by carriage of an HDTV signal.¹¹⁷

31. More specifically, the broadcast petitioners argue that the Commission’s definition of “primary video” is not supported by the statutory language and the accompanying legislative history.¹¹⁸ Noncommercial Broadcasters state that because of the unavailability of a plain meaning interpretation, the Commission must look to the Act as a whole to determine what Congress meant by a broadcaster’s “primary video.”¹¹⁹ They submit that, because of the ambiguity of the statute, the most reasonable interpretation of the term “primary video” includes “the package of video and audio digital services transmitted by the broadcaster free and over the air to viewers.”¹²⁰ Similarly, Commercial Broadcasters argue that the word “primary” is a generic adjective that may be used with singular or plural noun forms, as in the phrases “primary elements” and “primary colors.”¹²¹ They state that the Commission should not have applied a literal definition, but rather interpreted for the new digital context what was intended by the term for the analog situation.¹²²

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See, e.g.,* Commercial Broadcasters Petition at 10-16; Noncommercial Broadcasters Petition at 4-14; Telemundo at 2-10; Broadcast Group Petition at 5-6; Disney Petition at 3-17.

¹¹⁴ *See, e.g.,* Tribune Comments at 3; Paxson Petition at iii, 10-14; Fox Comments at 5-6.

¹¹⁵ *See, e.g.,* Broadcast Group Petition at 5; Telemundo Petition at 4-5.

¹¹⁶ Disney Petition at i.

¹¹⁷ *See id.*

¹¹⁸ *See, e.g.,* Noncommercial Broadcasters Petition at 5-10; Paxson Petition at iii; Disney Petition at 7-9.

¹¹⁹ *See* Noncommercial Broadcasters Petition at 6.

¹²⁰ *Id.* at 7 (this “primary video” package can consist of a single HDTV stream and accompanying audio, or as many as six multicast SDTV program streams).

¹²¹ *See* Commercial Broadcasters Petition at 11. *Accord* Paxson Petition at 12.

¹²² *See* Commercial Broadcasters Petition at 12.

32. NCTA, Time Warner, and other parties ask us to deny the petitions.¹²³ They contend that a plain reading of the statute clearly indicates a limited carriage obligation, and that, even if there are other interpretations of the provision, the Commission's interpretation is a reasonable one, because it gives meaning to the word "primary" and is consistent with the common usage and meaning of the term.¹²⁴ Additionally, NCTA contends that the Commission's interpretation is consistent with the underlying policy objectives of the Act and Congress's clear intention to limit carriage obligations in light of First Amendment concerns.¹²⁵ NCTA argues that carriage of multiple video programming streams would multiply the burden on cable operators as well as the unfairness to cable program networks without serving any of the purposes of the must carry provisions of the statute, thereby raising First Amendment infirmities.¹²⁶ NCTA states that the Commission is compelled to avoid such a construction of the Act even if it were to find the term "primary video" to be at all ambiguous.¹²⁷ According to Professor Tribe's filing on behalf of the NCTA, "forcing cable operators to carry multiple video streams of digital broadcasters would abridge the editorial freedom of cable operators, harm cable programmers, and invade the right of audiences to choose what they want to view – all without promoting any of the governmental interests contemplated by Congress in enacting the must-carry rules, or any of the interests approved by the Supreme Court in *Turner I* and *Turner II*."¹²⁸ Professor Tribe also argues that mandatory carriage of multiple streams of video programming would result in a permanent, physical occupation of a substantial amount of a cable operator's capacity, raising "substantial issues under the Fifth Amendment's Takings Clause and under the separation of powers."¹²⁹

33. After consideration of all the arguments and evidence presented on this issue, we affirm our earlier decision, and decline, based on the current record before us, to require cable operators to carry any more than one programming stream of a digital television station that multicasts. On reconsideration, we acknowledge, however, that the language of the Act may be less definitive than portions of our earlier decision suggested. This conclusion is, in fact, more consistent with our observations in the *First Report and Order* "that the terms 'primary video' as used in sections 614(b)(3) and 615(g)(1) are susceptible to different interpretations,"¹³⁰ and that "[t]he legislative history does not definitively resolve the ambiguity regarding the intended application of the term 'primary video' as used in this context."¹³¹ As explained below, however, we continue to hold that the best construction of the must-carry provisions, based on the current record before us, is that cable operators need not carry more than one programming stream.

¹²³ See, e.g., NCTA Opposition at 8-13; Time Warner Opposition at 11-16.

¹²⁴ See, e.g., NCTA Opposition at 9; Time Warner Opposition at 11 (broadcasters' interpretation is contrary to plain meaning), 13 (the statutory language suggests that there can be only one video transmission that is first in rank).

¹²⁵ See NCTA Opposition at 11.

¹²⁶ See *id.* at 11-12.

¹²⁷ See *id.* at 12. NCTA also submitted an analysis of the issue by Professor Laurence H. Tribe. See NCTA Ex Parte Letter in CS Docket No. 98-120 (filed July 9, 2002) (hereinafter "*Tribe Primary Video Analysis*") (containing a constitutional analysis of the multicast carriage issue entitled: "Why the Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obligation"). *Contra* NAB Ex Parte Letter in CS Docket No. 98-120 (filed Aug. 5, 2002) (hereinafter "*Jenner & Block Response to Tribe Analysis*") (submitting a rebuttal to Professor Tribe's constitutional analysis).

¹²⁸ See *Tribe Primary Video Analysis* at 2.

¹²⁹ *Id.* at 2, 12-18.

¹³⁰ 16 FCC Rcd at 2620.

¹³¹ *Id.* at 2621.

34. We recognize that Sections 614(b)(3) and 615(g)(1) do not directly translate to digital technology generally, much less to associated multicasting capabilities specifically, and thus do not appear to compel a particular result for multicasting must-carry. In the *First Report and Order*, we noted that “the incorporation of the primary video construct into the Act in 1992 was reasonably contemporaneous with the gradual change in common understanding of the new television service . . . to DTV (digital television) with the ability to broadcast high definition television, SDTV (standard definition television) with multicasting possibilities, as well as the broadcast of non-video services.”¹³² On reconsideration, we agree with the broadcasters that Sections 614(b)(3) and 615(g)(1) appear to have been written with analog technology in mind, given references to “line 21,” “vertical blanking interval,” and “subcarriers,” which are not applicable in digital technology.¹³³ Thus, we conclude that Congress – although aware of digital technology when it drafted the must-carry requirement¹³⁴ – did not expressly compel a particular result with respect to the application of “primary video” to digital television generally, and multicasting specifically.¹³⁵

¹³² 16 FCC Rcd at 2621.

¹³³ See, e.g., NAB Petition at 12.

¹³⁴ See 16 FCC Rcd at 2621-2622; see also H.R. Rep. No. 104-204(I), 104th Cong., 1st Sess. 220 (1995).

¹³⁵ We reject, however, the argument of Disney and other broadcast petitioners that the Commission’s definition of “primary video” for purposes of Section 614(b)(3)(A) of the Act is somehow inconsistent with Section 614(b)(3)(B), which provides that “[t]he cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991) or any successor regulations thereto,” 47 U.S.C. § 534(b)(3)(B). See Disney Petition at 9-11; Broadcast Group Petition at 14. See also NAB/MSTV/ALTV Petition at 16-17; Telemundo Petition at 3-4; Paxson Petition at 10-12. The legislative history of Section 614(b)(3)(B) does not indicate any connection to the carriage of multiple video programming streams of a single broadcaster. According to the House Report accompanying the 1992 Cable Act, “[s]ubsection (b)(3)(B) prohibits ‘cherry picking’ of programs from television stations by requiring cable systems to carry the entirety of the program schedule of television stations they carry” H.R. Rep. No. 102-628, at 93 (1992). In other words, the point of Section 614(b)(3)(B) is “to prevent[] cable operators from using portions of the signals of different broadcasters to create composite channels in an effort to increase the audience for cable programming.” *Id.* at 58. That provision, therefore, requires cable operators to carry the entire program lineup that is assembled by a broadcaster on a particular channel that is entitled to carriage pursuant to Section 614(b)(3)(A). We agree with Time Warner Cable that it has nothing to do with carriage of multiple channels or program lineups. Section 614(b)(3)(B) simply requires that when a cable operator carries an eligible primary video programming stream, it must carry that stream in its entirety and may not provide a composite, cherry-picked programming stream. If Section 614(b)(3)(B) meant what broadcasters say it means, then Section 614(b)(3)(A) would be a nullity.

We also disagree with some broadcasters’ argument that, as a policy matter, the Commission’s interpretation of “primary video” creates potential “administrative problems.” See, e.g., Disney Petition at 11; Paxson Petition at 15. Disney, for example, asserts that a digital broadcast signal may be configured in a variety of ways throughout the day, requiring the broadcaster, at multiple times throughout the day, to have to ascertain whether the programming elements being televised are independent or related, program-related, or otherwise. See Disney Petition at 11-12. They surmise that there will thus be constant disputes as to whether particular multicast signals are program-related (and thus required to be carried) or unrelated (therefore not required to be carried). Although a mandatory multicast carriage policy could eliminate the need to determine what is or is not program related, we do not find that a compelling reason to read the term “primary video” as requiring cable operators to carry more than one programming stream. We will define in a subsequent Report and Order in this docket the parameters of what is program-related in the digital context, which we believe will assist in alleviating the type of dispute that some broadcasters predict.

35. Recognizing that the statutory language is ambiguous, however, of course does *not* mean that we are now *compelled* to interpret the statute differently than the Commission previously did. Rather, given that “Congress has not directly addressed the precise question at issue”¹³⁶ -- *i.e.*, “the statute is silent or ambiguous with respect to the specific issue,”¹³⁷ the question for us is to derive a “reasonable interpretation” of the meaning of “primary video.”¹³⁸

36. Given the ambiguity of the language of the statute, we consider its legislative history. As the Commission acknowledged in the *First Report and Order*, however, “[t]he legislative history does not definitively resolve the ambiguity regarding the intended application of the term ‘primary video’ as used in [the multicasting] context.”¹³⁹ The legislative history indicates that “the must carry provisions were not intended to cover all uses of a signal,”¹⁴⁰ but they do not precisely specify which portion of a signal is entitled to carriage and which is not. In other words, “[t]he term primary video, as found in Sections 614 and 615 of the Act, suggests that there is some video that is primary and some that is not,”¹⁴¹ but the legislative history of these sections does not suggest precisely which video signal(s) is (are) primary and which is (are) not. The legislative history of subsequently enacted Section 336, which relates not to cable carriage obligations but mostly to digital television implementation, likewise does not reveal any clear intention of Congress with respect to the multicasting must-carry issue.

37. We next focus on the underlying purposes of the statutory provisions, and evaluate whether requiring cable operators to carry more than one programming stream of a multicasting station would fulfill those purposes. In *Turner II*, a majority of the Supreme Court recognized as “important” two “interrelated interests” that Congress sought to further through the must-carry provisions: (1) preserving the benefits of free, over-the-air local broadcast television for viewers, and (2) promoting “the widespread dissemination of information from a multiplicity of sources.”¹⁴² As explained below, we cannot find on the current record that a multicasting carriage requirement is necessary to further either of these goals. Based on the current record, we find a reasonable interpretation of the Act is to require cable operators to carry one programming stream.

38. Significantly, there is nothing in the current record to convince us that mandatory carriage of all multiple streams of a broadcaster’s transmission is necessary to achieve either of these goals. In the analog context, broadcasters could invoke explicit Congressional findings that the benefits of free, over-the-air television for viewers would be jeopardized without must carry. Congress, however, has made no such findings regarding multicast must carry and broadcasters have not made a convincing argument that over-the-air broadcasting would be jeopardized in the absence of mandatory multicasting. Unlike in the analog carriage debate, here broadcasters fail to substantiate their claim that mandatory multicasting is essential to ensure station carriage or survival.¹⁴³ Broadcasters argue that carriage of

¹³⁶ *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

¹³⁷ *Id.*

¹³⁸ *See id.* at 844.

¹³⁹ 16 FCC Rcd at 2621.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2620.

¹⁴² *Turner II*, 520 U.S. at 189-190 (quoting *Turner I*, 512 U.S. at 662); *see id.* at 225-226 (opinion of Breyer, J., concurring in part).

¹⁴³ *See Turner II*, 520 U.S. at 187 (“Congress drew reasonable inferences from substantial evidence before it to conclude that in the absence of must-carry rules, significant numbers of broadcast stations would be refused carriage.”) (internal quotations omitted).

multicast streams is essential to help them develop and support additional programming streams,¹⁴⁴ but they have not made the case on the current record that these additional programming streams are essential to preserve the benefits of a free, over-the-air television system for viewers. Broadcasters will continue to be afforded must carry for their main video programming stream, which can be in standard definition or high definition, and any additional material that is considered program-related. Broadcasters can also rely on the marketplace working without mandatory carriage in order to persuade cable systems to carry additional streams of programming.¹⁴⁵ There is evidence from the record, as well as news accounts, that cable operators are voluntarily carrying the multiple streams of programming of some broadcast stations, including public television stations, that are currently multicasting.¹⁴⁶ Indeed, the Association of Public Television Stations and the NCTA recently announced an agreement that involves cable operators carrying up to four programming streams of at least one public TV station in a DMA during the transition from analog to digital technology, and *every* public TV station in a DMA after the transition, subject to certain nonduplication contingencies.¹⁴⁷ Under these circumstances, the interests of over-the-air television viewers appear to remain protected.

39. Likewise, based on the current record, there is little to suggest that requiring cable operators to carry more than one programming stream of a digital television station would contribute to promoting “the widespread dissemination of information from a multiplicity of sources.” Under a single-channel must-carry requirement, broadcasters will have a presence on cable systems. Adding additional channels of the same broadcaster would not enhance source diversity. Furthermore, programming shifted from a broadcaster’s main channel to the same broadcaster’s multicast channel would not promote diversity of information sources. Indeed, mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system.¹⁴⁸

¹⁴⁴ See, e.g., Noncommercial Broadcasters Ex Parte in CS Docket No. 98-120 (filed Mar. 20, 2003); Disney Petition at 7-11; CBS Television Network Affiliates Association Ex Parte in CS Docket No. 98-120, at 13-16 (filed Jan. 13, 2004); NBC Television Affiliates Association Ex Parte in CS Docket No. 98-120, at 17-18 (filed Jan. 8, 2004).

¹⁴⁵ In this regard, we note that, despite the assertions made by some commercial broadcasters about the need for mandatory multicast carriage, some stations believe, nonetheless, that “network and affiliates can persuade cable operators of the value of carrying broadcast-digital channels even if the law doesn’t require it.” Steve McClellan, “NBC: Multicasting Might Fly Even Without Must-Carry,” *Broadcasting & Cable* (Jan. 20, 2004) (based on interview with NBC Television Network Group president Randy Falco).

¹⁴⁶ See, e.g., Comcast Ex Parte in CS Docket No. 98-120, at 2 (filed Oct. 4, 2004) (Comcast has agreed with many PBS affiliates to multicast carriage arrangements); Comcast Ex Parte in CS Docket No. 98-120, at 2 (filed Feb. 3, 2005) (“Comcast has entered into voluntary agreements that include carriage of multicast digital signals with over 130 commercial broadcast stations located in 62 markets across the nation. The number of these agreements has steadily increased as broadcasters have created new and innovative local programming. As a result of the agreements Comcast has entered into, Comcast currently carries 26 multicast digital signals and is adding more each month as broadcasters continue to launch their digital services.”).

¹⁴⁷ See Letter from NCTA and APTS to FCC Chairman Michael K. Powell, CS Docket No. 98-120 (Jan. 31, 2005) (“The PTV digital programming to be carried by a cable operator will include up to four streams of free non-commercial digital programming (high definition or standard definition), if a station chooses to offer that many streams. The cable operator will also carry associated material, including formal educational and homeland security or other emergency public safety information. Carriage of multiple digital public television stations’ multicast streams is subject to limits on duplication of programming.”).

¹⁴⁸ We note that the President’s Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters recommended that broadcasters offer independent and unaffiliated parties or programmers access to their programming streams, in exchange for any “enhanced economic benefit” that broadcasters realize from multicasting. See Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting* (continued....)

40. Additionally, no persuasive case has been made on the current record that a multicasting carriage requirement will facilitate the digital transition. High quality programming in a digital format is a major factor that will drive this transition. Some broadcasters explain that they are reluctant to invest in additional programming streams absent an assurance of carriage.¹⁴⁹ In response, NCTA states that cable operators “want to carry HDTV and other compelling digital broadcast content that is desired by their customers,”¹⁵⁰ and that they want to carry local programming to distinguish their offerings from satellite.¹⁵¹ NCTA also cautions that giving “shelf space” to broadcasters might lead to carriage of “infomercials, home shopping, or other low value content.”¹⁵² NCTA therefore suggests that a guaranteed carriage requirement would diminish incentives for broadcast stations to produce high quality programming, which would “reduce incentive for consumers to switch to digital TV.”¹⁵³

41. Given the lack of a meaningful showing on the current record that mandatory carriage of more than one programming stream is necessary to achieve any of the goals discussed above, we determine not to impose such a requirement. We thus find it a reasonable construction of the must-carry provisions of the Act, on the record before us and in light of the Supreme Court’s precedent,¹⁵⁴ not to require cable operators to designate capacity or “shelf space” for multicasting programming streams at the expense of other competing interests.¹⁵⁵

(Continued from previous page) _____

the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters, at 54-55 (1998). This practice may enhance diversity and the public interest, although we take no position on whether a future record that demonstrated evidence of this practice would change the result for purposes of the multicasting must-carry issue before us today. In a number of pending proceedings, the Commission is considering broadcasters’ public interest obligations in the Digital Age. Our interpretation of Sections 614 and 615 in this Order does not prejudge the outcome of any of those proceedings, which will continue.

¹⁴⁹ See Telemundo Petition at 7; NBC Television Affiliates Special Submission in CS Docket No. 98-120, at 3 (filed Jan. 8, 2004) (lack of a multicast carriage requirement would serve as a barrier to the ability of broadcasters to sustain multicast streams or to launch the ideas they are currently developing for a multicast product, thereby depriving over-the-air viewers from that service), 6-7 (“Implementing these plans requires a substantial investment now in equipment and facilities upgrades, as well as in acquiring and developing programming. Many stations, however, cannot afford to invest a significant portion of their limited resources in developing multicast streams absent the knowledge that such streams will reach the majority of their viewers served by cable. Lack of a multicast carriage requirement is therefore a serious impediment to broadcasters bringing their plans and ideas for multicasting, many of which are in the formative stages today, to fruition.”); CBS Network Affiliates January 13, 2004 Ex Parte at iii.

¹⁵⁰ See Letter from NCTA to Members of Congress, at 2 (dated Feb. 7, 2005) (“*Letter from NCTA to Members of Congress*”), available at http://www.ncta.com/pdf_files/RJS-Letter-to-Congress-2-7-04.pdf. (emphasis in original).

¹⁵¹ See, e.g., Comcast February 3, 2005 Ex Parte at 10.

¹⁵² *Letter from NCTA to Members of Congress* at 2.

¹⁵³ *Id.* at 3.

¹⁵⁴ See *Turner I and II; United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994).

¹⁵⁵ See joint ex parte filed by The Filipino Channel, the Golf Channel, The Inspiration Network, and Outdoor Life Network in CS Docket No. 98-120 (filed Sept. 5, 2002) (a multicasting must-carry requirement would deprive cable networks of available channel slots on cable systems that already lack extant channel capacity; at a minimum, requiring cable systems to give spectrum to broadcasters would render it more difficult for non-broadcast networks to compete for carriage, in violation of the narrow tailoring requirement established in the *Turner* decisions); see also Bloomberg/TechTV Ex Parte in CS Docket No. 98-120, at 5-6 (filed Oct. 23, 2003) (arguing same).

42. We also note that cable operators contend that requiring them to carry more than one programming stream would constitute a taking under the Fifth Amendment.¹⁵⁶ Given that we decline to impose such a requirement, we do not reach this issue.

43. Nothing in this Order diminishes the Commission's commitment to completing action on the multiple open proceedings on localism and on the public interest obligations of digital broadcasters. We believe the public interest and localism proceedings are essential components of the Commission's efforts to complete the transition to digital television. The Commission intends to move forward on these decisions within the next few months and complete action in these dockets by the end of the year.

44. Accordingly, we grant in part and deny in part the petitions for reconsideration on this issue and affirm our decision in the *First Report and Order*. Therefore, if a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video, and the cable operator is required to provide carriage of that stream. Cable operators can choose to carry additional video programming streams through retransmission consent agreements. As reflected in the statute, cable operators are also required to carry "program-related material," to the extent technically feasible.¹⁵⁷ What constitutes program-related material in the new digital context is defined separately from primary video and will be addressed fully in a subsequent Report and Order in this docket.¹⁵⁸

IV. PROCEDURAL MATTERS

45. **Paperwork Reduction Act of 1995 Analysis.** This document does not contain new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

46. **Final Regulatory Flexibility Certification.** The Final Regulatory Flexibility Certification is found in Appendix D, *infra*.

¹⁵⁶ *See Tribe Primary Video Analysis* at 18-23.

¹⁵⁷ *See* 47 U.S.C. § 614(b)(3)(A).

¹⁵⁸ For now, our decision on the program-related issue in the *First Report and Order* should provide sufficient guidance. *See* 16 FCC Rcd at 2622-24. Beyond the examples provided in the *First Report and Order*, we stated that we would continue to look to the three factors enumerated in *WGN v. United Video*, 693 F.2d 622 (7th Cir. 1982), to determine what material is considered program-related if a cable operator is required to carry a broadcaster's digital signal. *See* 16 FCC Rcd at 2624. Information or material that is program-related must be carried, whether it is in the PSIP, another program stream, or elsewhere, so long as it is technically feasible to do so.

V. ORDERING CLAUSES

47. Accordingly, **IT IS ORDERED**, pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that the petitions for reconsideration filed by the parties listed in Appendix C **ARE GRANTED IN PART AND DENIED IN PART** as indicated above, and that this Second Report and Order and First Order on Reconsideration **IS ADOPTED**.

48. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Second Report and Order and First Order on Reconsideration, including the Final Regulatory Flexibility Certification, to Congress, pursuant to the Congressional Review Act, and also to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Appendix A**Comments filed in Response to Further Notice of Proposed Rulemaking**

A&E Television Networks (“A&E”)
American Cable Association (“ACA”)
Association of America’s Public Television Stations, Public Broadcasting Service, Corporation for
Public Broadcasting (collectively “Noncommercial Broadcasters”)
AT&T Broadband (“AT&T”)
Cablevision
Consumer Electronics Association (“CEA”)
Courtroom Television Network
C-Span
DIRECTV
Discovery Communications (“Discovery”)
EchoStar Satellite Corporation (“EchoStar”)
Entravision
Filipino Channel, *et. al.* (“Filipino Channel”)
Gemstar
Home Box Office (“HBO”)
Insight/Mediacom
International Cable Channels
KSLs/KHLS
Maranatha Broadcasting
National Association Of Broadcasters, Association for Maximum Service Television, Association for
Local Television Stations (collectively, “Commercial Broadcasters”)
National Cable and Telecommunications Association (“NCTA”)
National Football League (“NFL”)
National Hockey League (“NHL”)
Paxson Communications
Satellite Broadcasting and Communications Association (“SBCA”)
Starz
STC Broadcasting
TechTV
Time Warner
Univision
Walt Disney Co.

Appendix B**Reply Comments filed in Response to Further Notice of Proposed Rulemaking**

A&E Television Networks
Adelphia/Insight/Mediacomm
American Cable Association
Association of America's Public Television Stations, Public Broadcasting Service, Corporation for
Public Broadcasting
AT&T Broadband
Benedek broadcasting/Arizona State University/Vermont Educational Television
Comcast Communications
Consumer Electronic Association
Courtroom Television Network, L.L.C.
EchoStar Satellite Corporation
Gemstar
LIN Broadcasting/Midwest/Raycom
Maranatha Broadcasting
Michigan Government Television
National Association Of Broadcasters, Association for Maximum Service Television, Association for
Local Television Stations
National Cable and Telecommunications Association
National Datacast
National Hockey League/PGA/Baseball
Ovation, Inc.
Paxson Communications Corporation
Pennsylvania Cable Network
Station's Representatives Association
Time Warner

Appendix C**Pleadings Filed in Reconsideration Proceeding****Petitions for Reconsideration:**

Adelphia Communications Corporation
Arizona State University, Benedek Broadcasting Corporation, Midwest Television, Inc.,
and Raycom Media, Inc. (collectively "Broadcast Group")
Association of America's Public Television Stations, Public Broadcasting Service,
and Corporation for Public Broadcasting (collectively "Noncommercial Broadcasters")
Gemstar-TV Guide International, Inc. ("Gemstar")
National Association of Broadcasters, Association for Maximum Service Television, Inc.,
and Association of Local Television Stations, Inc. (collectively "Commercial Broadcasters")
National Cable Television Association ("NCTA")
Paxson Communications Corporation ("Paxson")
Telemundo Communications Group, Inc.
Time Warner
The Walt Disney Company

Oppositions/Comments:

A&E Television Networks
Guenter Marksteiner
Mediacom Communications Corporation
National Association of Broadcasters, Association of Maximum Service Television, Inc., and
Association of Local Television Stations, Inc.
Gemstar-TV Guide International, Inc.
National Cable & Telecommunications Association
Paxson Communications Corporation
Time Warner

Replies/Comments:

Adelphia Communications Corporation
Association of America's Noncommercial Broadcasters, Public Broadcasting Service,
and Corporation for Public Broadcasting
FBC Television Affiliates Association
Gemstar-TV Guide International, Inc.
National Association of Broadcasters, Association for Maximum Service Television,
and Association of Local Television Stations, Inc.
National Cable & Telecommunications Association
Paxson Communications Corporation ("Paxson Consolidated Reply")
Paxson Communications Corporation ("Paxson Reply to Mediacom")
Tribune Broadcasting Company
Time Warner
The Walt Disney Company

Appendix D

Final Regulatory Flexibility Certification

1. The Regulatory Flexibility Act of 1980, as amended (RFA),¹ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁴ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵

2. In this Second Report and Order and First Order on Reconsideration, the Commission takes action on two significant cable carriage issues, the resolution of which are essential to the Commission’s ongoing efforts to complete the transition from analog to digital television. The issues resolved in this Order concern (1) whether cable operators are required under the Communications Act to carry both the digital and analog signals of a station (also referred to as “dual carriage”) during the transition when television stations are still broadcasting analog signals; and (2) whether the Commission, in the *First Report and Order* in this proceeding, properly construed the term “primary video,” which appears in Sections 614(b)(3) (for commercial broadcasters) and 615(g)(1) (for noncommercial broadcasters), as requiring cable operators to carry only a single video programming stream (and not multiple streams of several separate, independent, and unrelated programming streams). Further, in the *First Report and Order*, the Commission also determined that the statute neither mandates nor precludes the mandatory carriage of both a television station’s digital and analog signals. The Commission tentatively concluded that, based on the available record evidence, a dual carriage requirement would likely violate cable operators’ First Amendment rights. In order to evaluate the issue more fully, the Commission adopted a *Further Notice of Proposed Rulemaking*. In this Second Report and Order and First Order on Reconsideration, the Commission affirms its tentative decision in the *First Report and Order* not to impose a dual carriage requirement on cable operators, and declines, based on the record evidence, to require cable operators to carry any more than one programming stream of a digital television station that multicasts.

3. Although the Commission did not receive any comments directed at the Initial Regulatory Flexibility Analysis, some of the comments filed in response to the *Further Notice of Proposed Rulemaking* addressed issues of concern to small entities. The American Cable Association, for

¹ The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² 5 U.S.C. § 605(b).

³ 5 U.S.C. § 601(6).

⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁵ 15 U.S.C. § 632.

example, filed reply comments contending that dual carriage and mandatory multicast carriage would be overly burdensome for small cable operators because of the more limited channel capacity of smaller cable systems and that the costs of implementing such requirements, if imposed, “present an economic impossibility” for smaller systems.⁶ The Commission considered these concerns, and decided not to impose additional requirements. While small broadcast television stations could benefit from a decision to impose mandatory dual carriage and mandatory multicast carriage, consideration of the economic impact of our decision is only relevant to cable operators, because the obligation to comply with an expanded must carry requirement would attach (in the context of this proceeding) only to cable operators – *i.e.*, a decision not to impose expanded must carry requirements does not, in any way, result in any regulatory obligation on the part of television broadcast stations or any other non-cable entities. Our resolution of the specific issues in the Second Report and Order and First Order on Reconsideration does not result in any rule changes affecting small entities.

5. The Commission, therefore, certifies that the requirement of this Second Report and Order and First Order on Reconsideration will not have a significant economic impact on a substantial number of small entities. Rather, it appears that our decisions here are likely to foster competition in the video marketplace and ensure the ability of small cable systems, in particular, to maximize the use of its available capacity to deliver diverse digital programming and to offer other services, such as high-speed Internet service, to customers.

6. The Commission will send a copy of the Second Report and Order and First Order on Reconsideration, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.⁷ In addition, the Second Report and Order and First Order on Reconsideration will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.⁸

⁶ See American Cable Association Reply Comments at 6-9.

⁷ See 5 U.S.C. § 801(a)(1)(A).

⁸ See 5 U.S.C. § 605(b).

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

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

Today we hold that Congress did not give broadcasters the statutory right to free carriage of all their channels on a cable provider's system. This is the second time we have held the statute does not authorize "multi-casting." New digital technology allows broadcasters to take what once was one channel, and divide it into four to six or even more channels in the future as compression technology advances. While that affords them expanded business opportunities, we hold nonetheless the statute limits cable carriage rights to one. They, of course, remain at liberty to commercially negotiate for carriage of other channels, just as public broadcasters have recently done and as other cable programmers must do.

The must-carry statute limits the video signal that must be carried to the "primary video." While, admittedly, lawyerly wordsmiths can argue what "primary" means, it clearly evidences intent to restrict, or limit the video that must be carried. If some video is primary, it necessarily follows that some is secondary. The view urged by broadcasters that primary video includes *all* their video streams without limitation proves too much and, to my mind, effectively strikes the restriction from the books.

When interpreting a statute that is susceptible to different interpretations, the commission is admonished to read it in a manner that best avoids raising serious constitutional issues. Must-carry unquestionably imposes a first amendment burden on cable providers. Indeed, the Supreme Court upheld the must-carry statute only by a slim 5-4 margin. I believe reading the statute now as expansively as broadcasters urge would likely wither before a First Amendment challenge. At a minimum, a serious constitutional question would be raised. In such circumstances, the law directs the agency to endorse the reasonable interpretation that avoids such a question, if possible. Reading the statute to authorize one video stream gives effect to the primary restriction and best avoids constitutional infirmity.

Moreover, in contrast to how the statute is applied in the analog context, Congress has made no factual findings about the need for multi-cast must-carry in a digital context. In fact, it has not spoken directly to the point at all. The Commission would be on weak ground if it interpreted Congress' will to authorize multi-cast must carry without a better legislative foundation. Consequently, it would be wholly improper for this agency to expand the must-carry regime—concurrently expanding the First Amendment imposition—without a clearer directive from Congress.

Finally, the record simply does not demonstrate with any strength that vital or important government interests are advanced, sufficient to justify further encroachment on the first amendment rights of cable providers. Broadcasters provide a valuable service to the American people, and their voice remains one government should work to preserve, but it simply is not the case, in our judgment, that an expansion of carriage rights is necessary for their survival, or to preserve diversity and localism. Recognizing the expense of making the digital transition, the government has taken steps to subsidize it by providing billions of dollars of spectrum for free, and through other government actions, such as mandatory digital tuners in televisions and broadcast flag protection. I do not believe a constitutionally suspect reading of the must-carry statute needs to be added to the list.

Over the course of the last four years, the Commission has taken nearly every step within our authority to bring the public the wonders of digital television and put our country in a position to reclaim needed spectrum for future public safety and broadband use. Today, we finally strike off our list another open question about the terms of that transition.

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Cable Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120.

Over the last several years — covering almost the entirety of my tenure at the FCC — the Commission has struggled with the issue of mandatory multicast carriage of digital television streams (and, to a lesser extent, with dual carriage of analog and digital broadcast signals). The Commission has proceeded with great caution because of the complexity of the constitutional issues and the importance of these matters to the digital television transition. Now that the matter has finally been presented for a vote, I am forced to conclude that the Commission lacks authority to mandate either dual carriage or multicast carriage. In light of the overwhelming attention paid to the multicasting issue in the comments and ex parte process, I elaborate on my reasoning regarding multicasting below.

Broadcasters have been persuasive in arguing that their development of multiple digital programming streams promises to deliver significant public interest benefits, including the advancement of the DTV transition. And they are undoubtedly correct that, in the absence of mandatory cable carriage for all these streams, many broadcasters may be forced to curtail the breadth of their digital programming services. As I read the relevant Supreme Court precedent, however, the test is *not* whether a multicasting requirement would deliver more broadcast content to consumers. Rather, the Court set the bar much higher: To justify the considerable restrictions on cable operators' First Amendment freedoms entailed by a multicasting requirement, the Commission would have to adduce "substantial evidence" in support of a finding that multicasting is necessary to prevent a substantial number of broadcast stations from suffering significant financial hardship.¹ The record simply does not support such a conclusion.

A threshold problem for proponents of mandatory multicasting is that, in contrast to the circumstances surrounding the analog must-carry requirement, Congress has not expressly directed the Commission to adopt a multicasting mandate, much less issued detailed factual findings in support of such a requirement. There is a substantial argument that the Act *precludes* adoption of a multicasting requirement as a matter of statutory interpretation. But even assuming that the Act is ambiguous and thus *permits* a multicasting requirement — as I am willing to conclude — the absence of express congressional direction would deprive the Commission of the heightened deference accorded to legislative determinations.²

Moreover, as an empirical matter, the record developed before the Commission cannot justify a conclusion that multicasting is necessary to the continued preservation of the benefits of broadcast television. Critically, broadcasters will continue to be entitled to compulsory carriage of their primary video signal, along with all program-related material, thereby preserving the status quo. While broadcasters undoubtedly would prefer guaranteed carriage for any new programming services they develop, any contention that carriage cannot be secured through voluntary negotiations is purely

¹ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 211 (1997) (*Turner II*); see also *id.* at 208 ("The harm Congress feared was that stations dropped or denied carriage would be at a serious risk of financial difficulty . . . and would deteriorate to a substantial degree or fail altogether.") (internal quotation marks and citations omitted).

² See *Turner II*, 520 U.S. at 199 ("Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference, in examining the evidence, to Congress' findings and conclusions . . .").

speculative — and thus a far cry from the “substantial evidence” required to pass First Amendment muster. Even assuming that there were some evidentiary basis to presume that voluntary carriage is doomed to fail, the Commission would still need to identify substantial evidence in support of the assertion that denial of carriage for new digital programming streams would subject broadcasters to “a serious risk of financial difficulty”³ notwithstanding the preservation of must-carry rights for the primary video signal.

In fact, far from showing that negotiated carriage will not occur and that this failure will imperil the future of broadcasting, the record in some respects points to the contrary conclusion. Notably, the National Cable & Telecommunications Association reached a broad accord with the Association of Public Television Stations to provide for voluntary cable carriage of up to four streams of free non-commercial digital broadcast programming and associated material from one public television station in each market, in addition to the station’s analog signal.⁴ Negotiations regarding carriage of commercial stations have not progressed as far, but the record indicates that many stations already have obtained carriage for non-primary streams,⁵ and common sense suggests that most cable operators will want to carry programming that would significantly interest their subscribers — especially free programming. As noted above, I am mindful of the reality that, in a competitive environment, some broadcasters — particularly smaller independent stations — likely will be unable to secure carriage in some instances. But too many unsupported and attenuated inferences would be required for that likelihood to justify a sweeping determination that the benefits of broadcasting will be imperiled in the absence of mandatory multicasting.⁶

In closing, this decision, while important, leaves the Commission and Congress with much work ahead to bring the DTV transition to a successful conclusion. Without question, the Commission must consider more fully what it means to be a broadcaster in the digital age, including how the competitive marketplace intersects with the various public interest obligations that have traditionally been imposed on broadcasters. As Congress considers an appropriate deadline for the return of analog broadcast spectrum, it will no doubt examine a host of related issues, including the multicasting debate. Given the strong congressional interest in the DTV transition and the interrelatedness of multicasting with other aspects of the transition, it is appropriate for the final resolution of this debate to occur before the legislature.

³ *Id.* at 208.

⁴ APTS/NCTA Press Release, Public Television and Cable Announce Major Digital Carriage Agreement, Jan. 31, 2005.

⁵ Comcast, for example, reports that it has entered into multicasting agreements with more than 130 commercial broadcast stations located in 62 markets. Comcast Ex Parte Letter at 2 (filed Feb. 3, 2005).

⁶ While the plurality opinion in *Turner II* considered an analog must-carry requirement a narrowly tailored means of promoting fair competition, the Commission is further constrained by the fact that five justices concluded that that less intrusive must-carry requirement was *not* necessary to prevent anticompetitive conduct. *Turner II*, 520 U.S. at 226 (Breyer, J., concurring), 232 (O’Connor, Scalia, Thomas, and Ginsburg, JJ., dissenting).

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

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

In a few moments, I will vote to concur in this item. It was not an easy decision. I do so because the item has been significantly improved from what it was through the intense discussions of recent days. Still, the outcome falls far short of what might have been, the timing is out-of-sync with other important proceedings, and the process short-circuits the Commission's public interest responsibilities.

We are told to act now because this proceeding has been pending for so long. That's fine—if we have done our work. But we have not done our work. Other items integral to this one, prerequisites for today's vote, have been around even longer. Consider that in 1999, more than a year *before* our first must-carry vote, we opened a proceeding on the public interest obligations of digital TV broadcasters. And in that public interest proceeding, remember that we were not writing on a blank slate. Rather, we were addressing issues raised in a report from a Presidential advisory committee that was issued a full year before that. It is six years later now, and this Commission still has not provided the American people with a clear idea as to how broadcasters' enhanced digital spectrum is going to improve our viewing experience. The must-carry decision was a golden opportunity in which to consider this—but we let it slip away. Instead we have a record of inaction that will go down, I believe, as the Commission's major failing in its efforts to move the digital transition forward.

So I want to be clear that this Order is not of my making and its timing is not of my choosing. I have been abundantly clear throughout that we should address the public interest first. I have begged my colleagues to do this. I have begged my broadcaster friends to engage the issue. The digital transition holds the promise of reinventing free, over-the-air television by not only providing consumers new and valuable services, but offering broadcasters new and valuable business opportunities.

I am frustrated that broadcasters have been reluctant to engage in a dialogue on the public interest. It is particularly small and independent broadcasters who should be leading the discussion because they have so much to gain—or lose—via the wrong must-carry outcome. The networks and stations with real market leverage need not worry—they know they will have carriage through the pure power of their market negotiating muscle. I am concerned, however, about independent broadcasters, including those that seek to provide public affairs programming, religious programming, family-friendly programming, Spanish-language programming, or other programming to reach underserved parts of their communities. Independent broadcasters already face so many challenges in this consolidated environment, and I worry that this decision may impose very high opportunity costs on them. I am also concerned, I should add, that this decision may lead some broadcasters to use the public spectrum for ancillary pay services, rather than for free over-the-air broadcasts to their communities. That's not what the digital transition is supposed to be all about.

When we pause to consider what truly local stations could bring to the television experience by way of covering community developments, local news, district-level Congressional races, high school and local college sports and how they could feature and encourage local talent and local creativity, it becomes very clear very quickly that making good use of this spectrum is profoundly important to the people—you and me—who own it.

My disappointment goes beyond the broadcasters to the Commission itself, because it has short-circuited proceedings that cried out to be completed before we decided on the must-carry item. We are little more than half way through the grassroots localism hearings the Commission pledged to conduct so that we could better understand how to promote media diversity and localism. Isn't how broadcasters

make use of the significant additional spectrum resources given to them integral to any worthy discussion of diversity and localism? But we'll complete localism later, I guess. Ready, fire, aim. Our snail's pace in handling public interest items that have been pending here for more than five years is, to me, embarrassing. Today we manage to get some assurance that the public interest items will be called up soon and hopefully completed before the year is out—these are items pertaining to disclosing a station's public file on the Internet and the even more important proceeding regarding the general responsibilities of television broadcasters in the digital era—something on which the Presidential advisory committee spent a lot of time and effort and also something which a host of public-spirited groups have been advocating for years. If we can move boldly forward on items concerning the mechanics of the digital transition—like we did on digital tuners, plug-and-play, the broadcast flag, signal replication and so on—then why, oh why, haven't we been able to address what's in the digital revolution for our consumers and citizens?

Time and again we have failed the American people and local broadcasters. On top of the localism and public interest proceedings I just mentioned was the majority's decision in 2003 to drastically loosen media consolidation protections, thereby threatening the very survival of small local broadcasters who represent what is left of localism and diversity in the new big media environment. We also have failed to deal in a timely fashion with the NASA petition concerning local stations' relationship to the networks. Now we fail again.

I believe that a properly-crafted must-carry decision would be a boon to localism, diversity and competition. Does that mean cable should have to carry every programming idea that any broadcaster can dream up? Of course not. I don't believe cable should have the burden to carry every camera hanging out of a window or the home shopping programs or all those infomercials masquerading as real programs. Our challenge is to craft some balance here. But we never sought balance. We never had that public dialogue about how to incent truly local and diverse programming. Nor, indeed, did we attempt to understand the economic consequences that would flow from any of the various decisions we could have made about must-carry. What does it mean for broadcasting if there is no available audience for those huge swaths of spectrum opportunity that multicast affords? What does our decision mean in terms of who has what leverage in future carriage negotiations? What does this mean especially for small, independent stations who just may have the wherewithal and the desire to provide good multicast programming but who lack negotiating power to give it an audience? Where is the analysis here? Someone is going to pay for whatever decision we make—and, here as in so many other areas, it is the consumer who ends up footing the bill, monetary and otherwise.

Even where I agree with specific outcomes, I disagree with much of the analysis in this item. For example, I concur with the decision to deny dual carriage during the digital transition; I agree that a dual carriage mandate would be a burden that cable operators are not legally required to shoulder. But I believe our denial need not reach the Constitutional issues referenced in today's item. I also believe there is ample latitude available to the Commission to determine changed carriage requirements in a changed media environment through both the broad language of the statute and also through court decisions admonishing us to seek diversity, a multiplicity of voices and a viable environment for free, over-the-air broadcasting. These fundamental objectives are at the heart of our communications statutes and they have been repeatedly referenced and upheld by courts across the land. By the way, I also wonder why, if there is such urgent need to decide must-carry today, the related question of what "program-related" means does not qualify for our decision-making at this time?

I urge cable operators and broadcasters to negotiate in good faith for cable carriage of local programming or other broadcast offerings that serve their communities. Maybe it's the impossible dream, but the promising agreement that issued last week from discussions between cable and public television indicate that, dreams aside, it can be done. The agreement between cable operators and public television to guarantee cable subscribers access to digital public television programming breathes hope and life into digital television like nothing else we have seen. I commend the parties for their dedication to

accomplishing this landmark agreement, I hope all operators will participate, and I hope we will all learn a lesson from it.

I also wish to emphasize, as the Order now does, that the decision we make today is based on the record presently before us. It is an incomplete record if for no other reason than important prior proceedings, upon which this one should have depended, are left unfinished. I look forward to a day when the Commission will once again accept its responsibility and we can have a dialogue on localism, diversity and the public interest in the digital age that will yield consumer-friendly, and citizen-friendly, results, allowing us all to reap the expansive new opportunities that digital technology can produce.

The discussions of the past few days have been intense for all of us. I want to thank my colleagues for their hard work. All of them participated, but I want to single out Commissioner Adelstein particularly for the energy, commitment and creativity he has brought to our discussions. He has my deep and sincere gratitude. Thanks also to our hard-working personal staffs, who braved late hours and even sickness to work through this, and thanks to all those in the Bureau who worked so hard on this proceeding.

**SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN
DISSENTING IN PART AND APPROVING IN PART**

Re: Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Report and Order and First Order on Reconsideration, CS Docket 98-120

Today, the Commission concludes that broadcasters should not get cable carriage of their multicasted broadcast signals. This issue has been pending for several years and the decision was a difficult one for the Commission. Indeed, even the majority acknowledges that the statutory language is ambiguous, and therefore that we could have interpreted it to mandate broader carriage. Ultimately, the Commission made a policy judgment that the benefits of this programming were outweighed by the burden on cable operators. I disagree. I think the public would benefit more from more free programming.

Congress gave broadcasters valuable spectrum to use to offer “advanced” television to American consumers. Thanks to recent technological developments, broadcasters now can use this digital spectrum to offer high-definition programming as well as several additional standard definition programming streams at the same time. Without cable carriage, however, many of these programs will not have the opportunity to succeed commercially. As a result, by denying cable carriage to all but one of the potential broadcast streams, this Order effectively prevents any broadcaster relying on “must carry” from investing in multiple programming streams. The record is replete with examples of the free programming services broadcasters want to provide or expand, including local news, local weather, local sports, coverage of local elections and government proceedings, and foreign language programming. Yet, with carriage rights for only one stream, these broadcasters cannot support all of this additional programming. The burden on cable of a requirement to carry these multicasted channels, however, actually would be significantly less than it was in the analog world, due to compression technology and dramatically expanded cable capacity. Moreover, the burden on cable capacity is capped by statute—a cap that has been upheld by the Supreme Court.

Finally, it should be kept in mind that this decision will have the most adverse impact on small, independent, religious, family-friendly and minority broadcasters. Network stations and most large-market broadcast affiliates are likely to get their signals carried through retransmission consent; must-carry was never about the large broadcasters. Must carry was designed for these smaller broadcasters that in the past have been unable to negotiate with larger cable operators. These broadcasters play an important part in their communities, and we should not be hindering them from investing in new, free programming for their viewers.

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules; CS Docket No. 98-120; Second Report and Order and First Order on Reconsideration

It's been somewhat agonizing to reach the decision I'm voting to approve today. Neither the timing nor the conclusion is ideal. I tried unsuccessfully to work both within the Commission and with the broadcasting industry to steer a different path, one premised upon guarantees for the public interest. But the Commission has thus far failed to address the public interest proceedings. So, in many ways, this decision is the unfortunate result of neglect, during the past two years that I so strongly pressed for the public interest.

I appreciate the support of my colleagues in making changes to the item that greatly improved it. I certainly commend the Chairman and my colleagues for agreeing in this item to move the public interest and enhanced disclosure items in the next few months, and completed within the year. This is an historic commitment by the Commission. But this gesture comes too late to prove of any consequence in calculating the proper outcome of this must-carry proceeding.

As I have traveled this country engaging the public on the state of their local media, I heard heartwarming stories of local broadcasters who epitomize responsible stewardship of the public airwaves. I have witnessed extraordinary local service provided by broadcasters all across our country. I saw many examples in small and rural markets. I applaud those broadcasters who are building upon that special local service with digital programming. Unfortunately, without some baseline public interest obligations, I cannot conclude that every broadcaster will treat extra digital program streams with the same sense of responsibility for local service.

In the analog world, the strong local service that broadcasters were already providing went a long way toward Congress establishing and the Supreme Court narrowly upholding a single-channel carriage mandate.¹ At that time, without must carry, over-the-air viewers were threatened with being deprived of many broadcast channels. Today's action does not affect the required carriage of a single digital channel, so the over-the-air viewing public will not face the same type of threat. Here, instead, broadcasters seek carriage of additional program streams that are largely unknown and remain unaccountable to the public. The more pertinent question is how much benefit the extra program streams – without any public interest protections – provide to this audience. For this reason, I've long held and expressed forcefully that it's imperative for the Commission to articulate strong public interest obligations before reconsidering multicast carriage issues. My efforts proved futile.

Having no assurance that true local service will materialize on each new digital program stream, I am not prepared to conclude as a legal or policy matter that Congress intended carriage of these streams.

¹ Congress based analog must carry on public interest justifications, including broadcast television as a source of "local origination of programming," and an "important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." 1992 Cable Act at §2(a)(10) & (11).

Primary Video & My Primary Considerations:

From my earliest days on the Commission, I have been bombarded with various definitions of the term “primary.” Since that time, the intensity of the multicast carriage debate has never waned. The statute’s undeniable ambiguity means underlying policy factors and Congressional intent take on greater importance.²

1. Protecting Public Broadcasters:

A top consideration of mine in this proceeding was to understand how digital must carry rules would affect public broadcasters. Public television stations have shown a real commitment to making the digital transition happen while serving the public interest. They were the first with real plans for how their multicast program streams could enrich and sustain the public, including new programs for children, teachers, seniors, non-English speakers, individuals with disabilities, and other underserved populations. Through local educational interactive services, increased local public affairs coverage, including state legislatures and local town meetings, and workplace development programs, it’s easy to understand how these digital plans translate into benefits for the viewing public. Also, because public broadcasters do not share the same statutory retransmission consent rights as commercial broadcasters, the carriage of each of their program streams was a vital consideration for me.

So I was particularly pleased that the cable industry stepped forward and, through the personal leadership of Robert Sachs, reached a comprehensive and long-term agreement to carry the bold new offerings planned by America’s public television stations. I understand this agreement took hard work and compromise on both sides. I commend the cable and public television industries for working through the details to reach common ground. APTS President John Lawson has been a tireless advocate and leader for public television stations. The agreement between the cable industry and public television takes away one of my major concerns in the multicasting debate, as I can see clearly that the public stands to benefit in very tangible ways from this arrangement.

2. Defining the Digital Public Interest:

My other major concern has been trying to understand how the public stands to benefit from multicasting and what that means for a governmental carriage mandate. For nearly two years, both internally and externally, I have consistently maintained that it would be premature to decide multicast carriage without assurance that each programming stream would indeed serve its local community through the imposition of concrete and meaningful public interest requirements. I reached out directly on a number of occasions to the National Association of Broadcasters seeking an earnest dialogue on digital public interest obligations. I repeated this request to each broadcaster that came into my office. A handful of public-service minded broadcast stations and networks pledged to work with me. They expressed their pride in serving their local communities, and assured me they understood the need to put some parameters on the new digital program streams. Those companies should know that I took their pledge seriously and wanted to work with them to prescribe meaningful public interest requirements.

Unfortunately, for two years I was unable to engage the industry in an effective fashion to step forward and engage in public interest discussions. Illustrating the resistance, the NAB expressed hostility

² On the record before us, without more explicit instruction from Congress, I agree that the Commission should not impose dual carriage obligations on cable operators.

to the Commission even inquiring into broadcast localism.³ And aside from concluding a children's programming item last year, the Commission until today continued to sit on an enhanced public disclosure proposal and a more than five-year old general inquiry into digital public interest obligations.⁴ Now, the NAB has asked us to reconsider the children's television item, saying that our action simply to make broadcasters' children's programming obligations commensurate with the amount of programming they choose to air on multicast streams is constitutionally suspect and will inhibit multicasting generally.⁵ So the public interest continues to be neglected by the broadcast industry and the Commission.

This is not for the lack of a vocal coalition of organizations dedicated to advancing the public interest. I commend the Public Interest, Public Airwaves Coalition⁶ for presenting a public interest proposal, as well as other entities with other approaches. I deeply regret that these ideas were not put out for public comment to frame the multicasting dialogue. It would be a worthwhile discussion. I expect it will be when the Commission fulfills its commitment to act on this proceeding this year, and it certainly still can be in Congress. I give the Coalition a lot of credit - many diverse entities, all working together to further the public interest, never gave up the notion that the public has a right to be heard on matters involving their public airwaves.

That is how it should be. The Commission has a sacred responsibility to regulate broadcasting in the public interest for the American people. Through their stewardship of the public airwaves, broadcasters play a significant role in our society. Spectrum scarcity and exclusive federal licenses to use the public's airwaves set broadcasting apart from other media. A cornerstone of the public interest is that broadcasters air programming to serve the needs and interests of their communities.

The digital television transition holds the promise that broadcasters will seize upon business opportunities and deliver new and valuable services to consumers. But without protections for the public, none of this is guaranteed. In recognizing a governmental interest in preserving the benefits of free, over-the-air local broadcast television, the Supreme Court was rightly concerned with the preservation of free outlets of localism and diversity for the viewing public. For that reason, a broadcaster's public interest obligations could not be more relevant to considerations of multicast carriage.⁷ So to me the focus should

³ See *In re Broadcast Localism*, MM Docket No. 04-233, Comments of the National Association of Broadcasters at i (filed Nov. 1, 2004) ("NAB Localism Comments") ("The National Association of Broadcasters oppose the Notice of Inquiry on localism.").

⁴ See *In re Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, MM Docket No. 99-360 at ¶ 8 (Dec. 15, 1999) (seeking comment on "how broadcasters can best serve the public interest during and after the transition to digital technology," including "how broadcasters could better serve their communities of license").

⁵ *In re Children's Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167, National Association of Broadcasters Petition for Reconsideration and Request for Clarification (filed Feb. 2, 2005).

⁶ The Public Interest, Public Airwaves Coalition includes Alliance for Better Campaigns, Benton Foundation, Campaign Legal Center, Center for Creative Voices in Media, Center for Digital Democracy, Center for Governmental Studies, Center for Voting and Democracy, Citizens for Independent Public Broadcasting, Committee for the Study of the American Electorate, Common Cause, Democracy Matters Institute, Demos, Free Press, Georgetown University Law Center's Institute for Public Representation, Global Resource Action Center for the Environment, Media Access Project, Media for Democracy 2004, MediaChannel.org, MoveOn.org, National Council of Churches, New America Foundation, Office of Communication of the United Church of Christ, Rock the Vote, Public Citizen, True Majority, United States Conference of Catholic Bishops, U.S. Public Interest Research Group, and Women's Institute for Freedom of the Press. The Coalition submitted a proposal for quantitative standards and for disclosure of local, civic, electoral affairs, independently produced, underserved community, paid and closed captioned programming.

⁷ Indeed, the Senate Commerce Committee recently voted for the Commission to complete both proceedings simultaneously. See also Letter to Hon. Michael K. Powell, Chairman, FCC from Hon. Diane E. Watson *et al.* (July (continued....))

never stray from the public interest, and the benefits that free over-the-air broadcasting provides to viewers.

Congress clearly specified that digital broadcasting must continue to serve the public interest,⁸ but how this obligation will be fulfilled has yet to be decided. After promising to do so in 1997, and beginning a general inquiry more than five years ago, the Commission has taken few other steps to define the digital character of broadcasting.⁹ If broadcasters choose to multicast, what should be required for the additional program streams? Should the Commission promote localism by requiring a portion of each program stream to air locally-produced programming?¹⁰ How will the extra capacity be used to further diversity? Will broadcasters use this capacity to invigorate political discourse? And how will broadcasters disclose to the public how they met their public interest requirements on the additional streams? The answers to these questions will shape the digital television era, yet the Commission has never even begun a rulemaking proceeding to define the precise contours.

The need for enhanced public interest requirements in a multicasting era was established long ago. In 1998, the President's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, comprised of a broad cross-section of interests including broadcasters, educators, and advocates, issued a comprehensive report. They acknowledged that the digital transition would profoundly affect "[t]he quality of governance, intelligence of political discourse, diversity of free expression, vitality of local communities, opportunities for education and instruction, and many other dimensions of American life."¹¹ The report concluded that broadcasters who choose to multicast, "and in doing so reap enhanced economic benefits," should have additional public interest responsibilities: "If the digital portion of the public airwaves does provide enhanced economic benefits to broadcasters, . . . it is reasonable to recommend ways for the public to receive some benefit in return."¹² The Commission recently validated this principle by determining that the public interest obligations for children's television should be commensurate with the new opportunities provided by digital channels.¹³

Several broadcasters have told me that they could agree to definable public interest obligations and believe they would easily exceed them. I have every confidence that most broadcasters would. Some broadcasters excel at providing real in-depth political coverage. Belo's "It's Your Time" campaign, Hearst-Argyle's strong commitment to candidate-centered coverage, Scripps' and Young Broadcasting's

(Continued from previous page) _____

23, 2004) (signed by 35 Members of Congress urging the Commission to define public interest obligations before digital multicast must carry).

⁸ 47 U.S.C. § 336(d) ("Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity.").

⁹ In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report & Order, 12 FCC Rcd 12809, 12830 (1997). A recent exception is the recent order on children's TV item, where the Commission determined that the public interest obligations for children's television should be commensurate with the new opportunities provided by digital channels. See Children's Television Obligations of Digital Television Broadcasters, Report & Order, 19 FCC Rcd 22943 (2004) ("Children's Digital TV Order").

¹⁰ Indeed, I find it instructive that when identifying which low-power television stations would be entitled to must carry, Congress limited the stations only to those that meet a variety of criteria, including certain programming requirements, and a determination by the Commission that the programming will "address local news and informational needs." 47 U.S.C. § 534(h)(2)(B).

¹¹ *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters* at xi, 1. (Dec. 18, 1998) ("Advisory Committee Report").

¹² *Id.* at 43.

¹³ See Children's Digital TV Order, *supra* note 5.

free air time to candidates, Capitol Broadcasting Company's extensive local political coverage, and Post-Newsweek's similar efforts are some of the standouts. Networks such as NBC and ABC have worked with their affiliates on local weather and local news multicast channels. But as a Commission, we cannot just consider these broadcasters. We also must be concerned with assuring that *every* broadcaster will meet a baseline public interest standard.

And there is reason enough to be cautious about the broadcasting industry's recent public service record. Study after study has documented declining civic affairs coverage. There is scant coverage of local or state candidates, or ballot issues. And the stories that do run focus on polls and the horse race rather than the candidates' backgrounds or positions.

The Alliance for Better Campaigns reports that local TV stations took in \$1.6 billion in political advertising from the 2004 elections.¹⁴ Yet Martin Kaplan of the Annenberg School for Communications and the Norman Lear Center this week filed a stunning report that more than 90% of news broadcasts for the month before election day in 2004 contained no stories at all about any local candidate races.¹⁵ Of those election coverage stories that aired, only one-third focused on actual issues, as opposed to campaign strategy and the horserace.¹⁶ Eight times more coverage was devoted to stories about accidental injuries than to coverage of all local races combined.¹⁷

And this was *after* Senate Commerce Committee Chairman John McCain, Chairman Powell and I all stood together at a press conference and put broadcasters on notice that we would be watching the 2004 coverage, and that we expected broadcasters to do better job than they had in past elections. The broadcasting industry may dispute these findings, yet the industry fails to provide its own comprehensive and systemic studies, despite my request that they do so. Absent industry studies, I will continue to rely on the few good studies that we do have.

Recent events seem to validate claims that broadcasters' news coverage has been increasingly devoid of information to help citizens participate in their democracy, or, worse yet, promoting an ideology or unbalanced political agenda thinly disguised as journalism.¹⁸ Sinclair Broadcasting Group, which refused to air an ABC Nightline tribute to US soldiers killed in Iraq deeming the show "politics disguised as news," then instructed its 62 television stations to preempt regularly scheduled programming to air a politically-charged documentary, "Stolen Honor: Wounds That Never Heal," even going so far as to fire its long-time reporter John Lieberman for criticizing the company's plans.¹⁹ Lieberman subsequently asserted that Sinclair's entire news operation is systematically ideologically driven by its

¹⁴ Alliance for Better Campaigns, "Local Stations Are Big Winners in Campaign 2004: TV Broadcasters Rake in More Than \$1.6 Billion in Political Advertising," available at www.bettercampaigns.org/standard/display.php?StoryID=322.

¹⁵ Lear Center Local News Archive, Local News Coverage of the 2004 Campaigns: An Analysis of Nightly Broadcast News in 11 Markets 3, 8 (filed in FCC Docket No. 04-233).

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 3.

¹⁸ See, e.g., Mark Gillespie, "Media Credibility Reaches Lowest Point in Three Decades," Gallup Organization (Sept. 23, 2004) (Gallup Poll indicating that just 44% of Americans express confidence in the media's ability to report news stories accurately and fairly).

¹⁹ See, e.g., "Public Airwaves, Private Purpose," *Business Week* (Oct. 25, 2004); Michael Learmonth, "B'casters Caught in Sinclair Glare," *Variety* (Oct. 24, 2004); Reed Hundt, "Sinclair Ought to Know Better – and So Should the FCC," *Minnesota Star Tribune* (Oct. 13, 2004) (noting that "in a large, pluralistic information society democracy will not work unless electronic media distribute reasonably accurate information and also competing opinions about political candidates to the entire population").

owners' political perspective. Although Sinclair broadcast a modified program, Paxson, which sells much of its non-prime air time for paid programming, then quietly broadcast the "Stolen Honor" documentary in its entirety ten times the weekend before the election on the PAX broadcasting network as an infomercial.²⁰ CBS News and anchor Dan Rather were derailed over forged documents related to President Bush's Vietnam-era military service.²¹ And just before the election, Pappas Telecasting Companies was faulted by the FCC for blatantly violating our equal time rules by donating \$325,000 in airtime to one party's candidates without offering the same amount of free time in comparable time periods to the other party's candidates.²²

Increasingly, it seems we're in an era where ownership and ideology shape what viewers see and hear over their public airwaves. An exclusive federal license to use the public airwaves ought to carry a higher level of civic responsibility and accountability. Broadcast licensing should serve the civic needs of a democracy by preserving the freedom of an "uninhibited marketplace of ideas"²³ to serve the common good. Instead, if broadcasters use their exclusive federal licenses to promote an ideology or political agenda, they put their own private beliefs ahead of the needs of a democratic society.

A broadcasting license should do more than line the pocket books of the broadcaster. I'm concerned with reports of the rising level of paid programming on the public airwaves. A 2003 study by the Alliance for Better Campaigns found that community public affairs programming accounts for less than 1/2 of 1 percent of local TV programming nationwide – that compares to 14.4 percent for paid programming.²⁴ Even Paxson, which so strongly advocates multicasting must carry, boasts that paid programming represented 41% of PAX TV's 2003 revenue.²⁵ This bears heavily on the underlying policy issue of multicasting – should public policy reward those broadcasters who sell the public airwaves with full multicast cable carriage?

Since much of television and radio was deregulated in the early 1980s, market forces alone, without concrete regulatory monitoring and enforcement, have seemingly eroded much of the local service on which the industry was founded. Yet the NAB opposes a mere inquiry by the Commission into the local service that is currently being provided.²⁶ NAB laments more disclosure and accountability as an impediment to the journalistic discretion of broadcasters – apparently discounting that they hold their licenses as stewards of the public interest. NAB even suggests that a requirement to air a certain amount of local programming would face constitutional problems. Yet it argued exactly the opposite in its

²⁰ According to press reports, the conservative news website, NewsMax.com, spent \$294,500 to buy infomercial time for the film on the PAX broadcast network, which reaches nearly 90% of U.S. television homes. *See, e.g.,* Walter F. Roche Jr., "Group Challenges Sinclair Licenses," *Los Angeles Times* (Nov. 2, 2004).

²¹ *See, e.g.,* Josh Getlin & Scott Collins, "Report Condemns CBS News," *Los Angeles Times* (Jan. 11, 2005). Sumner Redstone, the Chairman of CBS's parent company, Viacom, later enthusiastically endorsed the election of a Republican administration because it "has stood for many things we believe in, deregulation and so on." Johnnie L. Roberts, "Media Mogul Maelstrom," *Newsweek* (Oct. 4, 2004).

²² *See In re Equal Opportunities Complaint Filed By Nicole Parra Against Pappas Telecasting Companies*, Order (rel. Oct. 29, 2004).

²³ *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

²⁴ Alliance for Better Campaigns, "All Politics is Local," available at <http://www.bettercampaigns.org/reports/display.php?ReportID=12>.

²⁵ Pax TV, Annual Report, available at <http://www.sec.gov/Archives/edgar/data/923877/000100515004000854/0001005150-04-000854.txt>.

²⁶ *See* NAB Localism Comments, *supra* note 3, at i ("The National Association of Broadcasters oppose the Notice of Inquiry on localism.").

petition to have the Commission restrict the local programming of satellite radio providers.²⁷ If NAB claims banning local content is constitutionally permissible, surely requiring local content could also be.

NAB's outright hostility to the localism inquiry raised real questions for me about how broadcasters will choose to fill the extra digital programming capacity. NAB admits that many stations have dropped local newscasts, without discussing the effect this is having on the station's stewardship in those communities. NAB sees little connection between broadcast localism and national playlists and voice-tracking technology,²⁸ oblivious to the loss of localism from these tactics. NAB relies upon a study showing that syndicated programming costs less than news production.²⁹

So without strong public interest obligations, how can the Commission, let alone the viewing public, be assured that the extra digital channels will add to localism and diversity? Without concrete public interest obligations, there are no protections against non-local or paid programming content filling up the entire extra capacity. Without some modicum of balance, the government could be multiplying an ideological agenda five-fold. Without assurances of localism, the extra broadcast program streams could merely be the same type of 24-hour national feed that are found on cable systems. Worse, the government could theoretically be mandating carriage of 24-hour a day infomercials. I'm not suggesting this would happen, but the mere possibility gives me enormous pause.

I remain steadfastly committed to the strong governmental interest in ensuring "public access to a multiplicity of information sources."³⁰ While I respect the need for diverse sources of information, particularly for news and civic information, magnifying one owner's views over more channels does not translate into more diversity of information sources. It just gives a bigger megaphone to voices that are already booming. Since the vast majority of television signals on cable are carried under retransmission consent arrangements, granting multicast must carry could embolden big media companies to leverage their clout into even bigger platforms for disseminating their views.

Broadcasters do not appear eager to turn over extra programming capacity to underserved segments of the community, or take other steps to further the strong governmental interest in expanding the diversity of viewpoints and voices available to the American public over its airwaves. President Clinton's Advisory Committee on the Public Interest of Digital Television Broadcasters recommended that multicasting broadcasters, in exchange for the benefits the capability may give them, make multicast channels available to local voices and unaffiliated programmers.³¹ Public interest protections like these would greatly strengthen the argument that granting multicast must carry would contribute to the widespread dissemination of information from a multiplicity of sources. It would buttress the case for multicasting in court against a constitutional challenge. Without such steps, I fear a multicasting carriage mandate could have an overall deleterious effect on diversity by crowding out other publicly-oriented programming like C-SPAN 3.

²⁷ See, e.g., In re Request for Comment on Petition Filed by the National Association of Broadcasters Regarding Programming Carried by Satellite Digital Audio Radio Services, MB Docket No. 04-160, Reply Comments on the National Association of Broadcasters at 12-13 (filed Apr. 14, 2004).

²⁸ See NAB Localism Comments, *supra* note 3, at iv, 53-61.

²⁹ *Id.* at 33.

³⁰ *Turner Broad. System. v. FCC*, 520 U.S. 180, 190 (1997) (quoting *Turner Broad. System v. FCC*, 512 U.S. 622, 633) (1994)).

³¹ Advisory Committee Report, *supra* note 11, at 55 (suggesting that digital television broadcasters who multicast, and "in doing so reap enhanced economic benefits," might "include a commitment to provide robust programming and access for local voices, or lease one such channel at below market rates to an unaffiliated programmer who is local and has no financial or other interest in a broadcast station").

Quite simply, without public interest protections, any claim that multicast must carry is needed for the preservation of free over-the-air broadcasting rings hollow. It is simply unacceptable to maintain that broadcasting is a free market whenever proposals are made about accountability, but then, without blinking, turn around and demand a government mandate for free cable carriage of multiple signals, not to mention other protections for the industry. If broadcasters want to be treated as an integral public square on our modern-day digital platforms, then they must realize the public has a right to be squarely involved in that endeavor. To grant multicasting carriage without any protections for the public would test the willingness of the broadcasting industry to serve public ends as never before. It's a risk the recent record does not justify taking.

That said, I remain concerned that broadcasters' quality local multicast content must receive carriage from cable companies on its own merits. I have heard troubling allegations of cable companies refusing to carry programming – not because it fails to provide quality local content but for a business or economic decision that favors other channels which bring advertising revenue or other advantages to the operators. I'm also concerned that independent or publicly-oriented channels receive cable carriage on a merit basis without the cable industry extracting an ownership percentage in return. If cable operators fail to carry local content that broadcasters seek to air on multicast streams, they should know that I will do all I can to help bring about that carriage. I will openly condemn any cable operators that do not agree to carry such programming, as long as it is offered by broadcasters without any strings attached.

To not risk losing relevance in the digital future, broadcasters can continue to choose to drive innovation and champion the potential of digital broadcasting. They can produce the kind of strong local programming that would serve their communities and would fuel the transition. They can run public service announcements promoting the benefits of the transition for viewers. The recent Consumer Electronics Show displayed countless devices seeking to enrich digital video content, making the potential of digital television all the more evident. By driving the transition, broadcasters stand only to transform the television viewing experience in dazzling and potentially lucrative new ways.

Indeed, while I understand the broadcast industry has incurred great costs, it has also been granted generous benefits in the DTV transition. Broadcasters have already been given a free second allotment of spectrum, free guaranteed cable carriage for a DTV signal (upon surrendering their analog spectrum), guaranteed access to the basic service tier, retransmission consent rights, and the right to use their spectrum for revenue-producing ancillary and supplemental services – all without agreeing to abide by any specific and meaningful public interest commitments.

This country has waited long enough with the hope that this Commission would act upon the longstanding public interest matters in a way that enhances the digital transition for consumers. The public interest inquiry has lingered for more than five years, far longer than the reconsideration petitions in this proceeding. Perhaps Paxson's direct challenge in the courts forced the timing of today's item. One wonders whether the public interest community would have had similar success had they pointed out their remarkable patience to the D.C. Circuit.

That is not to say that I would have chosen this process under any circumstance. And I remain hopeful that Congress will have more ability to bring about protections for the public. If each additional program stream were guaranteed to carry other voices, or a significant percentage of locally-produced content subject to meaningful public interest protections, the governmental interest in fostering localism and free-over-the-air television for viewers would carry far more weight. Of course, recognizing the tremendous value of localism, one would expect – and I will demand – that the cable industry carry all such programming voluntarily without hesitation or discrimination. The Act, after all, already identifies

as a purpose that “cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”³²

So today I stand up today for the public. I take today’s action entirely for the viewers who entrust the Commission to oversee the stewardship of their airwaves in their best interest.

³² 47 U.S.C. § 601(4).