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 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

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[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 . . . .").

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.

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[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).