

**EX PARTE SUBMISSION**  
**FILED ELECTRONICALLY**

April 20, 2004

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: MB Docket No. 03-15 and CS Docket No. 98-120**

Dear Ms. Dortch:

This letter responds to a series of recent filings by broadcasters that present their views on the transition to digital television and cable operators' obligations for signal carriage.

Three years ago, the Commission determined that the statutory requirement that cable operators carry the "primary video" of must-carry stations should be construed to require carriage of only a single stream – not multiple streams – of digital broadcast programming. And the FCC tentatively concluded that cable operators should not be required to carry a broadcaster's digital signal in addition to its analog signal. As NCTA and others have repeatedly shown, these determinations are consistent with the plain language and purposes of Sections 614 and 615 of the Communications Act and are necessary to avoid serious constitutional problems under the First and Fifth Amendments.

The Media Bureau's recently announced proposal to expedite the digital transition has become another pretext by the broadcasters to resurrect their arguments against the Commission's digital carriage decisions.<sup>1</sup> In an April 15 letter, broadcasters, led by NAB,

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<sup>1</sup> The Bureau has proposed a way to reach the 85% threshold that must be met before the transition can be completed and the broadcasters' analog spectrum can be returned. It would require cable systems, after 2008, to carry the digital signals of all must-carry broadcast stations, and to down-convert such signals to analog at the cable headend. Subscribers to systems carrying such down-converted digital signals would count towards the 85% threshold, so that, in many communities, the test might actually be met.

MSTV and the network affiliates, attack the Bureau's plan. Their letter does not look to help devise solutions to the serious issues that must be overcome to complete a transition to a fully digital broadcasting system. Their letter does not address issues and responsibilities uniquely within the expertise of the broadcast industry, namely measures (including the deployment of equipment for analog sets that receive only off-air signals) to bring broadcast viewers who subscribe to neither cable nor DBS into the digital age. Instead, the broadcasters apparently view this as yet *another* opportunity to seek to regulatory protection and favoritism at the expense of cable operators, programmers and cable customers by imposing dual carriage and multicasting requirements on the cable industry, measures which the FCC previously rejected.

Their response to a good-faith effort by the Commission to address the hard issues of the digital transition is a distraction to the work at hand. It is a distraction because it focuses on what they want the government to impose on other industries and their customers, not on what broadcasters are themselves willing to do. Specifically, their counterproposal to the Media Bureau is nothing more than a repackaged version of the so-called "either/or" demands broadcasters put forth last November. That proposal is the functional equivalent of dual carriage, unless cable customers were forced to lease digital-to-analog set-top boxes for the 145 million analog sets in their homes.<sup>2</sup>

While attacking the Bureau's plan, broadcasters still express their "strong interest in expediting the transition." But NCTA has also demonstrated in its earlier response that the "either/or" proposal would do nothing to advance the end date for the digital transition. Nothing in the broadcasters' most recent letter demonstrates the contrary.

Among other things, broadcasters now claim that while the Bureau's down-conversion proposal might accelerate the pace of the digital transition, it would "retard" the transition's supposed "purposes." They argue, for example, that the plan would deter cable customers from purchasing HD sets and frustrate those customers who have already purchased such sets. But they simply fail to come to grips with the fact that cable customers, if they are so inclined, already have ample reason to purchase HD television sets. That's because cable is offering HD program services. At the end of last month, cable operators in 155 television markets throughout the country already were voluntarily carrying a mix of HD programming. That number will only continue to rise as more HD product is available, from both broadcast and non-broadcast sources, and as HD set prices continue to fall.

Broadcasters also express concern that the Bureau proposal will frustrate the transition insofar as it does not require forced carriage of their multicast digital services in addition to their primary video digital service. As NCTA has shown on multiple occasions, forced carriage of multicast services will do nothing to expedite the analog spectrum give-back. In any event, contrary to their statutory claims, nothing in the Act ties the analog give-back to carriage of all digital program streams.<sup>3</sup>

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<sup>2</sup> NCTA Ex Parte Letter, CS Docket No. 98-120 (dated Dec. 15, 2003) (attached).

<sup>3</sup> The Balanced Budget Act test focuses on MVPD carriage of "one of the digital television service programming channels of each of the television stations broadcasting such a channel in such a market". 47 U.S.C. §309(j) (14) (B)

In short, the broadcasters continue to offer nothing new by way of ideas, just a recycled version of their persistent efforts to impose dual and multicast carriage requirements on cable operators. As NCTA has repeatedly shown, such requirements will simply burden the cable industry without bringing the end of the transition anywhere closer.

The broadcasters' letter comes on top of earlier efforts by organizations representing affiliates of NBC, CBS and ABC to argue that mandatory multicast carriage is critical to the future of broadcast television.<sup>4</sup> In those ex parte submissions, they contend that they are unlikely to follow through on multicast plans without a guarantee that all their multicast programming will be carried by local cable systems. They not only argue that the viability of their multicast programming depends on guaranteed cable carriage; they go so far as to contend that without such guaranteed carriage, the very viability of broadcast television would be imperiled. Yet they provide no evidence to support their claims.

It is important to note at the outset that the affiliates groups are not simply arguing that the multicast programming of stations that elect "must carry" status should be required to be carried. Why would they? The vast majority of network affiliates opt to be carried pursuant to "retransmission consent," because most cable systems want to transmit the popular network and local programming carried by those stations on their analog channels. Accordingly, what the network affiliates are urging in their ex parte submissions is that cable operators should be required to carry the multicast programming of all broadcast stations – including those that choose retransmission consent.<sup>5</sup>

Network affiliates can and do use retransmission consent to negotiate for carriage of programming other than the main programming service that is currently carried on their analog channels. Many have already successfully negotiated for carriage of their second, digital channels during the transition. As of March 31, 2004, the digital signals of 88 ABC

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(iii) (I). This provides no support for the broadcasters' suggestion that failure to require carriage of the "innovative multicast services" somehow runs afoul of congressional intent.

<sup>4</sup> See "Special Factual Submission in Support of Multicast Carriage by the NBC Television Affiliates Association" (January 8, 2004); "Special Factual Submission of the CBS Television Network Affiliates Association in Support of Multicast Carriage Requirement" (January 13, 2004); Letter from Chairs of Board of Governors of ABC Television Affiliates Association, NBC Television Affiliates, and CBS Television Network Affiliates Association to the Chairman and Commissioners (March 16, 2004).

<sup>5</sup> Thus, the most recent letter from the chairs of the three organizations does not mention "must-carry" and simply argues that "the Commission should rule now that cable systems may not invade broadcasters' digital signals and strip out multicast program services." The letter from the CBS Affiliates is even more explicit: It asks for an "anti-stripping" requirement that "would prohibit cable systems from stripping any free multicast services from broadcasters' digital signals, and . . . would apply even if the digital signal were carried pursuant to a retransmission consent agreement. An earlier letter from the President of the ABC Owned Television Stations, to which NCTA has already responded, made the same point: "We believe that when cable operators carry a DTV signal (whether pursuant to must-carry or retransmission consent arrangements), the cable operator should not block the customer's reception of any portion of the DTV signal that the customer otherwise could receive for free."

affiliates, 85 CBS affiliates, and 79 NBC affiliates are being carried by local cable systems.<sup>6</sup> In addition, cable systems voluntarily carried the digital channels of 130 other commercial and public broadcasters. While most of these digital channels are currently providing HDTV signals, there is no reason to believe that network affiliates could not also use retransmission consent to negotiate carriage of multicast digital programming if, like HDTV, that programming were compelling and offered something of value to cable customers.

The network affiliates' "twofer" proposal would, in effect, give them the continued benefits of retransmission consent with respect to carriage of their main programming channel and the benefits of must-carry for their additional digital programming streams. It would take those additional digital streams off the retransmission consent negotiating table and force cable operators to carry them without regard to their quality or their appeal to cable customers.

Thus, while the affiliates suggest that mandatory cable carriage of their multicast signals would foster the creation and distribution of high quality programming, the opposite is true. By sheltering them from the need to negotiate and compete in the market for carriage, a multicast carriage requirement would reduce the affiliates' incentives to create the most attractive and compelling programming. And it would make it more risky and difficult for non-broadcast cable program networks to invest in and try to gain carriage of their own attractive and compelling programming. If broadcasters are unwilling to compete on the same non-guaranteed terms as cable networks, a guarantee of carriage will ensure that broadcasters have fewer incentives than cable networks to develop compelling programming – and that the quality of programming available to cable subscribers will be diminished.

The affiliates' submissions are long on promises but short on performance with respect to multicasting. For example, even a cursory examination of the "Special Factual Submission" of the NBC Affiliates makes clear that its "Futures Committee" has not yet developed any plans or business model for multicast programming that is economically viable and/or attractive to viewers. The *only* service that the NBC Affiliates have "decided to move forward with" is "a multicast weather channel that will provide viewers with local and national extended weather coverage, as well as local alerts (e.g., AMBER and terror alerts) and traffic and travel-related information."<sup>7</sup> The ex parte submission describes several other inchoate ideas that some affiliates "might provide"<sup>8</sup> or are "considering"<sup>9</sup> – for example, local news, local government affairs, local amateur sports. But none of these seem to be beyond the drawing boards even in concept, much less as economically viable business ventures, given the not insignificant cost of producing high quality, audience-attracting local programming.

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<sup>6</sup> These numbers obviously include not merely the 57 stations owned and operated by the networks (including Fox). Indeed, the stations whose digital signals are being carried are owned by 68 different broadcast group owners.

<sup>7</sup> NBC Affiliates Submission at 8.

<sup>8</sup> Id.

<sup>9</sup> Id. at 9.

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The CBS Affiliates' similar "Special Factual Submission" is also full of intentions that have not yet been implemented. Thus, CBS affiliates have lots of "plans" – including "active plans"<sup>10</sup> and "particularly innovative plans"<sup>11</sup> – and are "exploring opportunities."<sup>12</sup> In contrast, there's nothing "particularly innovative" about the only examples provided by the CBS affiliates of programming that is actually being provided. All they point to are sporadic sports broadcasts – of ACC basketball games in Roanoke, NCAA basketball games and golf tournaments in Orlando, and NCAA tournament games during March in Indianapolis and Fort Wayne. In most cases, the broadcasters have had no problem gaining cable carriage of these broadcasts pursuant to retransmission consent. In several cases, cable systems were providing these sporting events to their subscribers even before they were available on digital broadcast stations. In fact, in some cases (as in Salisbury, MD), the cable operator agreed to waive its contractual right of first refusal in order to allow the local broadcaster to provide the events on its digital channel.

The affiliates, in their various filings, suggest that the cable operators will not carry multicast broadcast programming because they compete with broadcasters for local advertising revenues. As shown by their carriage of the local sports programming discussed above (as well as, in several cases, their carriage of UPN network programming provided on the digital signals of some CBS affiliates), cable operators are eager to carry broadcast programming that is attractive to their customers – even though this is the programming most likely to attract advertising. But, as the Supreme Court has recognized, cable operators exercise an editorial function under the First Amendment and have wholly legitimate, pro-competitive reasons for selecting compelling programming that adds significant value for subscribers – and for not wanting to carry services that merely clutter the basic tier with unattractive or redundant programming.<sup>13</sup> Indeed, a majority of the Supreme Court, in the *Turner Broadcasting* case, specifically determined that the analog must carry requirements could *not* be factually sustained on the basis of cable operators' supposed "bottleneck position and anti-competitive incentives."<sup>14</sup>

Moreover, the notion that cable systems are "bottlenecks" that can simply refuse to carry programming that would be attractive to their subscribers is even less true now than when the *Turner* cases were decided several years ago. Today, cable operators face fierce competition nationwide from two DBS services. They have every incentive to fill available channels with the most compelling programming – and no incentive to refuse to carry attractive programming that might be carried by their DBS competitors. There are good reasons why cable operators are not rushing to commit to carry the multicast programming that broadcasters are currently "exploring," but those reasons have nothing

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<sup>10</sup> CBS Affiliates Submission at 5.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

<sup>14</sup> *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 225 (1997) (Breyer, J., concurring in part) ("I join the opinion of the Court except insofar as Part II-A-1 relies on an anticompetitive rationale").

to do with bottlenecks and anticompetitive conduct – and everything to do with the broadcasters’ failure to come up with compelling and viable programming.

The affiliates claim that, absent a guarantee of cable carriage, they will refuse to invest in multicast programming. This may be because, unlike cable networks – who, although they have no government guarantee of carriage, continue to invest in new programming ideas and new networks – broadcasters retain a guarantee of carriage of their main stream of video programming, which they can choose to use to provide HDTV in lieu of multicasting. But beyond their guaranteed carriage rights, it makes no sense to add more guarantees to coax these reluctant programmers; there are dozens of non-broadcast entities ready to compete for limited available channel space.

The affiliates’ contention that failure to require cable carriage of their as yet undeveloped multicast programming will somehow strike the death knell for over-the-air broadcasting is another hollow claim. They contend that “[i]f broadcasters did not believe that multicasting *could* be critical to ensuring a vibrant and competitive broadcast service, they would not be developing plans for multicasting services.” It’s not obvious why this is the case. One would think that, even if multicasting were not critical to the survival of broadcasters, they might still invest in multicasting services if such services were sufficiently likely to attract viewers and produce incremental profits – which is the calculus that other programmers use in deciding whether to invest in new services. Notwithstanding the guaranteed carriage of their analog signals, broadcasters are apparently unwilling to take even the ordinary investment risks inherent in the programming marketplace and assumed by other programmers.

The NBC Affiliates assert that “once broadcasters launch multicast streams, there is no reason to think that they will survive non-carriage better than any other program service.” But there is also no reason to think that, if they provide compelling program, they will fare any worse than other program services – especially given their government-conferred advantage of retransmission consent. And, in any event, there is no reason to think – and no evidence in the affiliates’ submissions – that failure to secure guaranteed carriage of multicast services would in any way threaten the economic survival of broadcasters or the preservation of their service for over-the-air viewers.

This is not only true for the network affiliates who, as noted above, generally opt for retransmission consent. It is even true for the independent non-network affiliated broadcasters who more often depend on must carry. Indeed, one such independent broadcaster, Entravision Holdings, LLC, has specifically told the Commission that it and “other similarly situated independent broadcasters presently have little to gain from a multicast must-carry requirement.” According to Entravision:

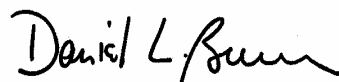
Network-affiliated broadcasters have characterized multicast services as an integral component of the future business plans of broadcasters and as indispensable to a successful DTV transition and the continuing vitality of free over-the-air television service. However, while digital multicast services may already be a reality for some network affiliates with the programming and financial resources to advance and support such technology,

independent stations simply do not have access to the programming or capital to invest in such technology at this time, or in the foreseeable future.

In other words, a multicast must carry rule would do nothing to preserve the viability and availability of must carry stations. Forcing cable operators to carry the multicast signals of retransmission consent stations – stations whose viability is not remotely at risk – would simply give those stations additional leverage in their retransmission consent negotiations and an additional competitive advantage vis-à-vis non-broadcast cable program networks. That is essentially what the affiliates groups are asking for. It has nothing to do with the must carry rules at issue in this proceeding, nor would it serve the public interest.

The affiliates groups have submitted a series of declarations attesting to the economic pressure that competition from cable and others has placed on the business of broadcasting. But these dispatches from the competitive marketplace – cable operators and programmers have their share of business headaches, too – hardly amount to proof that these affiliates face an imminent threat.<sup>15</sup> It may be that if broadcasters do not adapt to a competitive marketplace with a product that consumers value, their role in the media marketplace will eventually be diminished – whether or not they are carried by cable systems. But for now, there are no signs that broadcasters face any threat to even their long-term survival. And there is no reason to further insulate them from marketplace competition by extending must carry protection beyond their primary video programming stream to their multicast programming.

Very truly yours,



Daniel L. Brenner  
for National Cable &

Association

Telecommunications

DLB:gl  
Attachment

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<sup>15</sup> As reported recently in Broadcasting & Cable, broadcasters continue to garner a disproportionate share of TV advertising revenue relative to cable networks despite the former's continued decline in viewership relative to cable. "The Great Divide," Broadcasting & Cable, Mar. 29, 2004 at 1.



December 15, 2003

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: CS Docket No. 98-120**

Dear Ms. Dortch:

This letter is in response to NAB's and MSTV's letter of November 25, 2003, which purports to address the Commission's concerns about imposing a dual carriage obligation on cable.<sup>1</sup> In their letter, NAB and MSTV submit what they call a "new proposal for a must carry rule during the DTV transition" and claim that it "allays the Commission's constitutional concerns by never requiring cable systems to carry more than one signal of any local television station." For the reasons explained below, nothing in this proposal should allay the FCC's legitimate concern about the constitutional infirmity of requiring dual carriage. Indeed, there is nothing new about NAB's and MSTV's repackaged proposal to force cable carriage of each broadcaster's digital signal, in addition to its analog signal, during the DTV transition.

NAB's and MSTV's "transitional carriage rule" comprises three elements: (1) a station may elect must carry for the analog or the digital channel and retransmission consent for the other channel, or retransmission consent for both; (2) an operator may cease carrying a station's analog channel if the system (a) passes through the station's digital signal to all digital television receivers and (b) downconverts the digital signal for receipt at no extra charge on all analog-only receivers for carriage on the analog basic tier; and (3) if by January 1, 2006, a cable operator is unable to implement the second provision, a station may elect must carry of both its analog and digital channels.

NAB/MSTV claim that this proposal would never require cable systems to carry more than one signal of any local television station. But it's impossible to see how that would be the case. It is certainly not true two years from now, where the plan expressly permits a station to choose must carry for both its analog and digital signal. But it also appears not to be the case for most stations even before then.

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<sup>1</sup> Letter from the National Association of Broadcasters and MSTV to The Honorable Michael K. Powell, dated Nov. 25, 2003 (hereinafter "NAB/MSTV" or "Letter").

Even if a broadcaster chooses must carry for its digital signal, the NAB/MSTV proposal deprives operators of a choice not to provide that broadcaster's analog carriage. The second element of the NAB/MSTV scheme requires an operator that wishes to stop carrying a station's analog channel to continue providing an analog version of the broadcaster's digital signal for carriage on the analog basic tier, albeit downconverted from digital.<sup>2</sup> This is the same as requiring an operator to carry an analog signal in addition to the digital signal. Downconverting a digital signal to analog and carrying it on the analog basic tier would still occupy the same channel capacity on a cable system – 6 MHz – as taking an analog signal off-the-air and transmitting it on the basic tier in analog. Carrying the digital must carry signal would consume more capacity – at least 3 MHz – on top of that. Thus, this plan can hardly be characterized as reducing the burdens that would be imposed by a dual carriage requirement; it differs not at all from the standpoint of its impact on cable system capacity.

The only way to avoid consuming additional bandwidth for carriage of a digital signal in analog under the NAB/MSTV plan would be to take the extraordinary step of outfitting every customer's analog television sets with a digital-to-analog converter box. There are approximately 250 million analog television sets in use today, only 30 million of which are hooked up to a cable-provided digital set-top box – and that is after more than five years of most cable operators offering customers the option of obtaining digital programming. Cable operators cannot be expected, from a practical, legal or financial standpoint, to purchase digital-to-analog set-top boxes for the remaining 145 million analog sets in their customers' homes.<sup>3</sup> Nor would it be realistic to force customers to lease these boxes for each analog television set at a cost of at least several dollars per box per month.

Even if the NAB/MSTV plan could be interpreted to embrace a true “either/or” choice, and operators were not obligated to carry an analog signal if a broadcaster opts for must carry for its digital signal, that still would not alter the practical effect of their proposal. The vast majority of cable customers continue to rely on analog viewing, and an operator has no realistic option of removing popular broadcast stations from its analog tier. Knowing that, stronger broadcast stations, which today in the main are carried pursuant to retransmission consent<sup>4</sup>, would be able

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<sup>2</sup> The Letter's second element could also be read to give dual carriage rights to stations that choose must carry for their analog signal, if an operator for some unexplained reason wanted to provide carriage of that station's digital signal in digital and downconvert it to analog too.

<sup>3</sup> The capital cost alone for such equipment would be approximately \$36 billion or roughly 6 times the capital that the broadcast industry has invested on its DTV transition.

<sup>4</sup> In response to a request by House Energy and Commerce Committee Chairman Billy Tauzin, NCTA conducted a survey in 2002 of the retransmission consent/must carry elections of commercial broadcast stations carried on the top 25 cable systems. The NCTA survey showed that on these systems, 55 percent of all commercial broadcasters were carried pursuant to retransmission consent and 45 percent pursuant to must carry. (Given that nearly one-third of the top 25 systems are located in the New York DMA, and more than half the top systems surveyed were located in the top 20 DMAs with more non-network, independent stations, these relative percentages may reflect more must carry stations than in markets with fewer television stations.) Stations affiliated with or owned by one of the top four broadcast networks chose retransmission consent 99 percent of the time.

to gain automatic carriage for their digital signals. Therefore, “either/or” provides the functional equivalent of dual carriage for most broadcast stations carried and would remove an important “in kind” element from retransmission consent negotiations. The broadcasters apparently feel this reward is justified because “larger stations were required to construct digital facilities before smaller stations.” But their weaker station brethren are ultimately rewarded under this plan: these stations at most would have a two-year waiting period before they, too, would gain dual carriage rights beginning January 2006.

No amount of spin can disguise that there’s nothing new in this latest NAB/MSTV dual must carry broadcast scheme. Operators would be saddled indefinitely with analog and digital carriage of broadcasters’ signals, either immediately or two years hence. And consumers would be deprived of the opportunity to access new, diverse channels of programming that compete for system capacity.

Glossing over the burdens that its proposal would impose on cable, it is not surprising that NAB/MSTV leap to the conclusion that their plan “would not present any issue under the First Amendment.” The Commission has already tentatively concluded that a dual carriage requirement would violate the Constitution. Even if the NAB/MSTV scheme could be read to give operators a choice of whether or not to carry a station’s analog signal, that does not mean that the proposal would pass constitutional muster.

NAB/MSTV claim that the proposal would “present no constitutional questions whatever since the carriage obligations will be no greater in absolute terms than the obligations that were upheld by the Supreme Court in Turner.” But contrary to the impression NAB and MSTV try to create, this plan is not a “one-for-one” switchout of analog carriage requirements for digital carriage requirements. Instead, the obligations would be much greater in absolute terms than those deemed “modest” and narrowly upheld in Turner.

The Turner court concluded that the burdens imposed by the analog must carry rules were acceptable because operators voluntarily were already carrying most local broadcast signals. The incremental burden imposed by must carry was only the burden of carrying those additional signals that were not already voluntarily carried.<sup>5</sup> The broadcasters’ proposal would multiply this burden many times over. In addition to those analog must carry stations that were forced to be added in 1992, every retransmission consent station in the country would gain new rights to compel carriage of their digital signal – signals that cable operators, in many cases, are not already voluntarily carrying. And after two years, even must carry analog stations would gain additional digital must carry rights. These burdens would far exceed the “modest” effects of

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<sup>5</sup> Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 215 (1997) (broadcast stations voluntarily carried not counted in assessing “actual burden” imposed by must carry).

analog must carry examined by the Turner court and found necessary to preserve the availability of broadcast stations from diverse sources for over-the-air viewers.<sup>6</sup>

These new burdens interfere with operators' and programmers' First Amendment rights just as surely as the old.<sup>7</sup> And this additional intrusion cannot be justified based on the broadcasters' belief that their "transitional" proposal would hasten the digital transition's end. NCTA has repeatedly shown that Congress did not intend the must carry provisions of the 1992 Act to serve this newly-minted governmental interest, and the FCC has not relied and cannot rely on it now to justify any digital must carry obligation.<sup>8</sup> But even assuming, arguendo, that hastening the digital transition could justify a digital must carry requirement, NAB/MSTV's claim that its proposal would in any way serve that interest fails to withstand scrutiny.

One glaring error: the letter's erroneous assertion that the proposal provides incentives for operators to upgrade their systems. This argument is founded on a fundamental misunderstanding of the state of cable system upgrades. Nearly 90 percent of cable customers are served by cable systems that already utilize digital technology. Cable operators have invested more than \$75 billion in private risk capital to upgrade their systems to offer additional digital video and non-video choices. This massive investment dwarfs the \$4 to \$6 billion that the broadcast industry is projected to spend on their upgrades to provide digital television.<sup>9</sup>

Now that cable's digital broadband infrastructure is largely in place, the challenge is finding the optimum mix of digital services that will induce cable customers to choose to purchase them and to buy or lease the digital equipment necessary to view them. More than 20 million cable customers lease more than 30 million digital boxes in order to view cable's digital offerings. Providing the additional 50 million cable customers with a reason also to make this investment – and inducing customers to take steps to ensure all their analog sets can receive digital programming – is the real challenge to reaching the day when carriage of analog signals over cable can cease.

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<sup>6</sup> NAB/MSTV also purport to rely on the Fourth Circuit decision upholding SHVIA's "carry one, carry all" requirement, explaining that "cable operators will not be under any legal compulsion to carry more than one signal from any local station, much as satellite providers are not required to carry any local signals." The relevance of the DBS carriage scheme to the broadcasters' back door dual must carry plan is not clear. There is an obvious difference between a requirement on cable to carry even just one signal from each of the broadcast stations in the country and the absence of any obligation on DBS operators to carry any stations. SBCA v. FCC provides no support for NAB/MSTV's position here.

<sup>7</sup> They also interfere with operators' Fifth Amendment rights – rights that the broadcasters' letter completely ignores. See Ex Parte Filing of NCTA, CS Docket No. 98-120, (submitted Nov. 24, 2003) (attaching paper prepared by Professor Laurence H. Tribe, "Why the Federal Communications Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obligation: A Reply to the Broadcast Organizations").

<sup>8</sup> Id. at 12-13.

<sup>9</sup> Kagan Digital Television, (Nov. 14, 2003) at 6.

Guaranteeing broadcasters a place for their digital signal on a cable system, no matter how unappealing to customers, will slow the transition. A grant of mandatory cable carriage merely insulates broadcasters against having to invest in compelling digital content and compete for carriage on the merits of their program offerings. This competition to get on systems provides the best incentive for broadcasters to develop or acquire compelling content that might help spur the transition along. (As noted below, more than 300 broadcast stations that offer compelling digital content already are carried on cable systems.) Forced carriage would waste valuable channel capacity and devalue cable's digital offerings in its customers' eyes. The NAB/MSTV scheme for digital must carry will therefore make it less likely, not more, that cable customers will find a reason to invest in this digital equipment. Most importantly, over-the-air viewers would have little reason to invest in the equipment that they would need to view material that has little or no marketplace appeal.<sup>10</sup>

NAB/MSTV also err in trying to support their plan based on the notion that "it is important that [cable customers] be able to get the benefits of digital signals through their cable systems, including not only high definition programming but other new and innovative digital services."<sup>11</sup> There is no reason to force cable carriage of all broadcasters' digital signals in order to provide cable customers with incentives to purchase digital receivers. As the FCC recognizes,<sup>12</sup> compelling digital programming will drive this transition – and compelling digital programming is what cable operators are offering to increasing numbers of their customers, both from broadcast and non-broadcast programming sources. Almost all cable customers already have the chance to view abundant new and innovative programming services offered on cable's digital tiers. Moreover, seventy million U.S. television households were passed by a cable system that offered HDTV as of December 1, including 96 of the top 100 designated market areas ("DMAs") and 143 of the 210 DMAs nationwide. More than 300 different digital broadcast stations are voluntarily carried today. And even in the absence of cable carriage, the FCC's requirement to include a digital tuner in every television set – whether cable "plug and play" digital cable ready TVs or analog TVs – will ensure that television households in increasing numbers can access digital signals over the air. A simple flick of the switch will mean that cable carriage will not be essential to a digital broadcaster reaching its audience.

Finally, in addition to its adverse impact on cable capacity and the pace of the digital transition, the NAB/MSTV scheme would further skew the market by strengthening the already strong hand of network-affiliated broadcasters in retransmission consent negotiations. It would

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<sup>10</sup> Over-the-air viewers' investment in digital equipment is the real linchpin of the DTV transition. Cable systems typically serve less than 70 percent of the households in a market. In order to meet the 85 percent threshold that triggers the transition's end, approximately half of non-cable customers must have a television set capable of receiving digital signals or a digital-to-analog set-top box for their analog TV.

<sup>11</sup> Letter at 1.

<sup>12</sup> See Second Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 97-80 at ¶ 55 (rel. Oct. 9, 2003) ("we believe access to high value digital content will spur the transition and increase consumer demand for unidirectional digital cable products and other navigation devices at retail...").

obviate the need for strong broadcasters to negotiate for digital carriage, providing those stations additional opportunities to demand yet other forms of remuneration for carriage of their analog signal. Under the NAB/MSTV proposal,<sup>13</sup> these stations, through government fiat, would be guaranteed carriage of all their free multicast digital services too (regardless of whether the digital signal is carried under must carry or retransmission consent), further insulating program carriage decisions from the dynamics of the marketplace. More powerful broadcast networks would gain more leverage to compel carriage of broadcast-owned cable networks at the expense of independent cable networks.<sup>14</sup>

In short, nothing in the latest NAB/MSTV proposal eliminates the practical or constitutional problems of dual must carry. It would cause serious harm to cable operators, programmers, and consumers.

Sincerely,

**/s/ Daniel L. Brenner**

Daniel L. Brenner

Diane B. Burstein

Michael S. Schooler

cc: The Honorable Michael K. Powell  
The Honorable Kevin J. Martin  
The Honorable Michael J. Copps  
The Honorable Kathleen Q. Abernathy  
The Honorable Jonathan S. Adelstein  
Jonathan Cody, Special Policy Advisor to the Chairman  
Catherine Bohigian, Legal Advisor to Commissioner Martin  
Jordan Goldstein, Legal Advisor to Commissioner Copps  
Stacy Fuller, Legal Advisor to Commissioner Abernathy  
Johanna Shelton, Legal Advisor to Commissioner Adelstein  
Ken Ferree, Chief, Media Bureau  
Rick Chessen, Associate Bureau Chief, Media Bureau  
John Rogovin, General Counsel, Office of General Counsel

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<sup>13</sup> Letter at n.1.

<sup>14</sup> U.S. General Accounting Office Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry (Oct. 2003) at 27-29 (finding that of the 90 most frequently carried cable networks, 43 percent were majority-owned by broadcast networks).