

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Carriage of Digital Television	)	CS Docket No. 98-120
Broadcast Stations	)	

**REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION**

The National Cable & Telecommunications Association (“NCTA”) hereby replies to the Opposition of the Association for Maximum Service Television, Inc., the National Association of Broadcasters, and the Association of Local Television Stations (“Broadcasters”), and the Opposition of Guenter Marksteiner (“Marksteiner”) to NCTA’s Petition for Reconsideration of the *First Report and Order* in the above-captioned proceeding.

NCTA’s Petition seeks reconsideration of a single matter – specifically, the Commission’s determination that new digital-only broadcast stations are entitled to mandatory cable carriage of their digital stations *in analog format*. As we demonstrated, there is no statutory basis for requiring such carriage, nor would such carriage promote the purposes of the must-carry provisions of the Communications Act or any other rational policy purpose. And none of the parties opposing the Petition supplies any such statutory or public policy basis.

**I. THERE IS NO STATUTORY BASIS FOR REQUIRING ANALOG CARRIAGE OF NEW DIGITAL-ONLY STATIONS.**

The Broadcasters hardly even try to come up with a statutory basis for requiring analog carriage of digital signals. They rehash their oft-repeated argument that “[a] local

television station transmitting an over-the-air signal, whether in digital or analog format or both, is entitled to mandatory carriage under Section 614 of the Communications Act”<sup>1</sup> and that “[a]s soon as a station transmits a DTV signal, it is entitled to an assurance that it will be carried on cable.”<sup>2</sup> But these arguments are irrelevant to the issue at hand, which is not whether new, digital-only stations are entitled to carriage but whether they are entitled to carriage *in analog format*.

The Broadcasters argue, citing Section 614(b)(4)(B), that “[o]nce it is established that a digital-only station is entitled to mandatory carriage, the Commission may adapt that requirement to ensure cable carriage of the station in accordance with the objectives of the Communications Act.”<sup>3</sup> Marksteiner similarly reads Section 614(b)(4)(B) as an “extremely broad” grant of authority, which “explicitly authorizes the Commission to make *any* change in the must-carry rules necessary to ensure carriage of DTV stations.”<sup>4</sup>

All that Section 614(b)(4)(B) explicitly directs the Commission to do is to adapt the must-carry rules “to *ensure cable carriage of such broadcast signals* of local commercial television stations which have been changed to conform with” any new, modified standards for television broadcast signals.<sup>5</sup> In the case of a digital-only station, the “broadcast signal” – *i.e.*, the signal that is transmitted – is a *digital* signal. If anything must be carried, it is the primary video of that *digital* signal. Nothing in Section 614(b)(4)(B) suggests any mandate – much less an “extremely broad” mandate – to go beyond this explicit directive.

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<sup>1</sup> Broadcasters Opposition at 2

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.*

<sup>4</sup> Marksteiner Opposition at 8

To the contrary, Congress made plain that any grant of authority in the provisions of Section 614 are to be construed *narrowly*, not broadly. Thus, Section 624(f) provides that “[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as *expressly* provided in this title.”<sup>6</sup> What Section 614(b)(4)(B) expressly requires is carriage of a digital broadcaster’s “broadcast signals.” And the “broadcast signals” of digital broadcasters are – in plain English – the *digital* signals that they *broadcast*.

**II. ANALOG CARRIAGE DOES NOT PROMOTE THE PURPOSES OF MUST-CARRY – OR ANY OTHER RATIONAL PUBLIC POLICY.**

Even if, as the Broadcasters and Marksteiner wrongly contend, the Commission had more expansive authority under Section 614(b)(4)(B) to require carriage of digital-only *stations* in a manner that advanced the policy objectives of the statute, carriage of such stations in analog format would not further any such objectives. The Broadcasters and Marksteiner concede that virtually no viewers who rely on over-the-air reception are equipped today to view new, digital-only stations. Nor, for that matter, are cable viewers. What the Broadcasters and Marksteiner argue is that the Commission should require analog carriage of these stations so that *cable* customers can view them and they can survive until the day when over-the-air viewers are finally equipped to watch them.

What public policy does this serve? Certainly not the statutory purpose that a majority of the Supreme Court found to be the justification for the must-carry provisions of the statute – *i.e.*, to preserve the availability of over-the-air broadcast stations for viewers who do not subscribe to cable, DBS or other multichannel video programming

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<sup>5</sup> 47 U.S.C. § 534(b)(4)(B) (emphasis added).

<sup>6</sup> *Id.*, § 544(f).

distributors.<sup>7</sup> It is hard to quarrel with the argument that a digital-only broadcaster will have trouble surviving without cable carriage if no over-the-air viewers can view its signal. But cable carriage does nothing for those viewers. They *still* will be unable to view the signals; and they still will be able to receive the analog signals of existing broadcasters, whose availability will continue to be preserved by the must-carry rules.

The Broadcasters argue that

[l]imiting a digital-only station to digital cable carriage at this stage of the transition would effectively eliminate its audience and kill the station. This, in turn, would thwart the goals of the digital transition by decreasing the number of digital stations on the air. It would thus discourage set manufacturers from bringing reasonably priced digital sets to market quickly.<sup>8</sup>

The idea that the digital transition will somehow be driven by over-the-air viewers buying digital television sets in order to receive new, digital-only stations is, frankly, ludicrous. Every existing broadcast station, including affiliates of the four widely viewed national networks, will be broadcasting digital signals throughout the transition. If the availability of those digital signals are not sufficient to encourage over-the-air viewers to purchase digital sets, it is unreasonable to assume that the availability of a new, digital-only station's programming would do the trick.

Even if the purpose of must-carry were to promote the sale of digital television sets and foster the digital transition – and Congress has never said this – it would still not make sense to require carriage of digital-only stations in analog format. Analog carriage would *defeat* this purpose. For carriage would mean that cable viewers have no need to

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<sup>7</sup> See *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 225-29 (Breyer, J., concurring).

<sup>8</sup> Broadcasters Opposition at 3.

buy digital sets in order to view the stations. And it would reduce the supposed incentive to do so.

### **III. MANDATORY CARRIAGE IN ANALOG FORMAT WOULD NOT SURVIVE FIRST AMENDMENT SCRUTINY.**

The Broadcasters and Marksteiner argue that mandatory analog carriage of a digital-only station is no different, with respect to the First Amendment, than the mandatory carriage of analog stations, which was upheld by the Supreme Court. They argue that the burden on cable operators is the same in both cases – since, in each case, carriage requires the use of one 6 MHz channel. And they argue that the preferential treatment of broadcasters vis-à-vis cable program networks is no different, since, in each case, the broadcaster gets the same preferred analog placement.

They miss the fundamental point. The analog must carry rules were narrowly upheld because, in the Supreme Court’s view, they advanced the government’s interest in preserving the availability of over-the-air broadcasting in a manner that imposed no greater burden on the speech rights of cable operators and program networks than was necessary to achieve that interest. But, for the reasons discussed above, analog carriage of new digital-only stations does not further that interest at all. Indeed, the incremental burden on cable operators – and the government-sanctioned preferential treatment of digital-only broadcasters vis-à-vis cable program networks – cannot be justified by *any* government interest.<sup>9</sup>

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<sup>9</sup> The Broadcasters disingenuously claim that NCTA’s petition for reconsideration is “surprising given its admission that ‘it may not be objectionable’ for a cable operator to carry in analog format the digital signal of an analog station that converts to digital and vacates it [sic] analog channel.” Broadcasters Opposition at 2 n.7, *citing* NCTA Ex Parte Letter, WT Docket No. 99-168 (filed June 6, 2000). That offer was made, of course, in a wholly different context, where “a broadcaster *whose analog channel is being carried* pursuant to the Commission’s must-carry rules vacates its analog channel prior to the end of the transition and provides the same channel on its digital channel.” Ex Parte Letter, *supra* (emphasis added). It hinged on the fact that a one-for-one swap of an analog signal for an analog feed

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in NCTA's Petition for Partial Reconsideration, the Commission should not require analog carriage of new digital-only broadcast stations.

Respectfully submitted,

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June 7, 2001

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of the same broadcaster's digital signal would not increase the must-carry burden on cable operators and program networks that already existed. But that was because the analog station was *already* being carried *in analog* on the system and would continue to be carried, pursuant to the must-carry rules, if the broadcaster chose not to relinquish its analog spectrum before the end of the transition. That rationale does not apply where a *new* digital-only station is required to be carried in analog. In that case, analog carriage imposes new costs and burdens on operators and program networks that did not and would not otherwise exist.

**CERTIFICATE OF SERVICE**

I, Susan C. Reeths, do hereby certify that on this 7th day of June, 2001, copies of the foregoing **Reply to Oppositions To Petition for Reconsideration** were sent by first-class mail, postage pre-paid, to the following:

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