EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of:	)	
	)	
Carriage of Digital Television Broadcast Signals	)	CS Docket No. 98-120
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999:	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	)	CS Docket No. 00-2

COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

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The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its comments in response to the Federal Communications Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1] NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving more than 90 percent of the nation's cable television

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[1] Carriage of Digital Television Stations, 58 Fed. Reg. 16524 (Mar. 26, 2001) ("First Report and Order" and "Further Notice.")

customers, and owners and operators of more than 200 cable program networks. NCTA also represents equipment suppliers and providers of other services to the cable industry.

INTRODUCTION AND SUMMARY

The Commission has entertained several rounds of pleadings comprising over a thousand pages of comments, and dozens of meetings with interested parties, on whether Congress in the 1992 Cable Act provided it with statutory authority to require cable operators to carry both the analog and digital signal of every television station, and whether imposing such a requirement would violate the Constitution.[2] It has been one of the agency's most thoroughly examined statutory questions in its 67-year history.

To date, the Commission has not adopted a double carriage requirement. Its January 2001 Report and Order reached the tentative conclusion that "based on the current record, a dual carriage requirement may burden cable operators' First Amendment interests more than is necessary to further the important government interests they would promote."[3]

In this Further Notice, the Commission proposed a variety of questions designed to update the voluminous record in order to assess whether requiring carriage of a broadcast station's analog and digital signals during the transition period would pass constitutional muster despite the tentative conclusion. But the constitutional inquiry needs to be refined – and simplified. The agency need not declare that the First or Fifth Amendment would be violated by a dual carriage

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[2] See e.g., Comments of the National Cable Television Association, filed Oct. 13, 1998; Reply Comments of the National Cable Television Association, filed Dec. 22, 1998, NCTA Petition for Partial Reconsideration, filed April 25, 2001; NCTA Opposition to Petitions for Reconsideration, filed May 25, 2001.

[3] Further Notice at ¶112.

obligation. It need only determine that interpreting the statute to require dual carriage presents a "serious likelihood that the statute would be held unconstitutional."[4] It does.

The constitutionality of the analog must carry requirement – which Congress clearly required in the 1992 Cable Act – was a close call at the Supreme Court. It follows that imposing an even more burdensome must carry regime, one that Congress has nowhere expressly authorized, would face an even greater likelihood of being struck down. The FCC under these circumstances must read the statute to prohibit imposition of digital must carry prior to the return of the analog spectrum – a reading that is fully consistent with the language of the statute. It should finalize its tentative conclusion and not require carriage of digital television signals during the transition period.

Moreover, the Commission should narrowly define what material is "program-related" in the digital environment. It should also permit operators to carry digital signals on a digital tier during the transition period, where all customers will already be receiving analog broadcast signals on the basic tier.

I. THE COMMISSION LACKS STATUTORY AUTHORITY TO IMPOSE DUAL MUST CARRY

The Further Notice approaches the issue of whether a dual must carry requirement could be lawfully imposed as if it were primarily a matter of building a record to evaluate the relative harms that would be caused by any such obligation. But that puts the cart before the horse. Before ever getting to the constitutional question, however, the Commission as a threshold matter must have the statutory authority to impose a digital must carry regime during the transition.

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[4] Almendarez-Torres v. US, 118 S. Ct. 1219 (1998).

As NCTA and others showed at great length in their comments in this proceeding, the statute does not explicitly and unambiguously require dual carriage. To the contrary, the language of the statute indicates that the Commission cannot require carriage of a broadcaster's digital signal while that broadcaster is still transmitting an analog signal.

Section 624(f) of the Communications Act provides that "[a]ny Federal agency, State or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title."[5] Thus, the FCC cannot impose dual must carry obligations unless Title VI expressly authorizes it. Accordingly, the Commission can find no implied or residual authority to adopt must carry requirements other than those set forth in Sections 614 and 615 of the Act.

Nothing in Title VI expressly authorizes or compels the Commission to require cable operators to carry broadcasters' digital signals along with their analog signals during the transition. Instead, Congress limited the FCC's authority in Section 614(b)(4)(B). That provision – entitled ADVANCED TELEVISION – specifically addresses the possibility that the NTSC broadcast signal standards might be changed and establishes carriage obligations in such circumstances. It directs the Commission 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."[6]

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[5] 47 U.S.C. §544(f)(1)(emphasis added).

[6] 47 U.S.C.§534(b)(4)(B)(emphasis added).

An analog signal that continues to be transmitted in the same format has not, in any sense, been changed merely because a new, second signal is being transmitted by the same broadcaster in a digital format. And the new digital signal cannot be said to have been changed from the analog signal while that analog signal is still being transmitted. The change-over can only be said to occur after the analog signal has been surrendered and a broadcaster is only transmitting in digital.

The Commission did not agree with NCTA's argument that the statute unambiguously foreclosed a dual carriage requirement. And it also rejected the broadcasters' argument that the statutory language compelled such a requirement.[7] But contrary to the assumption in the Further Notice, the tentative "draw" between the two sides does not, in fact, put the question in play. Even arguing arguendo that the language is ambiguous, that does not leave the Commission with discretion to impose or not impose dual carriage. The Commission must still construe the statute in a manner consistent with established canons of statutory construction, including Section 614(b)(4)(B). It must look to the purposes of the statute. And, under the long-established Supreme Court doctrine of "constitutional doubt," a statute "[m]ust be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but grave doubts upon that score."[8]

There is no denying that, at the very least, the constitutionality of a dual must carry requirement would be on highly shaky grounds. Indeed, the Commission has tentatively concluded that such a requirement would fail to survive First Amendment scrutiny.[9] Thus, to the

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[7] First Report and Order at ¶2.

[8] United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

[9] First Report and Order at ¶3.

extent that there is ambiguity about Congress' intent, the FCC must construe the statute in a manner that does not raise these constitutional problems.[10]

In other words, even if the provision requiring carriage of signals "which have been changed" does not unambiguously resolve the issue, the Commission is compelled to construe the language as foreclosing dual carriage because that construction is most consistent with the statutory purposes and avoids serious constitutional problems. As we now show, while the burden that dual carriage would impose on cable operators and program networks is exacerbated by the lack of excess available capacity to carry analog and digital broadcast signals, the constitutional burdens and problems would not disappear even if a particular cable operator had unlimited capacity to carry additional channels. A dual carriage requirement does not further any of the purposes of the must carry provisions of the statute. And it would substantially interfere with cable operators' and programmers' constitutional rights.

II. A DUAL MUST CARRY RULE WOULD BE INCONSISTENT WITH THE SUPREME COURT'S TURNER DECISIONS

As our initial comments and reply comments in this proceeding demonstrate, must carry proponents face insurmountable barriers to making a showing that a dual must carry obligation would serve any of the purposes of the must carry provisions of the statute, much less that it would do so in a narrowly tailored manner.

[10] Solid Waste Agency v. Army Corps of Engineers, 121 S. Ct. 675, 683 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. ... This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.")

A. Dual Must Carry Does Not Serve Any of the Governmental Interests Identified by Congress and the Supreme Court

Any dual must carry obligation must be shown to further an important governmental interest. But merely reciting the governmental interests addressed by the Turner court does not establish that digital must carry would serve those interests. As our initial Comments in this proceeding show, there are several critical distinctions between any possible digital must carry rules – especially dual carriage rules – and the analog must carry rules before the Supreme Court in Turner.

In contrast to the record regarding analog must carry, there are no congressional findings and scant materials in the legislative history with respect to digital must carry. Thus, as an initial matter, there is no showing that digital must carry is necessary to protect against any alleged harms to any important governmental interest. And, in fact, dual must carry would serve none of the governmental interests identified in Turner as justifications for adopting must carry requirements.

The Supreme Court identified three governmental interests asserted by Congress as reasons for adopting must carry rules: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.[11] But a majority of the court – the four dissenters and Justice Breyer – expressly did not agree that analog must carry could be justified by the third interest. Justice Breyer based his concurring fifth vote solely on the important governmental interest in "[p]roviding over-the-

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[11] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662 (1994); Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 189-190 (1997).

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."[12]

Every local analog broadcaster is carried today on virtually every cable system in its market. The Supreme Court found that such carriage served the governmental interest in preserving the benefits of free, over-the-air local broadcast television. There is no reason to believe that requiring additional carriage of a digital signal of the same broadcaster during the transition is necessary to protect the viability of that broadcaster, or that the absence of such a requirement will in any way diminish the availability or quality of broadcast signals available to non-cable subscribers.

Moreover, giving the same broadcast speakers access to additional space on a cable system that already carries their analog television signal hardly advances the other interest that Congress identified: ensuring access to a multiplicity of sources. Such a preference instead would crowd out voices of cable programmers that otherwise might provide diverse, non-duplicating programming in favor of those broadcasters that already have a government-bestowed preferred berth on cable systems.

B. Dual Must Carry Rules Cannot Be Based on an Interest in Accelerated Return of the Analog Spectrum

Since the governmental interests approved by Turner would not be served by dual must carry, it is no wonder that broadcasters in their previous comments in this proceeding have strained to concoct a wholly different alleged governmental interest as justification. Broadcasters now claim that it is necessary in order to hasten the end of the digital transition. But Congress

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[12] Id. at 226.

expressed no such interest – and the Supreme Court never embraced any such interest – in adopting and upholding the must carry requirements at issue.

That is no surprise. An interest in hastening the day when analog signals disappear would be in direct conflict with Congress' interest in protecting over-the-air viewers against the loss of broadcast service. Because when that day comes, over-the-air only viewers will lose access to all over-the-air television service unless they buy or lease a converter or purchase an expensive new digital television set. Accelerating the time by which these measures must be taken to get any over-the-air television at all can hardly be said to advance the government's interest in protecting those same viewers against the loss of television service, the very government interest that analog must carry was intended to promote.

The Further Notice nonetheless asks several questions about the pace of the transition and the proper statutory interpretation of the 85% threshold for the analog spectrum return incorporated in the Balanced Budget Act of 1997.[13] We have explained in our earlier comments why the legislative purpose of the contingent 2006 deadline was not to accelerate the analog spectrum give-back, but was, in fact, just the opposite. But as we now show, even assuming, arguendo, that the FCC could rely on an interest in hastening the digital transition as a justification for dual must carry, imposing such a requirement would not get the analog spectrum back.

[13] Further Notice at ¶¶117-118. The Further Notice asks whether "the analog television license will be returned when 85% or more of the television households in a market either subscribe to an MVPD that carries all of the digital broadcast stations in the market or have a DTV receiver or digital downconverter to receive the digital signal over the air." It appears that a television household will count toward the 85% threshold if either condition is satisfied. Therefore, the statute could be interpreted to require the spectrum to be returned even if cable customers could not view the digital programming carried on their cable system since they did not have a digital-to-analog converter and did not have a digital television set.

C. Cable Carriage of Digital Must Carry Stations Would Not Hasten the Transition's End

Cable operators serve 85% or more of the households in virtually no markets.[14] So even if cable systems were to carry a digital signal from every broadcaster in the market, the transition would not end in the remaining cable markets – nor would the finish line be any closer in sight. The real end of the transition will hinge on the behavior of those households that do not subscribe to cable or any other multichannel provider. These are the households presumably least able to afford cable or least interested in television generally, hardly the prime candidates to purchase expensive digital television sets or invest in digital-to-analog converter equipment.

In any event, there is no reason to believe that a dual carriage requirement would even provide much, if any, incentive for cable customers to purchase digital sets.

1. Broadcast Stations Are Not Offering Much HDTV and Little Original Digital Programming

As the Further Notice recognizes, broadcasters have offered precious little original digital programming.[15] In some cases digital television transmitters may only be turned on for certain hours of the day. In most cases, what is broadcast when those stations are on hardly resembles that which the American people were promised when they "loaned" the broadcasters $70 billion worth of free spectrum.

Broadcasters obtained their additional digital spectrum on the promise of offering HDTV. But other than CBS's prime time schedule, hardly any HDTV programming is being broadcast.

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[14] The Congressional Budget Office report showed that in only four of more than 200 cable markets in the United States do more than 85 percent of the television households subscribe to cable and these are not major metropolitan areas. Congressional Budget Office, "Completing the Transition to Digital Television," Sept. 1999 at Chapter II.

[15] Further Notice at ¶120.

Rather, beyond a limited number of high definition programs, the programming on many of these digital channels appears to consist of upconverted standard definition analog signals.

The FCC has "urge[d] broadcasters to increase the amount of digital and high-definition programming," believing that high definition programming in particular will help speed the transition to DTV.[16] With respect to high definition programming, cable programmers offer more of that programming than all the broadcast networks combined – and certainly more than those broadcasters that rely on must carry for carriage of their analog signals. In fact, HBO alone shows several times more high definition programming than the four broadcast networks. In addition, Showtime, Madison Square Garden Network, A&E and Discovery all are producing high definition programming.

2. Few Consumers Have Purchased Digital TV Sets

In the face of a paucity of compelling high-definition digital programming, it is not at all surprising that few consumers have decided to invest the many thousands of dollars it takes to purchase a new digital television set. Last year, more than 25 million television sets were sold in the United States, and less than 3 percent – a mere 625,000 – were digital HDTV sets.[17] Of those 625,000 digital sets, only about 27,000 are estimated to even have digital tuners; the remainder are simply designed to watch DVDs.[18] At the current rate, one broadcaster suggested that "it will take 12,000 years for Americans to replace their 300 million analog TV sets with digital ones," and "4,000 years before there's at least one TV set in 85 percent of U.S. homes."[19] Even if it will

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[16] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 00-39 (rel. Jan, 19, 2001) at ¶11.

[17] "As Sales of HDTV's Increase, Producers Ease Promotion," The New York Times, Jan.8, 2001.

[18] "Sony's Grebow Pushes Digital," Electronic Media, Apr. 30, 2001.

[19] "HDTV Outlook for the Next 12 Millennia," Electronic Media, Feb. 12, 2001 at 6 (citing Mark Hyman, Sinclair Broadcast Group Vice President of Corporate Relations.)

not take millennia for the switch-over to occur, experts including Chairman Powell[20] and Senator McCain[21] have all voiced their skepticism that the transition will end anytime close to 2006.

3. Carriage of Duplicate Must Carry Digital Programming is Not Likely to Spur Interest in Digital Sets

Assuming the 85% figure cannot be realistically reached by double must carry, it is still maintained by broadcasters that must carry will somehow "speed the transition" by greater purchases of TV sets and the like. But there is no evidence, and it confounds reason, to believe that mandatory carriage of the digital upconverted version of stations lightly viewed in an analog format would have the slightest impact on television purchasing incentives.

The fact is, cable and over-the-air viewers overwhelmingly watch stations that elect retransmission consent.[22] For better or for worse, these stations have a powerful tool for gaining digital carriage on a cable system – their analog broadcast station that is available in every cable customer's home. Not only does that station provide leverage to the broadcasters to negotiate for carriage of its digital services. It also is an obvious means by which the station can drive interest in its digital television offerings, leading to more customer awareness of, and potentially demands for carriage of, the digital stations.

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[20] Transcript of conversation between FCC Chairman Michael K. Powell and Sam Donaldson, NAB 2001 Convention (Apr. 24, 2001) ("I am one of those who is pretty openly critical that the [2006] date, as originally envisioned, will in any way be realized."); Broadcasting & Cable, "Delaying Digital TV" (Jan. 29, 2001). ("Powell considers it unreasonable to expect that the industry can remake itself with new technology and replace consumer sets by 2006, the date when the government aims to take back analog spectrum if 85% of U.S. homes have digital sets. 'I look in history in vain to find examples of consumer transformation, be it CDs from records to the introduction of VCR, to find any examples that show this complete a transformation in the time frame expected.'")

[21] Transcript of Mar. 1, 2001, Hearing on "The Transition to Digital Television Broadcasting," U.S. Senate, Committee on Commerce, Service and Transportation at 3. ("But this much is clear: By 2006, this country will have neither the transmission facilities, nor the digital content, nor the reception equipment needed to ensure that 85% of the population will be able to receive digital television as their exclusive source of television.") (Statement of Senator McCain.)

[22] Further Notice at ¶128.

The precise details of any retransmission consent agreements for digital signal carriage are generally highly confidential. But several agreements have been publicly announced, as the Further Notice references. For example, AOL Time Warner has entered into comprehensive agreements for carriage of the digital signals of the four major broadcast networks, several station group owners, and a group of public broadcasters. AT&T has digital retransmission consent agreements with Fox and NBC, and continues discussions with other broadcasters. Comcast has reached a digital retransmission consent agreement with Disney/ABC. Several cable operators reached agreement to carry CBS's multicast of the NCAA basketball tournament this past year.[23] There are likely additional agreements for the carriage of broadcast station's digital signals on cable systems that have not been publicly announced.[24]

In short, if the digital transition is to occur, it will be driven by marketplace interest in digital product. It is far more likely that digital broadcast stations carried pursuant to retransmission consent – or cable programmers providing digital fare – would be valued by cable customers than digital must carry stations. Intervening in that marketplace by forcing carriage of digital must carry stations would not speed the transition, but would simply interfere with customer preferences.

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[23] See Testimony of Michael Willner, President, Insight Communications, Before the Hearing of the House Telecommunications and the Internet Subcommittee of the House Energy and commerce Committee, Mar. 15, 2001 (describing agreement with LIN Broadcasting in Indianapolis, IN).

[24] The Further Notice asks whether cable operators "[h]ave refused to discuss digital retransmission consent with several network affiliated groups" and, if so, "why haven't cable operators entered into negotiations with network affiliated broadcast groups?" Further Notice at ¶129. From discussions with operators, it appears that a variety of factors explain why more agreements have not been reached. In many retransmission consent negotiations for the analog station, broadcasters have rarely mentioned carriage of their digital signal, instead demanding carriage of other things, like additional commonly owned non-broadcast programming services. Many stations still have no plans yet for how to use their digital spectrum – and simply demand carriage without any understanding of whether duplicate carriage will bring any value to cable customers.

D. A Dual Carriage Obligation Would Significantly Harm Operators and Programmers While Failing to End the Transition

Forcing cable operators to carry both analog and digital signals for any time period, regardless of the duration, will impose significant burdens on the protected speech rights of cable operators and cable programmers. Further, it will disrupt and interfere with the viewing preferences of cable customers on a scale that significantly exceeds the substantial burdens of analog must carry.

The Commission cannot reasonably expect cable operators to put plans on ice for offering customers services that they may desire so that broadcasters can gain an additional advantage – even if "temporary"[25] – by occupying channel space. As described below, that capacity remains scarce.

1. Cable Channel Capacity Remains Limited

The cable industry has been investing in the future. Cable operators have poured billions of dollars back to rebuild their systems to bring their customers better service and new choices. These upgrades have come in response to a variety of factors. Operators are competing for customers against DBS and other multichannel providers. DBS, in part due to its greater channel capacity, has a significant head start over cable in offering a variety of new services, such as multiple pay-per-view offerings and certain interactive services. Operators are delivering on the promises that the industry made in the mid-1990's – promises to offer customers broadband

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[25] Since cable carriage is not the determinant of the transition's end, a time-limited dual carriage requirement, about which the Further Notice seeks comment, is an alternative to a permanent dual carriage requirement in theory alone. In fact, imposing a three-year waiting period could be the equivalent to a death sentence for many struggling or nascent cable program networks, and could effectively block the emergence of new networks yet to be developed. Unlike digital broadcasters, they do not have an analog twin on the basic tier in every cable home in their market. And unlike digital broadcasters, they are unable to reach their intended audience over-the-air. Placing additional obstacles in the way of gaining distribution will put severe strain on programmer finances – putting into suspended animation these new services that are struggling to achieve the widespread distribution critical to gaining vital advertising revenues and subscriber fees.

access to the Internet; wire schools and libraries; provide more diverse program offerings; improve system reliability; and expand the range of non-video services that they provide, including telephony in competition to the local telephone monopolies.

Cable programmers have been gaining viewership at the same time, through increasing investments in original programming at both the national and local level. Indeed, cable program networks have invested $10.5 billion in original programming since 1999.[26] The cable industry has been doing its part to bring digital technology to its customers. Many systems now offer digital cable program networks that can be seen on existing analog television sets through digital-to-analog set-top boxes. More than 12 million customers subscribe to these diverse offerings.[27]

All of this has been accomplished through private industry investments. The cable industry was not granted any government handouts for bringing these new services to customers. Nor was it given any government-bestowed guarantee of success. Cable customers get to choose every month whether cable provides them with the services they want – because they otherwise have multiple options for obtaining the video entertainment and non-video services that cable provides – free over-the-air, or through DBS and other competitors.

Now that the cable industry is in the process of building and utilizing this capacity to provide new services, broadcasters ask the government to conscript even more capacity for their use. However, the forced carriage of additional broadcast signals will obviously consume more channel capacity than was the case at the time the Supreme Court evaluated the constitutionality

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[26] "Cable Programming Blossoms," www.mediaweek.com (May 30, 2001).

[27] Sixty new digital networks have been introduced. These include Biography Channel and History Channel International (from A&E); Science, Civilization and Kids (from Discovery); Noggin, Nick Too and Nickelodeon Games & Sports (from Nickelodeon); style. (from E!); six new Hispanic channels from Liberty Canales, new music channels from MTV and BET, and separate channels targeting Indian, Italian, Arabic, Filipino, French, South Asian and Chinese viewers from the International Channel. Additional premium offerings are also available from HBO, Showtime and Starz! Encore.

of the analog must carry requirements. And, in fact, as NCTA's earlier comments documented, the burden on cable operators from analog must carry is of a different degree than would be the case with digital carriage. Most analog television stations were already being carried voluntarily by cable systems. This would not be the case with digital signals, signals that for the most part duplicate those analog signals already being made available by cable systems to their customers. Worse, and decisionally significant from a burden standpoint, forced carriage will consume additional channels for standard definition versions of that programming that will look little different on a digital television set from that already provided today.

Even if channel capacity were unlimited – which it decidedly is not – mandatory carriage would come at the expense of other, more valuable uses of that bandwidth. It would stymie cable's efforts to introduce new non-video services as well to their customers. And it would relegate cable programmers to second class status yet again behind broadcasters that, in many cases, have yet to show any innovative uses for the spectrum that they managed to "borrow" from the government on a promise of innovative high definition pictures.

The Further Notice seeks updated information about cable channel capacity.[28] System rebuilds have continued since the FCC first launched this proceeding. As of year-end 2000, Warren Publishing data show that about 62 percent of cable subscribers were served by systems with 54 or more channels.[29] Other estimates show that cable operators by year-end 2001 will have approximately 77 percent of their plant upgraded to 550 MHz and above.[30]

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[28] Further NPRM at ¶125.

[29] NCTA, Cable TV Developments 2001 at 13 (Warren Communications News, Inc., The Television and Cable Factbook, Volume 69, 2001).

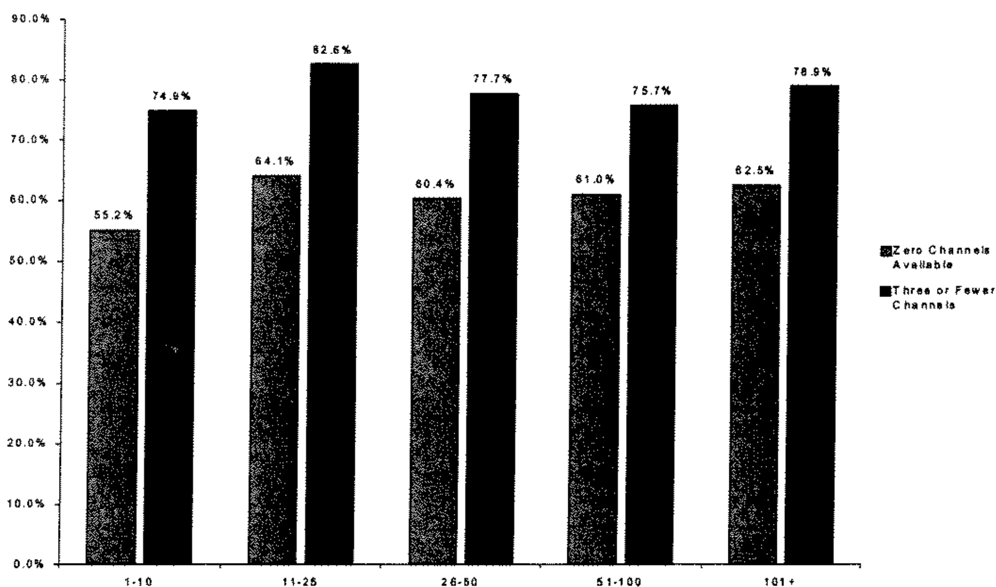
[30] NCTA, Cable & Telecommunications Industry Overview 2001 (Paul Kagan estimates.)

Some of those systems have been upgraded to 750 MHz capacity or higher.[31] But as the Further Notice seems to recognize, the mere fact that a system has been upgraded to 750 MHz does not mean it has available capacity – or that additional carriage obligations would be justifiable.

Upgrades notwithstanding, available cable system channel capacity is still in short supply. According to Nielsen data, more than half of the cable customers in the United States subscribe to cable systems with no available channels. This is true in all the markets across the country, from the top ten television markets to above the top 100. Moreover, even where some capacity is available, it still is highly limited. Nearly 80 percent of cable customers subscribe to systems with three or fewer available channels.

[31] Warren Publishing data show that 103 systems have 91 or more channels as of year-end 2000. NCTA, Cable TV Developments 2001 at 13. Kagan estimates for 2001 that 68 percent of cable homes will be passed by systems with 750 MHz capacity or more. NCTA, Cable & Telecommunications Industry Overview 2001.

Analysis of Channels Available by DMA Rank (Weighted by Subscribers)
A.C. Nielsen



Source: Nielsen Media Research, FOCUS database [formally Cable Online Data Exchange (CODE)], data as of May 31, 2001.

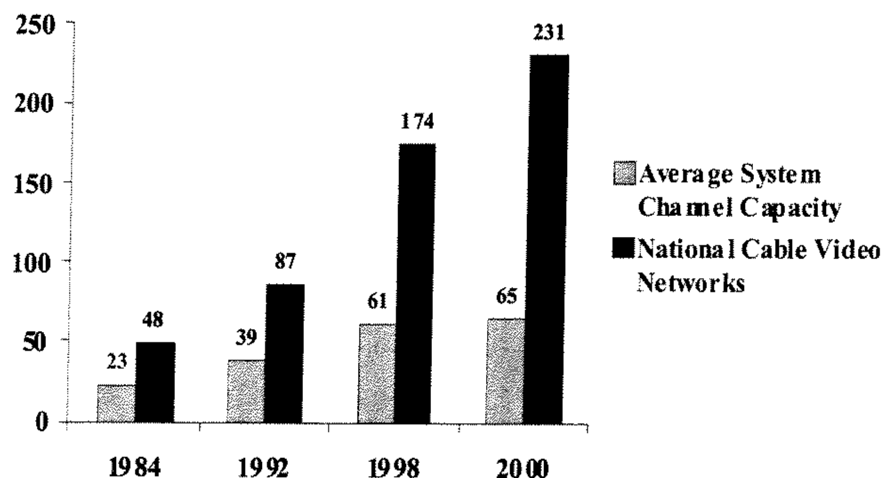
The fact that capacity remains tight is unsurprising. There are many competing demands for use of cable bandwidth. Cable operators have spent billions of dollars to increase capacity from under 550 MHz to above 550 MHz. The 550 MHz devoted to analog services will still be used to provide those analog services, since the vast majority of cable customers still have analog television sets and will continue to use them for the foreseeable future. But the 200 MHz in added capacity has been built to accommodate a wide range of innovative and desirable services, both video and non-video, well into the future.

A large portion of the newly constructed digital spectrum will be taken up with new video and non-video digital services – services like digital video, high definition programming, high speed Internet access (including multiple Internet service provider access), pay-per-view, video-

on-demand and near video-on-demand, telephony, digital audio, and interactive television applications. It will also be used for services under development, like IP telephony and other future uses which too will be competing for limited bandwidth. Thus, even a 750 MHz system may well be full up with existing services – and even if not, will have earmarked capacity for future uses depending on customer demand and market conditions.

Digital video uses alone continue to outpace increases in channel capacity. The number of national cable program networks has risen from 79 networks in 1990 to 231 networks in 2000 – nearly a threefold increase over ten years. While the average cable system has 65 channels of capacity, there are more than 280 national or regional cable program networks either launched today or expected to be launched soon.[32] New networks – and even several more mature networks – are struggling to gain access to an audience that, unlike broadcasters, they can only reach through a multichannel video programming distributor like cable.

Increased Channel Capacity Continues to be Outpaced by Increased Number of National Cable Networks



Source: Channel Capacity: Paul Kagan Associate, Cable TV Programming, July 23, 1992, p.1 and August 31, 1997, p.1; NCTA Estimate Based On Warren Publishing Data 2001; Cable Networks: NCTA, Cable Television Developments 2001.

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[32] See Appendix for a listing of national and regional networks, as of year-end 2000.

2. Techniques for Recovering Capacity are Costly and Their Potential Utility is Speculative

The Further Notice suggests that there may be techniques to recapture additional capacity.[33] But the FCC should not base estimates of available capacity on the tenuous notion that more capacity might be squeezed out of existing plant. There are significant costs and risks associated with doing so.

For example, the FCC asks about operators' plans to use 256 QAM instead of the 64 QAM modulation used by most cable systems today. But moving to 256 QAM is not without its own costs and difficulties. For example, millions of set-top boxes already deployed in the field today use 64 QAM. A system would need to support these boxes and could not switch over to 256 QAM without stranding this investment. In addition, use of 256 QAM places greater demands on a cable system's performance. As a result, it may not be possible to offer 256 QAM unless an operator pushes fiber deeper into its system and uses less active devices in its system in order to minimize noise and distortion. Thus, switching to 256 QAM is not a foregone conclusion for any system, and the decision to do so will depend on an analysis of whether the benefits outweigh the costs of making the switch.

Another recovery technique that the Further Notice raises is premised on an operator taking some capacity currently used to provide analog channels and using that capacity to provide digital instead.[34] In theory, doing so will free up additional channels. But in practice, removing analog channels is not a viable strategy for most systems.

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[33] Further Notice at ¶126.

[34] Id.

For the foreseeable future, most cable customers will continue to demand access to analog services for their existing television sets. Analog customers may well be angered if they lose services that they enjoy, or are only able to continue to view those services on television sets equipped with digital-to-analog converter boxes. At the same time, cable program networks that previously enjoyed carriage on an analog tier may lose access to a large base of their viewers due to shifts to a digital tier – and will be further disadvantaged vis-à-vis analog broadcasters, which will continue to occupy a preferred position on analog basic tiers that all customers of a cable system must buy before they even can view a cable program network.

* * *

In sum, a requirement to carry both analog and digital signals during the multi-year, open-ended transition to a fully digital environment would not serve any important governmental interest. Meanwhile, the burdens that such rules would impose on the First Amendment rights of operators and programmers would far exceed the significant burdens imposed by the existing analog rules. It is therefore hard to imagine how such rules could conceivably be deemed narrowly tailored to further an important government interest – now or in the future.

III. THE MUST CARRY RULES VIOLATE THE FIFTH AMENDMENT

But it is not just the First Amendment that poses a constitutional barrier to any Commission action here. The Fifth Amendment is implicated as well, as NCTA demonstrated in its earlier comments, including an analysis by Professor Laurence Tribe.[35] Must carry rules, insofar as they force cable operators to permanently cede the use of channel capacity to unaffiliated broadcasters, constitute a taking of property. Title VI of the Communications Act effectively forecloses any possibility of just compensation from broadcasters for such a taking.

And because Congress has not clearly authorized a requirement that cable operators carry broadcasters' analog and digital channels together, the Commission lacks authority to effectuate a taking that requires compensation by the government. Accordingly, any such requirement would run afoul of the Fifth Amendment, too. While the tentative decision did not make a finding on the Fifth Amendment, the Commission should rule on this constitutional issue as well.

A. Must Carry Rules Constitute a Taking of Property

The power to exclude others from one's property is a traditional property right. Indeed, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[36] Must carry rules do not simply regulate the manner in which cable operators use their systems. To the contrary, they give other entities – specifically, the operators' competitors – the right to use a portion of the operators' physical plants. This intrusion on the right of the operators to exclude others from the use of their property constitutes a compensable taking under the Fifth Amendment.

In Loretto v. Teleprompter Manhattan CATV Corp.,[37] the Supreme Court held that even a "minor but permanent physical occupation of an owner's property authorized by government constitutes a taking of property for which just compensation is due." In that case, the taking was effectuated by a state law compelling apartment building owners to permit the attachment of cable operators' wires to the outside of their buildings. The attachment involved the occupation of a mere 1½ cubic feet on a building's roof.

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[35] NCTA Comments at 32-37 (filed Oct. 13, 1998).

[36] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). See also Nollan v. California Coastal Comm'n, 483 U.S. 825, 830-32 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

[37] 458 U.S. 419, 421 (1982)

In Bell Atlantic Corp. v. FCC,[38] the D.C. Circuit invalidated the Commission's physical co-location rules, which granted competitive access providers "the right to exclusive use of a portion of the [local exchange carriers'] central offices." According to the court, the Commission's decision "directly implicate[d] the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve.'"[39]

Giving broadcasters exclusive use of cable channels on a continuing basis is no less a taking than granting cable operators the right to attach their wires to a small corner of a landlord's building or requiring local exchange carriers to permit co-location. It is tantamount to exercising eminent domain powers over – or effecting the nationalization of – a portion of the cable system. "When the Government has condemned business property with the intention of carrying on the business, as where public-utility property has been taken over for continued operation by a governmental authority[, and] the taker acquires going-concern value, it must pay for it."[40] The government cannot avoid this constitutional obligation by turning the condemned property over to private competitors instead of operating the business itself.[41]

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[38] 24 F.3d 1441, 1445 (D.C. Cir. 1996)

[39] 24 F.3d at 1445 (quoting Loretto v. Teleprompter Manhattan CATV, supra, 458 U.S. at 426). See also Eastern Enterprises v. Apfel, 118 S.Ct. 2131, 2146 (1998) (plurality opinion) ("'It is against all reason and justice' to presume that the legislature has been entrusted with the power to enact 'a law that takes property from A. and gives it to B.'" (quoting Calder v. Bull, 3 Dall. 386, 388 (1798) (Chase, J.) (emphasis in original)).

[40] Kimball Laundry v. United States, 338 U.S. 1, 12 (1949). See also Los Angeles Gas & Elec. Corp. v. Railroad Comm'n, 289 U.S. 287, 313 (1933).

[41] See Hawaii Housing Auth. V. Midkiff, 467 U.S. 229, 244 (1984).

The government's taking of only a portion of a landowner's property is no defense to a takings claim. If the government were to require cable operators to turn over their systems in their entirety to broadcasters, there would be no question that a taking had occurred. There is no constitutional exception that allows the government to avoid the Takings Clause by leaving some channels – even majority of the system's capacity – under the control of the cable operator. The Supreme Court has repeatedly rejected any such all-or-nothing principle.[42]

B. There Is No Guarantee of Just Compensation

That a regulation effectuates a taking does not by itself, of course, render the regulation unconstitutional. But to pass muster under the Fifth Amendment, a taking must be accompanied by "just compensation," and this means that "there must be at the time of taking 'reasonable, certain and adequate provision for obtaining compensation.'"[43] And, to be adequate, compensation must represent "the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken."[44]

The Commission cannot provide a mechanism that guarantees adequate compensation for the forced carriage of both analog and digital signals together. It obviously cannot guarantee payment of just compensation by the broadcasters. Section 614(b)(10) of the Act flatly prohibits cable operators from receiving compensation from such broadcasters.[45]

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[42] See e.g., Hodel v. Irving, 481 U.S. 704 (1987); Babbitt v. Youpee, 117 S.Ct. 727 (1997).

[43] Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-125 (1974) (quoting Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890)).

[44] United Sates v. Miller, 317 U.S. 369, 373 (1943).

[45] See 47 U.S.C. §534(b)(10).

Nor can the Commission guarantee compensation by the government. The Constitution vests Congress with the exclusive powers of raising revenue and appropriating money from the Treasury.[46] Accordingly, the courts have made clear that neither the Executive Branch nor administrative agencies may effect a taking that binds the government to pay Just Compensation under the Fifth Amendment unless there is clear congressional authorization for the taking.

In determining whether the Communications Act authorizes a Fifth Amendment taking by the Commission, the deference that is ordinarily afforded the Commission's construction of the Act does not apply.[47] Instead the operative rule is that the statute be construed where possible to avoid constitutional questions.[48] An administrative order that results in a taking, therefore, "must fall unless any fair reading of [the statute] would discern the requisite authority."[49]

For these reasons, even if the Commission believes that the statutory language is ambiguous and does not on its face prohibit a dual carriage requirement, it must construe the language in a manner that does not authorize or compel dual carriage – and thereby avoids several serious constitutional problems.

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[46] Art. I, §8, cl. 1; Art. I, §9, cl. 7.

[47] See Bell Atlantic Telephone Companies v. FCC, supra, 24 F.3d at 1445.

[48] Id. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). See also United States v. Security Indus. Bank, 459 U.S. 70, 78, 82 (1982) (rejecting construction of statute that would raise taking questions).

[49] Bell Atlantic Telephone Companies v. FCC, supra, 24 F.3d at 1446 (emphasis added).

IV. THE COMMISSION SHOULD ADOPT A NARROW DEFINITION OF "PROGRAM-RELATED" DIGITAL MATERIAL

The Further Notice seeks comment on whether certain theoretical uses of the digital spectrum might also piggy-back on a station's must carry rights because they are "program-related material" under Sections 614 and 615.[50] The specific uses on which the Further Notice seeks comment are a digital television broadcast of a sporting event that uses multiple camera angles that a viewer might choose among, sports statistics that "complement" a sports broadcast, "detailed financial information to complement a financial news broadcast,"[51] or "interactive enhancements like playing along with a game or chatting during a TV program."[52] And it also asks whether multicast educational programming aired by non-commercial stations could be considered "program related."

These speculative examples merely highlight the hazards of expanding the scope of "program-related material" beyond the narrow range that Congress intended. The FCC to date has understood the tight fit necessary between the primary program being shown and the supplemental related material. The potential for unintended consequences and disruption to customers' viewing experiences in the digital world – not to mention the potential for numerous disputes that the FCC would need to adjudicate – caution against loosening the stringent tests that have been adopted. Thus, to be "program-related" in the digital world, the information must be both integrally part of the single primary video and not ancillary or supplementary. As

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[50] Further Notice at ¶122.

[51] Id.

[52] Id.

described below, most of the uses about which the Further Notice theorizes would flunk those tests.

A. The Statutory Language and Legislative History Demonstrate a Narrow Obligation

Section 614 requires carriage of "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." The statute goes on to note that: "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."[53]

Congress at that time anticipated that broadcasters might seek to "enhance" the primary video and audio signal, but excluded these enhancements from any right to forced carriage. As the House Report accompanying the 1992 Act noted:

> Subsection (b)(3)(A) requires that a cable system transmit in its entirety the primary audio and video signal and the closed captioning transmission of each local commercial television station carried on the system, and, to the extent technically feasible, also retransmit any program-related material transmitted by the broadcaster on a subcarrier or in the vertical blanking interval (VBI). The Committee intends that the cable operator shall retain discretion whether or not to retransmit other material which may be transmitted in the vertical blanking interval or on subcarriers which may be unrelated to the main program service. Carriage of other program-related material in the vertical blanking interval and on subcarriers or other enhancements of the primary video and audio signal (such as teletext and

[53] Section 615 imposes a similarly limited requirement on cable operators to transmit in its entirety "the primary video, accompanying audio, and line 21 closed caption transmission of each qualified noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator." Section 615(g)(1).

> other subscription and advertiser-supported information) is left to the discretion of the cable operator.[54]

And Congress said that "program-related material" under Section 615 was intended to include integral matter such as subtitles for hearing-impaired viewers and simultaneous translations into another language. In fact, it expressly contemplated – and excluded – many of the uses raised in the Further Notice: "It was not meant to include tangentially related matter such as a reading list shown during a documentary or the scores of games other than the one being telecast or other information about the sport or particular players."[55]

In the analog must carry Order, the FCC added its own gloss to aid in evaluating whether material is "program-related," relying on the test articulated in the WGN case: (1) the broadcaster must intend for the information in the VBI to be seen by the same viewers who are watching the video signals; (2) the VBI information must be available during the same interval of time as the video signal; and (3) the VBI information must be an integral part of the program.[56]

Applying these tests, the FCC has identified only a handful of uses of the digital broadcast spectrum that are sufficiently closely related to the primary video to warrant a requirement that cable operators carry them. These include closed captioning information, program ratings data for use in conjunction with the V-chip function of receivers, Source Identification Codes used by Nielsen Media Research in the preparation of program ratings, and the channel mapping and tuning protocols that are part of PSIP.[57] NCTA does not oppose these common-sense

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[54] H.R. Rep. No. 92-628, 102d Cong.2nd Sess. 92-93 (hereinafter "House Report.") See also S.Rep. No. 102-92, 102d Cong.1st Sess. 85 ("The cable operator has discretion on whether to retransmit other material which may be transmitted in the vertical blanking interval or on subcarriers which are unrelated to the main program service.")

[55] Id. at 101 (emphasis supplied.)

[56] First Report and Order at ¶61.

[57] Id.

explications of program-related materials, which are closely related to the primary video. The new uses raised in the Further Notice, however, go way beyond these narrow exceptions to operator discretion.

B. "Ancillary and Supplementary" Services Are Not Entitled to Carriage, Even if "Program-Related"

Indeed, many of the additional uses would not be entitled to must carry rights, even if related to the primary video, because they are "ancillary and supplementary." The advent of digital television did not enlarge operators' carriage obligation beyond this narrow focus. To the contrary, Congress in the 1996 Telecommunications Act narrowed it even further. The 1996 Act restricts carriage obligations by ensuring that "no ancillary or supplementary service shall have any rights to carriage under section 614 or 615...."[58] Thus, even if a service might be deemed to be "program-related," a cable system cannot be forced to carry it at all if it falls into the ancillary and supplementary category.

The Commission has already delineated a wide variety of services that a broadcaster might offer that fall within this category, as the Report and Order recognizes.[59] These services include "[c]omputer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, [and] subscription video..."[60] The broadcaster may offer these enhancements free over the air or on a subscription basis[61] – but in either case, they are ancillary and supplementary and hence are not entitled to mandatory carriage.

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[58] 47 U.S.C. §336(b)(3).

[59] First Report and Order at ¶59.

[60] 47 C.F.R. §73.624(c).

[61] Certain ancillary and supplementary services are feeable – those for which "the payment of a subscription fee is required in order to receive such services" or for which a broadcaster received compensation from a third party in return for transmitting material furnished by that party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required.) 47 U.S.C. §336(e)(1).

Thus, services like e-mail, chat, or interactive materials would be ancillary and supplementary and not entitled to forced carriage. While the FCC provided broadcasters flexibility to offer a variety of services using their digital spectrum, forcing cable carriage of these services has nothing to do with the purposes of must carry. Congress accordingly directed that must carry categorically would not attach to these types of ancillary or supplementary materials.

C. Multiple Video Program Streams Are Not "Program-Related" Within the Meaning of Sections 614 and 615

Other potential uses of the digital spectrum that the Further Notice describes, such as multiple camera angles and multicast educational programming, are far afield from what Congress had in mind in creating this narrow exception to operator discretion. A cable operator may be required to consume one additional digital channel for each camera angle – just as it would for each additional educational program service.

But the Commission has already determined that the primary video in the digital context means carriage of only one digital programming stream.[62] There is no evidence that Congress intended to eviscerate this limitation by allowing broadcasters to sneak in additional carriage obligations by creating additional channels of video services, and the Further Notice fails to cite to any statutory support for such an expansion of carriage obligations.

Nor would it make sense from a policy standpoint to require such carriage. Additional bandwidth that might be forced to be set aside for carriage of multiple camera angles would come at the expense of other diverse services that viewers may well value more highly – such as a full-time cable program service.

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[62] First Report and Order at ¶57.

It is also impossible to square the narrow language of Section 615 with a broad obligation to carry all digital educational program streams. Section 615 governs carriage of program-related material aired by non-commercial educational stations, i.e., material "that may be necessary for receipt of programming by handicapped persons or for educational or language purposes." The legislative history of this provision confirms what a plain reading of the statute makes clear: Congress intended the program-related obligation to be a narrow one. In describing examples of educational uses of the vertical blanking interval that might be "program-related," the House Report explains that "PBS also delivers lessons plans and other data on the VBI to accompany the educational programming delivered to the nation's schools."[63] This language describes a close fit between the main channel and the VBI material. It requires more than that an additional program stream might have "educational" material. Rather, this legislative history says the supplementary material must be integrally related to the primary video service required to be carried.[64]

Merely because a separate program stream might be educational does not make it related to the primary educational video stream. The additional carriage duty is a program-related one. Congress limited that carriage obligation to carriage of the "primary video" of any non-commercial educational television station – that is, a single program stream.[65] This is not to suggest, however, that multicast educational public broadcasting services would not be carried absent must carry. In fact, negotiations are ongoing between cable operators and public stations over voluntary carriage arrangements.[66]

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[63] House Report at 101.

[64] Id. (explaining narrow reach of Section 615 "program-related" obligation).

[65] 47 U.S.C. §615(g)(1).

[66] See "PTV Stations, Cable Operators Pursue DTV Carriage Deals," Communications Daily, Apr. 19, 2001 (describing discussions between public broadcasters and cable operators over digital carriage agreements.)

D. Cable Operators Need Only Carry Program-Related Material If "Technically Feasible"

A further limitation on subsidiary carriage requirements is particularly relevant due to the nature of digital transmissions. Carriage of "program-related" material is only required if "technically feasible." In the analog world, the FCC has defined "technical feasibility" to mean that the operator generally is not required to "incur additional expenses and to change or add equipment in order to carry such material."[67] The FCC should ensure that any new and different digital carriage obligations beyond those already addressed do not cause technical problems.

V. THE COMMISSION SHOULD PERMIT OPERATORS TO PLACE DIGITAL SIGNALS ON DIGITAL TIERS DURING THE TRANSITION

During the transition, cable systems will already be carrying the analog signal of every broadcaster (other than superstations) on the basic tier.[68] The FCC asks whether to allow operators and broadcasters flexibility to enter into retransmission consent agreements that permit digital signals to be carried on a digital tier during the transition.[69]

That would surely be the right approach. To engage in any overly strict reading of the statute would be to impose a disincentive to cable carriage of digital signals during the transition. Tier placement should be an element of negotiation between the station and the cable system. If a broadcaster is willing to have its signal carried on the digital tier during the transition period, that should be the end of the matter.

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[67] Report and Order, 8 FCC Rcd 2965, 2986 (1993).

[68] 47 U.S.C. §543(b)(7) requires that each cable operator shall provide its subscribers a separately available basic tier which at a minimum, consists of all must carry signals, any PEG channels, and any signal of any television broadcast station that is provided by the cable operators to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of the station. The FCC has exempted systems that face effective competition from this obligation. First Report and Order at ¶102.

[69] Id. at ¶132.

The Commission's rules should encourage, rather than stymie, experimentation and flexibility during this interim period. The marketing, packaging, and delivery of digital signals is still in an experimental stage. Requiring basic tier carriage during the transition would not make sense under these circumstances.

Moreover, to the extent that the Commission permits cable operators to carry digital signals on an unregulated digital tier during the transition period, there is little need to address the potentially difficult rate regulation questions alluded in the Further Notice.[70] Assuming that cable operators are not required to carry digital signals during the transition, the need to devise a new rate regulation methodology is minimized. After the transition, a cable operator presumably will simply carry the digital broadcast signal on its basic tier in lieu of the analog signal previously carried without occupying a new channel.

[70] Further Notice at ¶133.

CONCLUSION

The FCC was right to tentatively conclude, it its January 2001 decision, that a dual must carry requirement would be unconstitutional. We applaud the Commission for adopting a practical approach that relies on marketplace demand to determine cable carriage of digital programming. As a matter of policy, it would be a mistake to allow dual must carry during the transition to be the driver of the ultimate outcome of the provision of digital programming to cable customers. And, as a matter of law, neither the Communications Act nor the Constitution allows it.

Respectfully submitted,

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June 11, 2001

APPENDIX

NATIONAL AND REGIONAL CABLE PROGRAM NETWORKS

Network	Service
@Max	Planned Services
5StarMax	Planned Services
A&E Network (A&E)	National Video Services
AACN	Planned Services
ActionMax	National Video Services
AEI Music	Network Audio Services
All News Channel	National Video Services
AMC (American Movie Classics)	National Video Services
AMC's American Pop!	National Video Services
American Legal	Network Planned Services
American West Network, The	Planned Services
America's Store	National Video Services
ANA Television	National Video Services
Animal Planet	National Video Services
Anthropology Programming and Entertainment	Planned Services
Anti-Aging	Network Planned Services
Applause	Networks Planned Services
Arabic Channel, The	Regional Video Services
ART (Arab Radio & Television)	National Video Services
Asian American Satellite TV	National Video Services
Auto Channel, The	Planned Services
Baby TV	Planned Services
BAYTV	Regional Video Services
BBC America	National Video Services
Beauty Channel, The	Planned Services
BET (Black Entertainment Television)	National Video Services
BET Gospel	National Video Services
BET on Jazz: The Jazz Channel™	National Video Services
Biography Channel, The	National Video Services
Black STARZ!!	National Video Services
Black Women's TV	Planned Services
Bloomberg Television	National Video Services
Boating Channel, The	Other Services
Bonjour USA	Regional Video Services
Booknet	Planned Services
Box Music Network, The	National Video Services
Bravo, The Film and Arts Network	National Video Services
C/NET, Inc.	Other Services
Cable Radio	Network Audio Services
California Channel, The	Regional Video Services
Canal Sur	National Video Services

Canales ñ	National Video Services
Cartoon Network	National Video Services
Casa Club TV	Regional Video Services
CCTV-4	National Video Services
Celtic Vision	National Video Services
Central Florida News 13	Regional Video Services
CFN–TV Children's Fashion	Network Planned Services
ChicagoLand Television News (CLTV)	Regional Video Services
CHOP TV	Planned Services
Cinemax	National Video Services
Classic Arts Showcase	National Video Services
CMT: Country Music Television	National Video Services
CN8 - The Comcast Network	Regional Video Services
CNBC	National Video Services
CNN (Cable News Network)	National Video Services
CNN en Espanol	National Video Services
CNN Headline News	National Video Services
CNN Money	National Video Services
CNN/Sports Illustrated	National Video Services
CNNI (CNN International)	National Video Services
Collectors Channel	Planned Services
College Entertainment Network	National Video Services
Comcast SportsNet	Regional Video Services
Comcast SportsNet (Mid Atlantic)	Regional Video Services
Comedy Central	National Video Services
County Television Network SAN DIEGO	Regional Video Services
Courtroom Television Network (Court TV)	National Video Services
Crime Channel, The	National Video Services
C–SPAN (Cable Satellite Public Affairs Network)	National Video Services
C-SPAN 3	National Video Services
C–SPAN2	National Video Services
CTN- Chinese Television Network	National Video Services
Deep Dish TV	National Video Services
Discovery Channel	National Video Services
Discovery Civilization Channel	National Video Services
Discovery En Español	National Video Services
Discovery Health Channel	National Video Services
Discovery Home & Leisure	National Video Services
Discovery Kids Channel	National Video Services
Discovery Science Channel	National Video Services
Discovery Wings Channel	National Video Services
Disney Channel	National Video Services
DMX MUSIC	Audio Services
Documentary Channel, The	Planned Services

Do-It-Yourself	National Video Services
Dream Network, The	National Video Services
E! Entertainment Television	National Video Services
ECOLOGY Communications	National Video Services
Ecumenical Television Channel	Regional Video Services
Empire Sports Network	Regional Video Services
ENCORE Thematic Multiplex SM	National Video Services
Encore® National	Video Services
ESPN National	Video Services
ESPN Classic National	Video Services
ESPN Extra National	Video Services
ESPN Now National	Video Services
ESPN2 National	Video Services
ESPNEWS National	Video Services
ETC National	Video Services
Eurocinema	Planned Services
EWTN	National Video Services
Extasy	Other Services
FAD TV (Fashion and Design Television)	Planned Services
FASHION Network	Planned Services
Filipino Channel, The	National Video Services
FLIX	National Video Services
Food Network	National Video Services
FOX Family Channel	National Video Services
FOX Movie Channel	National Video Services
FOX News Channel	National Video Services
Fox Sports Latin America	National Video Services
FOX Sports Net (West)	Regional Video Services
FOX Sports Net 2	Regional Video Services
FOX Sports Net Arizona	Regional Video Services
FOX Sports Net Bay Area	Regional Video Services
FOX Sports Net Chicago	Regional Video Services
Fox Sports Net Detroit	Regional Video Services
FOX Sports Net New England	Regional Video Services
Fox Sports Net North	Regional Video Services
Fox Sports Net Northwest	Regional Video Services
FOX Sports Net Ohio	Regional Video Services
Fox Sports Net Pittsburgh	Regional Video Services
Fox Sports Net Rocky Mountain	Regional Video Services
FOX Sports Net South	Regional Video Services
Fox Sports Net Southwest	Regional Video Services
Fox Sports World	National Video Services
Fox Sports World Espanol	National Video Services
FoxNet	National Video Services
FREE SPEECH TV (FStv)	National Video Services

FX (Fox Basic Cable)	National Video Services
Galavision	National Video Services
Game Show Network	National Video Services
GEMS Television	National Video Services
GETv Program Network	Planned Services
Global Village Network	Planned Services
Golden Eagle Broadcasting	National Video Services
Golf Channel, The	National Video Services
GoodLife TV Network	National Video Services
Gospel Network, The	Planned Services
Great American Country (GAC)	National Video Services
Hallmark Channel, The	National Video Services
HBO (Home Box Office)	National Video Services
HBO Comedy	National Video Services
HBO Family	National Video Services
HBO Latino	National Video Services
HBO Plus	National Video Services
HBO Signature	National Video Services
HBO ZONE	National Video Services
Health Network/Web MD, The	National Video Services
Hip Hop Network	Regional Video Services
History Channel International, The	National Video Services
History Channel, The	National Video Services
Hobby Craft Interactive	Planned Services
Home and Garden Television (HGTV)	National Video Services
Home Shopping Network (HSN), The	National Video Services
Honey Vision	Planned Services
Hot Choice	National Video Services
Hot Networks, The	National Video Services
HTV	National Video Services
Idea Channel, The	National Video Services
iN DEMAND	National Video Services
Independent Film Channel, The	National Video Services
Inspiration Network (INSP), The	National Video Services
Interactive Channel	Other Services
International Channel	National Video Services
International Television Broadcasting, Inc. (ITV)	Regional Video Services
Investment TV	Planned Services
Ladbroke Racing Network	National Video Services
Learning Channel (TLC), The	National Video Services
Lifetime Movie Network	National Video Services
Lifetime Television	National Video Services
Lightspan Partnership, Inc.,The	Other Services
Local News Network	Planned Services

Locomotion Channel, The	National Video Services
Lottery Channel, Inc., The	Regional Video Services
Love Network, The	Planned Services
Madison Square Garden Network	Regional Video Services
Martial Arts Action Network, The	Planned Services
MBC Network, The	National Video Services
MBC Network, The	National Video Services
Melli TV	National Video Services
MGM	Regional Video Services
Michigan Government Television	Regional Video Services
Military Channel, Inc.	National Video Services
Moody Broadcasting Network	Audio Services
MoreMax	National Video Services
Movie Channel (TMC), The	National Video Services
MOVIEplex	National Video Services
MSNBC	National Video Services
MTV "S"	National Video Services
MTV "X"	National Video Services
MTV 2	National Video Services
MTV Latin America	National Video Services
MTV: Music Television	National Video Services
MuchMusic USA	National Video Services
Music Choice	Audio Services
My Pet TV	National Video Services
NASA Television	National Video Services
National Geographic Channel	National Video Services
National Jewish Television	National Video Services
Native American Nations Program Network (NAN TV)	Planned Services
New England Cable News	Regional Video Services
New England Sports Network (NESN)	Regional Video Services
New York 1 News	Regional Video Services
News 12 Bronx	Regional Video Services
News 12 Connecticut	Regional Video Services
News 12 Long Island	Regional Video Services
News 12 New Jersey	Regional Video Services
News 12 Westchester	Regional Video Services
NewsChannel 8	Regional Video Services
Newsworld International	National Video Services
NGTV – National Greek Television	Regional Video Services
Nick at Nite/Nick at Nite's TV Land	National Video Services
Nick Too	National Video Services
Nickelodeon GAS-Games & Sports Network	National Video Services
Nickelodeon/Nick at Nite	National Video Services

Nippon Golden Network	Regional Video Services
Noah's World International	Planned Services
Noggin	National Video Services
NorthWest Cable News	Regional Video Services
NTN Communications, Inc.	Other Services
NUE-TV	National Video Services
Oasis TV, Inc.	National Video Services
Ohio News Network (ONN)	Regional Video Services
Opportunity Television Network	Planned Services
Orange County NewsChannel	Regional Video Services
ORB TV	Planned Services
Outdoor Channel, The	National Video Services
Outdoor Life Network	National Video Services
OuterMax	Planned Services
OVATION - The Arts Network	National Video Services
Oxygen Media, Inc.	National Video Services
PAX TV	National Video Services
Pennsylvania Cable Network (PCN)	Regional Video Services
Performance Showcase	Planned Services
Pittsburgh Cable News Channel (PCNC)	Regional Video Services
Playboy TV	National Video Services
Pleasure	National Video Services
Praise Television	National Video Services
Product Information Network (PIN)	National Video Services
Proto x	National Video Services
Puma TV	National Video Services
Puppy Channel (SM), The	Planned Services
QVC	National Video Services
RadioTV	Network Planned Services
RAI International	National Video Services
Rarities–Exchange	Regional Video Services
Real Estate Network, Inc.– TREN®, The	Planned Services
Recovery Network	National Video Services
RomanceLand	Planned Services
Scandinavian Channel	National Video Services
SCI FI Channel	National Video Services
SCOLA	National Video Services
Seminar TV, The Seminar TV Network	Planned Services
Senior Citizens Television	Network Planned Services
Shop at Home	National Video Services
Short TV	National Video Services
Showtime	National Video Services
Showtime Beyond	National Video Services
Showtime Event Television	National Video Services
Showtime Extreme	National Video Services

Showtime Family Zone	National Video Services
Showtime Next	Planned Services
Showtime Women	National Video Services
Sí TV	Planned Services
Six News Now	Regional Video Services
SkyView World Media	National Video Services
Skywatcher Channel	Planned Services
Soapnet	National Video Services
Speedvision Network	National Video Services
Spice 1	National Video Services
Spice 2	National Video Services
SportsChannel Florida	Regional Video Services
STARNET	Other Services
STARZ!	National Video Services
STARZ! Action	National Video Services
STARZ! Cinema SM	National Video Services
STARZ! Family SM	National Video Services
STARZ! Love Stories	National Video Services
STARZ! MOVIEplex	National Video Services
STARZ! Mystery	National Video Services
STARZ! Theater	National Video Services
STARZ! True Stories	National Video Services
STARZ! WAM!	National Video Services
STARZ! Westerns	National Video Services
style.	National Video Services
Sun TV	National Video Services
Sundance Channel	National Video Services
Sunshine Network	Regional Video Services
SUPERAUDIO Cable Radio Service	Audio Services
TBN – Trinity Broadcasting Network	National Video Services
TBS Superstation	National Video Services
Tech TV	National Video Services
Telemundo	National Video Services
TeN – The Erotic Network	National Video Services
Texas Cable News	Regional Video Services
TFN, The Football	Network Planned Services
Theatre Channel, The	Planned Services
ThrillerMax	National Video Services
TNN	National Video Services
TNT (Turner Network Television)	National Video Services
Toon Disney	National Video Services
Travel Channel	National Video Services
TRIO	National Video Services
True Blue	National Video Services
Turner Classic Movies (TCM)	National Video Services

TV 5 – USA Inc.	National Video Services
TV Asia	National Video Services
TV Games	National Video Services
TV Guide Channel	Other Services
TV Guide Interactive	Other Services
TV Guide International	Other Services
TV Guide Online	Other Services
TV Guide Sneak Prevue	National Video Services
TV JAPAN	National Video Services
TV33	Regional Video Services
TVN Direct	Other Services
TVN Entertainment Corporation	National Video Services
TVR (TV Russia Network, Inc.)	National Video Services
Universal Torah Broadcasting Network	National Video Services
Univision	National Video Services
USA Network	National Video Services
UVTV/KTLA	National Video Services
UVTV/WGN	National Video Services
UVTV/WPIX	National Video Services
ValueVision	National Video Services
VH1 (Music First)	National Video Services
VH1 Country	National Video Services
VH1 Soul	National Video Services
WAM! America's Kidz Network	National Video Services
We: Women's Entertainment	National Video Services
Weather Channel, The	National Video Services
Weather Channel/Latin America, The	National Video Services
Weatherscan Local by The Weather Channel	National Video Services
WFMT	Audio Services
Wisdom Television	National Video Services
Wmax	Planned Services
World Cinema	Planned Services
Worship Network, The	National Video Services
Yesterday USA	Audio Services
Youth Sports Broadcasting Channel (Y.S.B.C.)	Planned Services
Z Music Television	National Video Services
Zee TV	

EXHIBIT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 93-215
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service	)	CS Docket No. 94-28
Cable Pricing Flexibility	)	CS Docket No. 96-157

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

INTRODUCTION & SUMMARY

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned rulemaking proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving more than 90 percent of the nation's cable customers, as well as more than 200 program networks. NCTA participated in

dozens of proceedings implementing the cable television rate regulation provisions of the 1992 and 1996 Acts.

This proceeding takes a fresh look at some of those regulations. Much has changed since the FCC established its benchmark and equipment rate rules in 1993. Most significantly, as of March 1, 1999, Congress ceased rate regulation of the cable programming service ("CPS") tier. In addition, the strong, steady and irreversible growth of competition from DBS and others means that the number of systems not subject to effective competition and therefore subject to basic rate regulation will be steadily diminishing.

The Notice[1] identifies and appropriately seeks to clarify and fine-tune aspects of the FCC's basic service and equipment regulations to address certain issues that have arisen over the years. The Notice also asks whether potentially more far-reaching changes to its basic rate regulation methodology are warranted. The FCC, cable industry and LFAs have all learned to live with the existing rate regulation formulas. Certain revisions to those calculations and procedures can and should be accomplished without a major rewrite of the rules. But there is no evidence that the benefits of a dramatic shift in rate regulation methodology outweighs the significant costs that would be imposed on the FCC, LFAs and operators.

I. RATE ADJUSTMENTS WHEN CHANNELS ARE ADDED TO OR DELETED FROM THE BST

A. Basic Rate Calculations for Channels Added or Deleted During the Interim Period Should be Grandfathered

The FCC's methodology for adjusting basic tier rates to reflect changes in the number of channels offered customers has been subject to considerable confusion since the sunset of CPS

1 Revisions to Cable Television Rate Regulations, Notice of Proposed Rulemaking and Order, MB Docket No. 02-144, MM Docket No. 92-266, MM Docket No. 93-215, CS Docket No. 94-28, CS Docket No. 96-157, 17 FCC Rcd. 11550 (2002) (hereinafter "Notice").

tier rate regulation. This uncertainty has led operators to use a variety of methods for calculating BST rates when channels are added, deleted, substituted, or moved from one tier to another.

These differing approaches stem from the lack of clarity that has surrounded the FCC's intent in including an automatic sunset to certain rules. A brief review of the FCC's changing methodologies for channel additions, deletions, and movements shows why that is the case.

The FCC in 1994 adopted its original methodology for adjusting rates for channel changes.[2] The "mark-up" method, codified in Section §76.922(e) of the rules, applied to changes in channels on both the basic and CPS tiers. The FCC modified this methodology for adding and deleting channels to the CPS tier by the "going forward" rules adopted in the Sixth Order on Reconsideration in 1995.[3] The FCC simultaneously established a new formula to reflect moving, substituting, and deleting channels from regulated tiers.[4] The new methodology, found in Section 76.922(g)(3)-(5), included calculation of a "residual" to account for channel deletions or shifts of channels from one regulated tier to another.

The problems today arise in large measure because of ambiguity contained in that Order. It stated that the "new rules for adjusting rates when channels are added, deleted or substituted on CPS tiers will be in place through December 31, 1997, and will be reviewed prior to the end of that period to determine if there is any reason to continue to increase the number of channels on any CPST."[5] The FCC also provided that the new rule would "expire on [December 31,

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2 Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd. 4119 (1994) (hereinafter "Second Order on Reconsideration").

3 Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 FCC Rcd. 1226 (1994) (hereinafter "Sixth Order on Reconsideration"). Operators with single-tier systems could also avail themselves of this methodology for adding basic tier channels.

4 Id. at 1248-1255.

5 Id. at 1260.

1997] and will be replaced by our existing rule unless it is reinstated by the Commission."[6] The FCC codified this provision in Section 76.922(g)(8), which provides that "paragraph (g) of this section shall cease to be effective on January 1, 1998 unless renewed by the Commission." The FCC never took any action to review these rules or to reinstate the "going forward" rules. And through a separate order, the mark-up table contained in Section 76.922(e) was relocated to Section 76.922(g)(5).[7]

After 1997, then, a significant question remained about how to calculate rates when operators changed channel line-ups on the basic tier. The Notice itself acknowledges that the impact of Section 76.922(g)(8) has been the "subject of some debate."[8] The FCC never made clear whether the sunset of subsection (g) was intended to affect basic rate setting. Nor did it clarify whether the mark-up method (and associated per channel adjustment factor) was intended to remain post-1997, or whether operators were still required to calculate a "residual" for BST channel deletions.

Under these circumstances, it is not surprising that FCC staff has been advised informally that "operator and franchising authority practices with respect to channel deletions and channel movements have varied considerably both before and after March 31, 1999."[9] The FCC did not formally clarify its view of the appropriate method for calculating basic tier rates for channel changes until its interim order in this proceeding – issued more than three years after the automatic sunset of subsection (g).[10] But prior to the interim order, operators still were forced to

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6 Id. at 1260.

7 Thirteenth Order on Reconsideration, 11 FCC Rcd. 388 (1995).

8 Notice at ¶15.

9 Id. at ¶ 16.

10 The FCC declined to clarify whether the "mark-up method" still applied to adjusting basic rates as recently as 1999. In Streamlining of Cable Television Services Part 76 Public File and Notice Requirements, 14 FCC Rcd

proceed with their planned additions and deletions of basic tier programming, and could not reasonably be expected to freeze channel line-ups until clarification was forthcoming.

In light of the confusion surrounding the appropriate method by which to adjust BST rates, whatever methodology the FCC adopts in this proceeding should only be applied prospectively. Existing rate calculations made in good faith during the interim period should be grandfathered.[11] As the Order Regarding Interim Adjustment for BST Channel Changes acknowledges, stability in this area is important. Indeed, for this reason the FCC already cautioned LFAs that have accepted or not questioned certain rate calculations in the interim to "not change that determination in the true-up process."[12] This interest in stability should apply equally to both channel additions and deletions. This will minimize the number of rate appeals to the FCC of LFA rate orders that challenge the methodology used by the operator. Moreover, it will minimize customer confusion by reducing the need to make subsequent changes to their rates.

B. Going Forward, the Rules Should Permit Operators to Adjust Their BST Rates Upward or Downward Based on the Same Formula

The FCC's Interim Order adopted rules for adjusting BST rates to account for changes in channels that provide for asymmetric rate adjustments. That is, an operator removing channels from the BST would be required to reduce rates by a greater amount than it would be allowed to

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4653, 4668 (1999), the Commission found that "[r]einstatement of the 'Mark-up Method' of adjusting cable rates is an issue involving rate regulatory matters and therefore is beyond the scope of this streamlining proceeding."

[11] The FCC has taken similar steps to grandfather reasonable actions taken prior to clarification of its policy in other instances where its rate rules created uncertainty. See, e.g., Sixth Order on Reconsideration, 10 FCC Rcd. at 1243 (allowing operators to treat certain a la carte packages as "new product tiers," even though they would not have qualified under newly established rules).

[12] Notice at ¶55.

increase rates if channels were added to that tier.[13] The Commission should remove this artificial restraint on BST pricing and reinstate its original approach, which provides for parity between rate adjustments for channel additions and deletions.

This approach is reflected in the Second Order on Reconsideration.[14] There, the Commission established the "mark-up method" for "adjusting capped rates when channels are added or deleted from a regulated tier...."[15] This methodology was chosen over several alternatives based on the determination that it would provide a relatively simple way for operators to calculate rates when they added new programming services to regulated tiers. The FCC preferred this over others based on the view that it will "thus facilitate the provision of new programming services, and is not unduly burdensome on operators and regulators."[16]

This methodology for adjusting rates was temporarily superseded by use of the "residual" for channel movement between tiers – an approach to adjusting regulated rates that was understandable, given the interest in maintaining the "tier neutrality" of the original rate decision.[17] But now that CPS tier regulation has ended, tier neutrality can no longer justify use of the residual. The Commission instead should return to its earlier methodology and permit operators to increase and decrease their rates by the same amount when channels are added to or deleted from a tier.

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13 Order, MB Docket No. 02-144 (rel. Aug. 14, 2002) (requiring, for rate adjustments after the order's release date, that operators when deleting channel reduce rates by the "residual", but allowing operators that add rates to at most increase rates based on the per channel adjustment factor plus programming costs and 7.5% mark-up).

14 Second Order on Reconsideration, 9 FCC Rcd. at 4244.

15 Id. at 4244.

16 Id. at 4245.

17 Sixth Order on Reconsideration, supra, 10 FCC Rcd. at 1256-1257.

This "mark-up method" allows operators to adjust rates based on the per-channel adjustment factor found in the table in Section 76.922(g)(2). Under the rule, an operator adds the old and new total number of channels subject to regulation and divides by two, and then looks to

the table for the per channel adjustment factor. Because the CPS tier is no longer subject to regulation, the FCC should modify its rule to eliminate consideration of CPS tier channels in computing the total number of channels. In other words, an operator adding or deleting services from the basic tier should only look to the number of BST channels to determine the per-channel adjustment factor. In addition, an operator should continue to be able to factor in any increase (or decrease) in programming costs times the 7.5% mark-up for that channel.[18]

This modified methodology will protect basic-only customers from large increases in basic rates when services are added to the tier. This should alleviate the concern, expressed in paragraph 21 of the Notice, that basic service tier customers could be charged increases that reflect a residual amount calculated based on unregulated CPS tier revenues. When channels are deleted from the basic tier, basing the per channel adjustment factor only on the number of basic tier channels will provide a larger decrease for basic-only customers than if previously regulated CPS channels were also included in the calculation.

At the same time, return to the preexisting formula will avoid the artificial rate reductions caused by subtracting the "residual" for channels deleted from the basic tier. This can, in some instances, lead to absurdly low rates, particularly where a large basic tier is divided into two tiers. The presence of rate regulation in those instances can lead to rates that are artificially

[18] Where an operator had only a single-tier system and added channels pursuant to the "caps" method, any deletion of these channels should reflect the actual per-channel adjustment taken when such channels were added to the operator's channel line-ups.

depressed by regulation and unsustainable in the long run. Unduly reducing basic rates will cause harm to operators who must compete for customers with other MVPDs that are free to package and price their offerings free from any regulatory constraints.

In sum, it is unnecessary to create a new rate regulation approach through, for example, "establish[ing] new BST per-channel values through new benchmarks based on an updated comparison of BST rates charged by competitive and non-competitive systems...."[19] A decade of experience in rate regulation need not be discarded in order to perfect a new rate regulation approach for added or deleted channels. The Commission should merely fine-tune the approach already incorporated in its rules as described above and allow operators to adjust BST rates by the same amount when channels are added to or deleted from that tier.

C. All Cable Systems, Including Single Tier Systems, Should be Permitted to Adjust Rates For Channel Additions During the Middle of An Annual Rate Cycle

The rules currently offer more flexibility to single tier systems than to other systems to adjust rates to account for channel additions. Single tier systems are permitted to make an additional rate adjustment to reflect channel additions to the BST, while other systems that file annually are not, absent special circumstances.[20] The Notice asks whether to retain this option for single tier systems.[21]

Not only should the FCC maintain this approach for single tier systems; it should also extend this flexibility to all cable systems for channel additions made during the year, regardless

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[19] Notice at ¶22

[20] Id. at ¶23. Section 76.922(e)(iii)(c) permits operators with single tier systems to make one additional rate adjustment during the year to reflect channel additions to the basic service tier. Operators that use the annual method for adjusting rates may adjust rates mid-term for channels required by local or federal law to be added to the basic tier, such as must carry, PEG and leased access channels. 47 C.F.R. §76.922(e)(iii)(B).

[21] Notice at ¶23.

of how many tiers they might have. As a matter of customer relations, operators desire to minimize the number of rate changes during the year. But there are circumstances that may require such adjustments.

For example, operators may reach agreement to carry digital broadcast signals pursuant to retransmission consent. Mid-year rate adjustments to account for these BST additions would not be covered by the existing rule. But there appears to be little reason to artificially force operators to wait until their annual rate filing date to add these signals, or to forgo recovery of needed revenues while these new channels are carried and occupy system capacity. Instead, to facilitate the roll-out of digital broadcast services, the Commission should provide all operators additional flexibility to account for voluntary basic tier channel changes by allowing an additional mid-year change to basic tier rates.

II. DIGITAL BROADCAST TELEVISION RATE ADJUSTMENTS

The Notice asks commenters to update the record to address rate adjustments for carrying digital broadcast signals on a rate regulated basic tier. Cable operators can incur significant costs, over and above those ordinarily incurred when making basic tier line-up changes, when adding digital signals to a cable system. The Digital Must Carry Order describes the various costs associated with these additions, including costs incurred at the cable systems' headend and at other points leading up to the customer's home.[22] Thus, in addition to the per-channel adjustments described above, the FCC's rate regulations should provide a relatively simple mechanism for recovering these costs.

We agree with the Commission's decision to allow operators to recoup those costs through pass-through of headend equipment costs necessary for carriage of DTV signals as an

external cost or through an add-on surcharge based on the Form 1235's network upgrade surcharge, but not both.[23] These extraordinary headend and upgrade costs necessitated by adding the capability to carry broadcasters' digital signals are not captured in the per-channel adjustment factor table or by any other channel addition factors.

The Notice suggests that operators could recover for each 6 MHz used to add digital signals to the basic tier. But the permissible rate adjustment should not be tied to the amount of cable capacity that the digital broadcast signal occupies.[24] The rate rules have always been based on channels, not bandwidth, and the Commission should not impose such a limit now. Cable's ability to compress more than one digital channel into each 6 MHz is irrelevant to the value for customers receiving the service. It should also be irrelevant for purposes of the rate rules.

The Notice also suggests that the Commission's policy goal is to provide "sufficient incentives to add digital television signals, particularly during the transition from analog to digital service...."[25] But a bandwidth-based calculation would not accomplish that goal. Adopting a rate approach for digital signals different than for analog signals would artificially skew operators' incentives against using basic tier capacity for digital services. It would effectively reduce the channel addition rates by half or more, depending on the compression method an operator uses. Thus, the Commission should allow operators to increase rates for

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[22] Carriage of Digital Television Broadcast Signals, 16 FCC Rcd. 2598, 2645 (2001) (hereinafter "Digital Must Carry Order").

[23] Notice at ¶26. The Notice also inquires into the ability to use existing forms to make adjustments. The Commission should modify the instructions to Worksheet 6 on the Form 1240 to allow all systems, not just small systems, to benefit from the network upgrade surcharge.

[24] See id. (suggesting that operators are allowed increases for each 6 MHz of capacity devoted to digital broadcast signal carriage.)

[25] Id.

each digital channel added pursuant to the approach described in Part I above, plus the upgrade surcharge or external cost adjustments to reflect digital headend equipment.

Finally, the Commission should clarify that when operators add digital signals to the basic tier, they may increase rates for all basic subscribers, not just those that take the digital broadcast signals.[26] Digital broadcast signals carried on the basic tier are available to all basic tier customers who choose to buy a digital television set or obtain the equipment needed to view digital broadcast signals. These signals still occupy capacity and operators still incur costs, regardless of how many customers choose to get that equipment.

Carriage of digital signals thus differs from an upgrade that is being rolled out in stages to a community. It makes sense to limit the upgrade surcharge in the latter case to those who can actually receive the benefit of that investment. But in the case of basic tier digital signal carriage, all cable customers can receive those digital signals if they so choose. In this respect, a non-digital customer resembles an analog customer who is unable to receive all the broadcast signals on a basic tier without obtaining a converter box, but who chooses not to take that box. The analog customer in that situation is not entitled to a lower basic tier rate than his neighbor with a cable-ready television set or converter box. The FCC should thus clarify that if digital broadcast signals are carried on the basic tier, all customers' basic tier rates may reflect that carriage.

III. INITIAL REGULATED RATES

Nearly a decade has passed since local franchising authorities were provided the opportunity to obtain certification to regulate basic service tier rates. For a variety of reasons, not every LFA has chosen to do so. Nevertheless, existing FCC rules provide an LFA the

opportunity to require operators to justify rates going back to 1992 to determine whether rates in 2002 are correct. As time has passed, this has obviously become an increasingly burdensome obligation. This is particularly the case if ownership of the system has changed over the decade. Obtaining the information necessary to justify rates charged in 1992, and subsequent rate increases, is a significant challenge.

The Notice appropriately asks whether a less burdensome approach is warranted.[27] We agree that the Commission's rules should adopt reasonable limits on LFAs' ability to require justification for rates charged long ago. Instead, operators should be permitted to maintain their prevailing rate once LFAs are newly-certified.

FCC precedent supports this approach. For example, the FCC recently determined that in cases of LFA recertification, operators are "permitted to maintain the rates that prevailed while subject to effective competition and subsequent rate increases shall be subject to generally applicable regulations governing increases."[28] The Commission adopted a similar approach to avoid the so-called "all rates in play" problem that had plagued its own review of CPS tier rates. The agency explained that "subscribers and franchising authorities have had ample opportunity to file a complaint that would result in Commission review of operators' entire rate structure. It has been nearly two years since subscribers and franchising authorities first had the opportunity to complain about their CPST rates. ... We believe that if subscribers and the franchising authority have not filed a CPST rate complaint, it indicates a level of satisfaction with their

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[26] See Digital Must Carry Order, 16 FCC Rcd. at 2647 (suggesting that upgrade surcharge may only apply to those that purchased digital programming).

[27] Notice at ¶27.

[28] Connecticut Department of Public Utility Control: Petition for Recertification of Rate Regulation Authority, DA 02-2693 (rel. Oct. 17, 2002) (hereinafter "Connecticut DPUC Order").

current rates that would not exist if they believed CPST rates were unreasonable."[29] The FCC has treated similarly small operators' rates that lose their eligibility for small operator treatment.[30]

The same logic applies here. LFAs have had ample opportunity to regulate basic tier rates or even to have the FCC step in to do so under particular circumstances.[31] Presumably, if LFAs had believed basic rates needed to be regulated over that time, they would have availed themselves of these options. Those local authorities that declined to act for a decade should be estopped from claiming that they would be prejudiced by limiting their review of previously-charged rates. Operators' basic tier rates that have not been reviewed to date should be deemed to be presumptively reasonable.[32]

To provide protection against unreasonable basic tier rates, LFAs that become certified for the first time should be permitted to review the last rate increase taken by the system to ensure that it conforms with the FCC's rules. This will ensure that operators are not in a position where they can dramatically increase rates to levels that exceed those that would have been permissible under the FCC's rules with impunity simply because it is apparent that an LFA will soon be able to initiate basic tier rate regulation.[33]

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29 Thirteenth Order on Reconsideration, 11 FCC Rcd. 388, 451-452 (1995).

30 Implementation of Cable Act Reform Provision of the Telecommunications Act of 1996, 14 FCC Rcd. 5296, 5334-35 (1999).

31 47 C.F.R. § 76.913.

32 The FCC should adopt the same approach for small systems using Form 1230. Those systems may charge the Form 1230 rate until that rate "catches up" to that which could have been charged using Forms 1200, 1210, and 1240. The FCC should eliminate the need for all systems, regardless of size, to go back to recalculate rate forms in order to justify rates charged today. Instead, it should extend the "prevailing rate" principle to all systems to avoid such a burdensome result.

33 See, e.g., Connecticut DPUC Order supra (cautioning against raising rates dramatically to protect those rates from regulatory review where apparent that operator will lose deregulated status.)

IV. UNIFORM RATE STRUCTURES AND REGIONAL RATE

The Commission previously acknowledged that inter-franchise rate uniformity provided numerous benefits, both to operators and consumers.[34] Rate uniformity throughout a region facilitates a cable operator's ability to promote its services on a regional basis, enables consumers

to make a better comparison of service packages offered by competitors, leads to improvements in customer service, and "reduce[s] subscriber confusion of those who move from one part of the service area to another and currently must pay a different amount for the same level of cable service, even if the service is provided by the same cable operator."[35]

The Commission attempted to liberalize its rate rules to facilitate operators' ability to charge uniform rates, both system-wide and throughout a region. But those changes do not go far enough. The ability to fully exploit these efficiencies has been affected by the artifacts of rate regulation and the power of local authorities within each discrete franchise area to review rate changes.

Current FCC policy gives LFAs the right to insist on franchise-specific filings even when all relevant factors, including program service and equipment rates, channel line-ups and franchise fees, are identical.[36] This policy serves no continuing purpose. Operators should have the option of filing system-wide rate submissions in such circumstances as a matter of right. The current FCC policy, which allows LFAs to object to such filings, needlessly impedes accomplishing the FCC's goal of flexibility in this area and imposes unnecessary regulatory costs.

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[34] Uniform Rate-Setting Methodology, 12 FCC Rcd. 3425, 3429 (1997).

[35] Id.

FCC rules also permit operators to establish rate uniformity in a region, but provide disincentives to doing so. Basic service tier rates throughout the entire area for which rates are to be uniform must be based on the lowest BST rate that would be established under rate regulations.[37] This requirement can deter uniform rates, since rate uniformity means losing revenues from the basic tier.

The Commission should liberalize these rules as well. Where an operator provides customers the same number of channels (except for PEG or broadcast channels) and itemizes franchise fees, the operators should have the option of calculating the basic service tier rates at a uniform level. This could be accomplished by permitting operators to use a weighted average basic revenue across its systems. This methodology would permit uniformity without providing a windfall to the operator. It would also more accurately reflect the price, overall, being paid by consumers in the region.

V. COMMERCIAL RATES

More than eight years ago, the Commission received comments as to why the Act does not permit rate regulation of charges to commercial establishments, and why the FCC's benchmark formulas do not and should not apply to those businesses. The Notice asks parties to update the record.

In its earlier comments, NCTA demonstrated that as a matter of law, Section 623 does not cover commercial rates.[38] Nothing in the Cable Act or its legislative history supports the conclusion that Congress was concerned with cable operators' charges to commercial customers.

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[36] See Questions and Answers on Cable Television Rate Regulation, June 1, 1994 (Question 4, page 3).

[37] Id. at 3432.

[38] Comments of the National Cable Television Association on the Fifth Notice of Proposed Rulemaking (filed June 29, 1994).

Nor does the language of the Act cover these establishments. Neither the definition of "effective competition," which focuses on service to "households," nor the definition of "subscribers," which contemplates a "member of the general public," encompasses commercial establishments.[39]

NCTA also pointed out that there are many legitimate reasons why the FCC should not regulate commercial rates. There are a variety of reasons why commercial and residential accounts simply are different types of customers. For example, unlike residential subscribers, commercial establishments may derive a financial benefit from providing cable service to their customers. Moreover, particularly where operators serve sports bars and similar businesses, programmers may charge operators higher fees to reflect the benefits that bars and restaurants receive from exhibiting cable programming. Commercial customers, due to the nature of their businesses, may have customized needs for service. These specialized needs may increase an operator's costs of providing service to this class of customers. Also, different companies may provide pay-per-view-programming, and operators have been held liable if they inadvertently sell pay-per-view programming to these establishments. This liability raises the cost of doing business.[40]

Finally, the record showed that commercial establishments routinely have a variety of competitors from which to obtain video programming. That competition has only intensified over the ensuing eight years. DBS providers have made significant in-roads serving these customers. DirecTV, which competes not only on price but in terms of their exclusive sports

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[39] NCTA's Comments also demonstrated that even if the Act could be read to cover charges to non-residential customers, the FCC's benchmark rate formula could not be applied to commercial rates since the survey on which it was based likely did not include such charges. See id. at 17-18.

[40] See National Satellite Sports, Inc. v. Eliadis, Inc., 253 F. 3d. 900 (6th Cir. 2001).

product, served more than 380,000 commercial accounts as of the end of third quarter 2002.[41] EchoStar also offers customized packages for "commercial public/private" accounts.[42] A variety of other providers focus on servicing this segment of a community, even if they may choose not to serve residential customers.[43] These competitors can package their offerings and charge prices totally free from rate regulation.

Even if the Commission disagrees with our reading of the statute, there is no need to rate regulate in this area. We agree with the Notice's suggestion that market forces suffice to ensure that rates to commercial establishments are reasonable in the absence of direct regulation.[44] For all these reasons, the Commission once and for all should announce that commercial rates are unregulated.

VI. COST-OF-SERVICE RATE PROCESS AND ABBREVIATED COST-OF-SERVICE SHOWINGS

The Notice asks whether, given the end of CPS tier regulation, its rules should still provide operators with the option of making a cost-of-service showing. Cost-of-service is a "very information and labor intensive mechanism for establishing rates,"[45] as the Notice explains.

No doubt the costs and burdens of making a cost-of-service showing are reasons that the overwhelming majority of cable operators establish rates using the benchmark rate

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[41] Selected DirecTV U.S. Financial Highlights, as of 9/30/2002.

[42] http://commercial.dishnetowrk.com/content/public_private/index.shtml

[43] For example, LodgeNet and TVN exclusively serve hotels and other commercial establishments.

[44] Notice at ¶ 30.

[45] Notice at ¶34.

methodology.[46] Nevertheless, cost-of-service remains useful as a limited "safety valve," notwithstanding CPS rate deregulation. For example, some cable systems have only a single basic tier and cannot use CPS rates to subsidize basic rates that would otherwise be considered confiscatory. But even those systems with CPS tiers cannot necessarily use those tiers to absorb costs that properly should be assigned to basic tier customers. All systems face competition, which means the Notice's unstated assumption that CPS rates can easily subsidize BST rates may not hold true. Moreover, as the Notice recognizes, principles developed as part of the cost-of-service rules still constitute an integral part of calculations governing equipment and installation rates.[47]

Furthermore, there remains a need for the abbreviated cost-of-service showing on Form 1235. The Commission is aware that many cable systems have undertaken significant upgrades since the benchmark rates were established.[48] The benchmark and price cap schemes for operators of any size do not reflect these costs. Thus, the ability to make an abbreviated cost-of-service showing through a Form 1235 remains relevant and necessary to ensure that the rules provide a means to recover basic customers' appropriate share of network upgrade costs.

VII. RATES OF INTEREST

The FCC established a rate of interest of 11.25 percent. The Notice asks whether that rate is still appropriate, or whether some different indicator should be used.[49]

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46 See Time Warner Entertainment Co., L.P. v. FCC, 56 F.3d 151, 170 (D.C. Cir. 1995) ("[B]ecause a cost-of-service regulatory proceeding is expensive for the cable operator,… the FCC can be confident that an operator will not lightly choose that option and it will indeed remain a limited exception to the general rule.")

47 Notice at ¶35.

48 The FCC recently reaffirmed the need for Form 1235 abbreviated cost-of-service showings to cover the costs associated with providing digital signals to basic tier customers. Digital Must Carry Order, 16 FCC Rcd at 2646-47.

49 Notice at ¶38.

The 11.25 percent interest rate is used to calculate over- and under-payments pursuant to the annual rate adjustment filing.[50] The Commission reasoned that "because we have already determined that 11.25% is presumptively the cable operator's cost of capital, we find that the interest rate presumptively should be 11.25%."[51]

This rate has not changed since the FCC adopted the annual rate adjustment methodology in 1995. But the Notice provides no reason to change it now. Stability and regulatory certainty should override whatever impulse there might be to recalibrate the rules to respond to changed circumstances on an on-going basis.

In any event, the Notice fails to identify how circumstances have changed. Cable operators' cost of capital – upon which the 11.25 percent rate is based – continues to fall within this range.[52] Kagan World Media, for example, estimates that cable's average cost of capital today is approximately 11.8 percent.[53] The Commission thus should maintain its 11.25 rate for use in connection with annual rate true-ups.

VIII. REFUNDS

The Notice asks whether it should update rules governing refunds for rates paid in excess of maximum permitted rates.[54] Experience gained over the decade of basic rate regulation suggests that the Commission should provide operators with additional flexibility for implementing refunds.

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[50] Thirteenth Order on Reconsideration, 11 FCC Rcd. 388, 421 (1995).

[51] Id.

[52] The FCC still maintains an 11.25 percent rate of return for interstate common carriers subject to rate-of-return regulation. See Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd. 7507(1990); Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interstate Carriers, 16 FCC Rcd. 19613, 19701 (2001) (terminating prescription proceedings on authorized rate of return).

[53] Kagan World Media estimate (Oct. 2002).

Existing rules limit an operator to two choices. Operators may either return with interest overcharges to those subscribers who actually paid them, through direct payment or as a "specifically identified credit to those subscribers' bills;" or they may provide a future one-time credit to the appropriate group of current subscribers.[55] The FCC should make available other reasonable alternatives.

For example, the rules should not limit operators to a one-time credit. Instead, they should allow installment refunds over a reasonable period of time or use of in-kind refunds. Adding this flexibility would alleviate hardships to operators that a one-time credit may cause. Installment refunds have been accepted by the Commission in the context of social contracts and rate settlements, as have in-kind refunds so long as the coupons represent a value equal to or greater than a cash refund.[56] The rules should permit all operators to avail themselves of these alternatives.

IX. RE-EVALUATION OF THE BST RATE REGULATION PROCESS

The Notice's "primary focus ... is intended to be on improvements within [the] existing regulatory scheme."[57] However, the Notice solicits comments on whether to go back to the drawing board and rework cable basic rate regulation by either recalculating the competitive differential or establishing an entirely new methodology for regulating basic rates.[58] Fortunately, the Notice also recognizes the difficulties that such an approach would cause for all concerned – cable operators, local franchising authorities, and the Commission: "Although the elimination of

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[54] Notice at ¶41.

[55] 47 C.F.R. §76.942(d).

[56] See, e.g., Social Contract for Continental Cablevision, 11 FCC Rcd. 11,118 (1996); Cablevision Industries, 11 FCC Rcd. 7341 (1996) (permitting installment refunds over limited time period); Social Contract for Continental Cablevision, 10 FCC Rcd 12651 (1995) (authorizing in-kind refunds).

[57] Notice at ¶6.

CPST rate regulation along with the associated concept of tier neutral regulatory process changes one of the predicates for the rules, this structure has come to be understood by both operators and local governments involved in the rate regulation process. There would be considerable regulatory cost involved in changing to an entirely new basic tier rate setting process."[59] We agree that whatever benefits there might be to redrawing basic rate regulation would be far outweighed by the costs.

Even a cursory examination of the lengthy history of the rate rules shows why. The Notice lists the nineteen orders, including fourteen orders on reconsideration, issued since 1993.[60] More than two thousand sets of comments relating just to the benchmark rate regulation system were filed in response to these notices.[61] The FCC issued numerous interpretive clarifications in the form of Questions and Answers and informal letter rulings, and adjudicated several hundred appeals from local rate regulation orders. Countless man hours have been spent mastering and implementing the details of the existing methodology.

The Notice provides no reason to believe that any new approach would be simpler to establish or, at this stage, easier to administer. The fourteen reconsideration orders and thousands of comments were all necessary to establish and fine-tune the current rate regulation approach to deal with the myriad differing fact patterns arising from applying rate regulation to a complicated and diverse industry.[62] Experience shows that any new methodology for regulating rates will invariably lead to its own set of unanticipated problems and questions.

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[58] Id. at ¶42-43.

[59] Id. at ¶6. (emphasis supplied.)

[60] Id. at ¶2 n.8.

[61] The FCC's Electronic Comment Filing System lists over 2200 records in Docket 92-266.

[62] Notice at ¶2 n. 8.

Regulatory stability and certainty strongly militate in favor of maintaining the existing rate methodology. The rate review process has become more routine as FCC guidance on particular issues has developed through reconsideration orders and on appeals. And disputes over basic tier rate increases have abated since CPS tier rates have been deregulated and operators have forgone basic adjustments. Any newly launched FCC effort to recalibrate basic tier rates would throw this hard earned stability into serious question.

Such a significant undertaking to refine cable basic tier rate regulation at this point would also inflict even more competitive harm on cable. While operators must seek permission from certified local authorities before making any rate changes – higher or lower – their unregulated competitors are free to use this lop-sided regulatory approach to their advantage.[63] Resources that could be better spent competing to satisfy consumer demand would be needlessly diverted to mastering and implementing new regulatory schemes.

In short, the FCC's years of experience in regulating rates demonstrate the difficulty of establishing an appropriate methodology for determining cable rates. Rather than embarking on a new undertaking to try to finely calibrate basic tier rates, the Commission should recognize that its rate rules have accomplished their goal of establishing reasonable rates and should maintain its basic methodology. The goal, we submit, should be to minimize regulatory interference in the rate area, not to devote limited resources to reinventing the wheel.

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[63] Given pervasive basic tier regulation since 1993, and the competitive pressure that cable operators face, it is unsurprising that there is no evidence in the Notice that basic rates are too high. The most recent annual price survey saw basic rates rise by a mere 2.1 percent from July 1, 2000 to July 1, 2001. In fact, BST rate increases for systems subject to effective competition rose 4%, while regulated systems' rates increased by only half as much – 2%. Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment (rel. Apr. 4, 2002) at ¶21, Tables 4 and 5.

X. EQUIPMENT AND INSIDE WIRING RATE REGULATION

The Notice seeks comment on a variety of issues relating to equipment regulation. When first implementing the 1992 Act, the FCC took an expansive view of its responsibility in this area. It swept within the "actual cost" regulatory standard a wide variety of equipment used to receive not only basic service, but virtually all cable service. The Notice properly proposes to give this approach a fresh look.

The initial rate order concluded that "[C]ongress intended the actual cost standard to apply broadly to all equipment used to receive basic tier service."[64] The Commission explained that "[C]ongress included equipment and installation in the definition of cable programming services to prevent cable operators from avoiding regulation of equipment, if any, used to provide cable programming services alone or in conjunction with unregulated services."[65] Thus, the Commission determined that all equipment through which basic tier signals passed – essentially all equipment at that time – should be regulated at actual cost.[66]

Since then, much about rate regulation has changed. The Notice suggests two changes may warrant a new view of the breadth of equipment price regulation – the introduction of digital tiers of service and the 1996 Act's commercial availability provision. Another significant change is the end of CPS tier rate regulation. It makes little sense to require the continued rate regulation of equipment used primarily to access non-basic digital tiers, even if basic signals go through those converter boxes, now that those tiers are unregulated. The underlying premise of

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64 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, 8 FCC Rcd. 5631, 5906 (1993) (hereinafter "1992 Act Report and Order").

65 Id. at 5807.

66 Id. at 5805.

protecting CPS customers from unregulated equipment costs has vanished with the end of CPS tier price regulation.

To be sure, the Commission's initial broad determination was upheld by the Court of Appeals.[67] But the court acknowledged that Congress had not dictated this outcome.[68] It based its decision simply on the FCC "having offered a permissible interpretation of the statute...." Now that the statute has changed to eliminate CPS tier regulation, the FCC should rethink its interpretation. It should deregulate equipment, like converter boxes, that are used primarily to access non-basic services, and limit regulation to equipment destined for basic-only service.

Even if the FCC feels constrained to continue to regulate boxes used to access analog tiers of service, it should provide operators the option of pricing digital boxes free from actual cost regulation. As the Notice explains, this equipment "involves investments very largely used to receive CPST or other unregulated services..."[69] Thus, mandatory LFA review of these rates on an annual basis introduces an additional layer of regulatory oversight unnecessary to protect basic rate payers.

LFA involvement may continue to be appropriate where operators aggregate digital boxes with other boxes subject to rate regulation. The equipment aggregation provision, adopted in the 1996 Act, allows operators "pursuant to any rules promulgated under [Section 623(b)(3)], to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category."[70]

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67 Time Warner Entertainment Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995).

68 Id. at 178 ("Obviously, Congress did not address the specific issue before us.")

69 Notice at ¶47.

70 47 U.S.C. §543(b)(7)(A). Operators may not aggregate equipment used by basic-only customers.

Equipment aggregation continues to serve an important purpose of facilitating roll-out of digital boxes. Where operators are availing themselves of this option, those digital boxes that are included in the pool from which aggregated converter prices are derived should maintain their rate regulated basis. This will ensure that operators cannot increase their digital box rate to levels above what the regulated rate would yield and recover those rates by imposing higher charges on other types of regulated converter boxes. Where operators do not include those digital boxes to derive an aggregated equipment rate, however, they should be free to set prices at market-driven levels for these optional pieces of equipment.

Operators are also developing other types of devices only tangentially related to basic service. For example, customers will be able to obtain advanced services, such as home networking, to view programming on a variety of devices in their home without the need for converter boxes on each of those devices. The Commission should make clear LFAs should play no role in regulating the rates that can be charged for these types of advanced services. Such a deregulatory approach is entirely consistent with the FCC's previous determination to leave to competitive forces certain cable offerings. For example, the FCC previously found that a "whole house" maintenance plan is not subject to regulation by the FCC or LFAs.[71] The Cable Services Bureau determined that cable operators competed with local telephone companies for the provision of these types of wire maintenance plans, and regulation was unwarranted for this offering.[72] Operators will face similar competition from unregulated entities – such as consumer electronics manufacturers or wireless providers – in offering home networking. Pricing for these

[71] Memorandum Opinion and Order, 16 FCC Rcd. 2198, 2201 (CSB 2001).

[72] Id.

types of competitive offerings should be determined in the marketplace and not be subject to oversight by thousands of local franchising authorities.

XI. RECOVERY OF LOST REVENUES FOR EQUIPMENT AND INSTALLATION

The Notice recognizes that existing rules may unfairly deny operators recovery of revenues lost or refunds paid pursuant to an erroneous rate order. In particular, local authorities may mistakenly disallow certain rate increases associated with equipment or installation.

Currently, if these errors were made with respect to service rates, an operator would be allowed to true-up its next year's rates (on a Form 1240) to recover the undercharge. The Commission is right to propose extending this policy to erroneous equipment rate orders, but its proposed approach – i.e., identifying undercharges as expenses on Schedule B of Form 1205 – will not work to ensure recovery of the full amount to which an operator is entitled. Only a portion of amounts entered as expenses on Schedule B are ultimately entered on Form 1205 and recovered by operators through increases to the permissible equipment and installation charges.

The best solution is to allow operators to recover the full amount of any undercharges through a temporary adjustment to basic rates. A simple adjustment to rates, whether implemented as a one-time charge or allocated (with interest) over a fixed period, is the best and least complicated way to make operators whole.

XII. CHARGES FOR CHANGES IN SERVICE TIERS

FCC rules limit the charges for customer changes in any service tiers or equipment.[73] The Notice asks what effect the end of CPS tier regulation has on this rule.[74]

Section 623(b)(5)(c) provides for rate regulation of service changes between regulated service or equipment. Since only basic tiers remain regulated, this rule has no continuing relevance to service tier changes. A corollary to the right to price CPS tiers based on marketplace factors should be the right to set charges for changing that level of service free from LFA oversight. If a different piece of equipment is needed to receive the new level of service, then the truck roll to deliver that equipment will remain regulated under the existing rate rules. But there remains no justification for continuing to interfere with the marketplace prices for tier changes when all those service changes relate to either upgrading or downgrading service from and within unregulated CPS tiers.

Thus, the FCC should eliminate regulation of tier change charges, which have essentially been capped at a presumptively nominal charge of $2.00 for computer-coded changes. It should also make clear that local franchising authorities and states may not regulate charges in this area. This policy is consistent with the FCC's earlier action preempting state laws that conflict with the Commission's rules governing service change charges.[75]

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[73] 47 C.F.R. §76.980 (generally limiting charges for computer-activated changes to a "nominal amount" not to exceed actually cost, or based on actual cost for changes that require more than a coded entry.)

[74] Notice at ¶ 51.

[75] See 1992 Act Report and Order, 8 FCC Rcd. at 5833 n.793 ("We believe that any state laws that prohibit charges for changing service tier would be preempted to the extent that they conflict with Commission rules implementing Section 623(b)(5)(C), which requires cost-based charges for changing service tiers.")

XIII. CHANGING THE EFFECTIVE COMPETITION PRESUMPTION

FCC rules presume that cable operators do not face effective competition. Operators bear the burden of proving the presence of sufficient competition to justify rate deregulation. This rule and presumption were adopted when "no 'competitive' DBS system [was] operational"[76] and the "vast majority of cable systems ... [were] not subject to effective competition."[77] In 1993, the Commission worried that it might be overwhelmed with the task of showing that cable systems did not face effective competition when it was fairly sure that the test could not be met in most cases.[78] Also at that time, the FCC was at the very beginning of cable rate regulation, and was concerned that applying the test to each system prior to regulating rates could result in undue delay and strain resources.[79]

That was then, and now the Notice recognizes much has changed. Last year's Competition Report observed that DBS penetration "now exceeds 20% of television households in 30 states and 30% in five states."[80] That trend continues. NCTA's Comments filed in connection with the latest Competition Report Notice demonstrate that DBS penetration exceeds 15 percent in 44 states; 20 percent in 36 states; 25 percent in 22 states; 30 percent in 7 states; and even 40 percent in one state.[81]

Under these circumstances, there no longer is any basis for the current rebuttable presumption that cable operators do not face effective competition. To the contrary, it makes more sense to presume the opposite. At least in those states where DBS penetration exceeds 15

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[76] Id. at 5660.

[77] Id. at 5670.

[78] Id. at 5669-5670.

[79] Id. at 5670.

[80] Notice at ¶53.

percent, it is reasonable to shift the presumption. Where a cable operator has not been regulated or seeks to be deregulated on the ground that it is subject to effective competition, the burden should be on the LFA to demonstrate that effective competition does not exist, using the same data and resources currently available to cable operators seeking to demonstrate that they are subject to effective competition.

It does not, of course, follow from the fact that statewide DBS penetration exceeds 15 percent that penetration exceeds 15 percent in every community. There may be states in which DBS penetration is especially high in some areas and low in others, and there would be no reason for a cable operator to seek to be deregulated in a community where penetration of DBS and other competing MVPDs is obviously below 15 percent. State specific petitions would be filed by the operator listing franchise areas where the operator believes the presumption applies. The LFA would then have the right to rebut the presumption. The general burden of proof and the presumption established in the Commission's rules should reflect the best prediction of the actual facts. And given that DBS penetration exceeds 20 percent nationwide, it makes the most sense to rely on statewide penetration as the best prediction of penetration throughout a state, and to establish a rebuttable presumption on that basis.

In addition to changing the presumption, the presence of strong MVPD competition throughout the nation justifies modifying the effective competition showing. The FCC can safely streamline and expedite the processing of effective competition petitions, as described below.

First, the FCC should eliminate certain elements of an effective competition showing that are no longer subject to dispute. Cable operators should no longer be required to demonstrate

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[81] NCTA Comments, Video Competition Report at 13 (filed July 29, 2002).

consumer awareness of competitive DBS offerings in their franchise area. DBS is a nationwide service and engages in significant, sustained marketing to convince cable customers to switch multichannel providers. It is safe to assume, given DBS advertisements in national newspapers, as well as in television, radio, Internet, direct mail, Sunday papers, billboard and telemarketing campaigns, that consumers in towns large and small fully recognize DBS as a competitive alternative to their local cable operator.

Moreover, it is by now well settled that DBS offers comparable programming to cable. The Commission should take official notice of this established fact and eliminate the requirement that operators provide channel line-ups as part of the petition. Further, there should be no need to show that DBS is physically able to deliver service to potential customers or that there are "no regulatory technical or other impediments to households taking service..." from DBS providers.[82]

Thus, the only remaining showing is whether DBS serves the requisite 15 percent of customers threshold. As for that showing, several modifications are in order.

One continuing difficulty has been an operator's ability to obtain accurate subscriber numbers on a timely basis from its competitors. The FCC should reiterate that competitors, including DBS, must provide a timely response to an operator's request for homes passed and subscriber information. Failure to respond within the 15-day deadline should result in fines for each day of delay. Moreover, the information provided must reflect both service to single family homes plus the total number of individual units in a multiple dwelling unit, regardless of whether they are individually or bulk billed.[83]

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[82] 47 C.F.R. § 76.905(e).

[83] Section 623(1)(l)(b)(ii) requires a showing that the combined penetration of all MVPDs "other than the largest" exceeds 15 percent. In the case of multiple competitors submitting aggregated data, it may be impossible to

Another problem concerns identifying zip codes in a manner that corresponds to the franchise area. The Commission should permit operators to use several different methods (e.g., American Fact Finder, SkyTRENDS) to track zip codes in a franchise.

Moreover, to reduce the number of disputes arising from identifying pertinent zip codes, the FCC should permit operators to provide LFAs a list of zip codes that the operator believes to cover the franchise area, in whole or in part. LFAs should be able to object within 20 days to any zip code that it believes does not relate to the operator's franchise area, provided they provide supporting evidence. Failure to object should create a binding presumption that the operator's zip code list is correct.[84]

As to local exchange carrier ("LEC") effective competition showings, the FCC should conclude that, once the LEC has a franchise with a buildout requirement and commences operation, the number of homes passed is irrelevant. It also should confirm that the LEC test applies if the competing MVPD or any affiliated entity offers local exchange service in any community, even if not the community where effective competition determination is sought.

In addition, grant of effective competition petitions should proceed quickly. After all, if LFAs do not object, there is no reason for operators to remain subject to regulation. Thus, the Commission should automatically grant unopposed effective competition petitions once the time for filing oppositions has elapsed.

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demonstrate which MVPD is the largest. The FCC should clarify that operators other than the "largest" MVPD can still make an effective competition showing, even if one or more of the competing MVPDs may be larger than the operator seeking relief.

[84] An operator could proceed with its list of zip codes, even in the face of an LFA's objection, in its FCC effective competition filing. But the operator would be required to defend the validity of its list before the FCC.

Finally, even when a petition has been opposed, the Commission should adopt a time limit for review and resolution of the petition. The FCC declined to set a time limit for itself at the outset of regulation, given the new, uncertain assignment it faced.

Must carry complaints must be resolved within 120 days.[85] CPS tier complaints had a 90 day deadline for resolution.[86] The FCC should adopt a similar time limit here, especially since the Commission now has years of experience in reviewing these petitions.

XIV. PROCEDURES FOR FCC REVIEW OF LOCAL RATE DECISIONS

FCC rules provide an important check on LFA basic rate review. Operators may file appeals at the FCC of LFA decisions. Over the last decade, the FCC has decided numerous appeals that have set the ground rules for basic rate regulation.

There is no reason to upset this balanced approach. The need routinely to take appeals to the FCC may have diminished as LFAs have become more familiar with the FCC's rules and as the FCC has clarified unforeseen ambiguities in the basic rate process. But the ability to appeal remains as important today as it was at rate regulation's inception.

The Commission in its initial rate rules established a deferential standard to LFAs in reviewing their basic rate decisions.[87] We therefore respectfully disagree with the suggestion that the FCC should increase the "deference already given to these local rate decisions… so that the Commission would intervene only when there were significant deviations from the

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[85] 47 U.S.C. §534(d)(3).

[86] 47 U.S.C. §543(c)(3).

[87] 1992 Act Report and Order, 8 FCC Rcd. at 5731 ("We also believe that the Commission should not conduct de novo review of local rate decisions and that the standard of review should be to determine whether there is a reasonable basis for the franchising authority's written decision. Since the Commission is in effect acting like an appellate court in such instances, it is appropriate to use the same standard of review – that is, the Commission will defer to the judgment of the local franchising authority provided that there is a rational basis for the decision.")

established rules…."[88] The Commission, not LFAs, is the expert agency, having established the basic rate regulation regime. The Cable Act charges the FCC with establishing procedures for resolving disputes between operators and LFAs concerning those regulations.[89] The existing appeal procedure has accomplished what Congress intended – providing operators an avenue for the redress of disputes concerning basic tier and equipment rates. Turning away from any role in all but the most egregious violations would appear to incorrectly abdicate the oversight Congress intended the FCC to exercise to resolve disputes.

National uniformity in the application of the rate rules is still as relevant today as it was when the FCC first adopted its regulations. Increased deference to LFAs would unfairly place operators in the position of having to tailor rate justifications for each LFA's particular interpretation of the rules. This would seriously undermine Congress' intent in charging the FCC with responsibility for establishing the ground rules for basic rate regulation.

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[88] Notice at ¶54.

[89] 47 U.S.C. §523(5)(B).

CONCLUSION

Cable operators – alone among MVPD competitors – remain subject to basic rate regulation in thousands of U.S. communities. The Notice provides an opportunity to simplify some of these processes. But in many respects, the industry, FCC and LFAs have learned to live with the existing rate rules. Wholesale changes to those rules are unnecessary and counterproductive. Streamlining and liberalizing the existing rules should be the goal.

Respectfully submitted,

/s/

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November 4, 2002

EXHIBIT 3

Your Friend in the Digital Age.

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Check out our $pecial Offers on Cox Services

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▶ Cable Channel Lineup

The Movie Channel, HBO, Cinemax, Showtime and iN DEMAND pay-per-view are available only with Cox Digital Cable. Click here for more information.

All channels listed below are included in Cox Cable's Limited Basic and Expanded Basic channel lineup as noted beside the channel.

Ch. #	Network	
2	WMDO -Telefutura	Limited Basic
3	WBDC 50	Limited Basic
4	WRC 4 - NBC	Limited Basic
5	WTTG 5- Fox	Limited Basic
6	MHz (formerly WNVC 56)	Limited Basic
7	WJLA 7 - ABC	Limited Basic
8	News Channel 8	Limited Basic
9	WUSA 9 - CBS	Limited Basic
10	FPA - Fairfax Public Access	Limited Basic
11	FCPS Teacher Channel	Limited Basic
12	City of Fairfax/City of Falls Church	Limited Basic
13	Leased Access	Limited Basic
14	WFDC -Univision	Limited Basic
15	*i* Independent Television	Limited Basic
16	Fairfax County Government	Limited Basic
17	TBS	Limited Basic
18	George Mason University	Limited Basic
19	NVCC	Limited Basic
20	WDCA UPN 20	Limited Basic
21	FCPS Red Apple 21	Limited Basic
22	WMPT	Limited Basic
23	Town of Herndon/Town of Vienna	Limited Basic
24	QVC	Limited Basic
25	FCPS Community Classroom	Limited Basic
26	WETA	Limited Basic

27	Cable Marketplace II	Limited Basic
28	WNVT 53	Limited Basic
29	Shop NBC	Limited Basic
30	FPA International Access	Limited Basic
31	WGN	Limited Basic
32	WHUT 32	Limited Basic
34	HSN	Limited Basic
36	C-SPAN Extra/Leased Access	Limited Basic
37	Fairfax Public Access Community Board	Limited Basic
38	Cable Marketplace	Limited Basic
41	C-SPAN	Limited Basic
43	C-SPAN 2	Limited Basic
53	Spike TV	Expanded Basic
54	Speed Channel	Expanded Basic
55	ESPN 2	Expanded Basic
56	ESPN	Expanded Basic
57	Comcast SportsNet	Expanded Basic
58	Lifetime	Expanded Basic
59	HGTV	Expanded Basic
60	Food Network	Expanded Basic
61	Oxygen	Expanded Basic
62	MTV	Expanded Basic
63	MTV2	Expanded Basic
64	VH-1	Expanded Basic
65	CMT	Expanded Basic
66	BET	Expanded Basic
67	MSNBC	Expanded Basic
68	CNBC	Expanded Basic
69	Weather Channel	Expanded Basic
70	CNN Headline News	Expanded Basic
71	CNN	Expanded Basic
72	Fox News	Expanded Basic
73	Discovery Channel	Expanded Basic
74	Discovery Health	Expanded Basic
75	TLC	Expanded Basic
76	A&E	Expanded Basic
77	History Channel	Expanded Basic
78	Animal Planet	Expanded Basic
79	Court TV	Expanded Basic
80	USA Network	Expanded Basic
81	FX	Expanded Basic
82	Sci-Fi Channel	Expanded Basic
83	E! Entertainment Television	Expanded Basic

84	TV Land	Expanded Basic
85	Comedy Central	Expanded Basic
86	Travel Channel	Expanded Basic
87	TNT	Expanded Basic
88	Telemundo	Expanded Basic
89	Galavision	Expanded Basic
90	Cartoon Network	Expanded Basic
91	Nickelodeon	Expanded Basic
92	The Disney Channel	Expanded Basic
93	AMC	Expanded Basic
94	Turner Classic Movies	Expanded Basic
100	Bravo	Expanded Basic
101	ABC Family	Expanded Basic
102	MASN	Expanded Basic

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