

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

In the Matter of)	
)	
Second Periodic Review of the Commission's)	MB Docket No. 03-15
Rules and Policies Affecting the Conversion to)	
Digital Television)	RM 9832
)	
_____)	

COMMENTS OF HDNET LLC

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April 21, 2003

SUMMARY

As the nation's leader in the production and distribution of high definition ("HD") content, HDNet LLC ("HDNet") is committed to the conversion to digital television ("DTV") and shares the Commission's strong desire to ensure that the transition's momentum continues to grow. HDNet submits that elimination of the simulcast requirement, which mandates that licensees simulcast a certain percentage of the video programming broadcast on their analog channel on their digital channel, would do much to propel the DTV transition.

At the time the FCC adopted the simulcast rule, it intended for the rule to become effective when the transition was at or near the end. As the Commission is well aware, however, the conversion to DTV has a long way to go, and there are many issues standing in the way of its successful completion. Members of Congress and the FCC and individual Commissioners, joined by a clear majority of DTV stakeholders—including broadcasters, cable companies, and consumer electronics manufacturers—agree that the availability and broadcast of high-quality innovative digital content plays a key role in stimulating consumer interest in digital television, and thus, in advancing the transition. The high costs associated with the conversion to digital broadcasting, combined with low set penetration levels and a lack of consumer awareness regarding DTV, however, have continued to provide disincentives for broadcasters to offer compelling high definition content. By mandating that broadcasters ultimately air all of the programming broadcast on their analog channel on their digital channel, the simulcast rule only serves to push the incentive to innovate even lower and discourages broadcasters from seeking creative uses of digital technology.

HDNet offers broadcasters a low-cost opportunity to obtain and distribute precisely the type of innovative HD programming that will help to move the DTV transition forward. But the simulcast rule stands as an impediment to the distribution of this unique digital programming –if

a broadcaster is going to have to simulcast in the near future, there is no need to develop relationships with HDNet or other similar program suppliers or to invest money in HD program offerings. Similarly, the presence of the rule eviscerates any incentive for broadcasters to produce their own high definition programming or to collaborate with industry participants to create innovative program offerings, because those offerings will have to be taken off the air in favor of simulcast programs in the very near future. Moreover, the simulcast rule is entirely unnecessary, because the functioning of the marketplace will ensure continued availability of valuable programming as we enter the digital age. Thus, by denying broadcasters the flexibility that they so desperately need at this critical phase of the DTV transition, the simulcast rule is simply an impediment to the digital conversion. Accordingly, the simulcast requirement should be eliminated.

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HDNet LLC (“HDNet”) hereby submits its comments in the above-referenced rulemaking proceeding, which constitutes the second periodic review by the Federal Communications Commission (“FCC” or “Commission”) of the conversion of the nation’s television broadcast system from analog to digital television (“DTV”).¹ The DTV transition is designed to increase efficient use of spectrum, expand consumer choice for video programming, and increase the amount of spectrum available for public safety and a variety of other wireless uses. Given these important goals, it is imperative that the Commission take whatever steps are necessary to ensure that the conversion to DTV moves forward with all deliberate speed. In this regard, HDNet submits that the FCC should immediately eliminate its current simulcast requirement—*i.e.*, the requirement that licensees simulcast a certain percentage of the video programming broadcast on their analog channel on their digital channel. As set forth below, the agency’s simulcast rule only serves to impede, rather than advance, the conversion, and, accordingly, should be removed.

¹ *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television*, Notice of Proposed Rulemaking, MB Docket No. 03-15, FCC 03-8 (rel. Jan. 27, 2003) (“*NPRM*”).

I. BACKGROUND.

HDNet. HDNet is the nation's leader in the production and distribution of high definition ("HD") content. Recognizing that compelling HD content is what is needed to spur consumer acceptance of digital television, and anxious to bring this exciting and important technology to the public, the founders of HDNet launched the service in September 2001 as the nation's first—and thus far only—fulltime HD programming network. HDNet's current cable and satellite offerings are available on DirecTV and select Charter Communications cable systems, providing viewers with HD content 24 hours a day in the form of sports, concerts, movies, news, and specialty programming. All of HDNet's programming is provided in the 1080i format—the highest quality format for high definition digital television. HDNet provides more hours of HD programming each week than any other program supplier or broadcast network.

In February 2003, HDNet launched its broadcast service with the near term goal of providing broadcast DTV stations access to low-cost, yet compelling, HD programming 24 hours a day. The HDNet content currently available to DTV broadcasters consists of a variety of genres, including sports, documentaries, musical events and other unique programs.² Beginning in the fall of 2003, HDNet intends to add HD movies to its broadcast line-up, and soon thereafter will begin buying and producing original content for DTV broadcasters that air HDNet programming. More than one million viewers currently watch HDNet in their homes, in sports bars with high definition television ("HDTV") receivers, and in the HDTV showrooms of more than 1,600 consumer electronics retailers. HDNet has thus placed itself firmly in the vanguard of

² In the first month, HDNet's library of HD content grew to include over 100 hours of unique HD programming, far surpassing even the biggest producers of HD content. To maintain this level of competitiveness through the DTV transition, HDNet intends to add approximately 8 new hours of HD content each week to its broadcast library.

the DTV transition.³ HDNet's ability to continue distributing HD programming to broadcasters, and, in turn, push the DTV transition forward, is threatened, however, by the Commission's existing simulcast rule.

The Second Periodic Review. The FCC's current simulcast rule requires that DTV licensees simulcast 50% of the video programming broadcast on their analog channel on their DTV channel by April 1, 2003; 75% by April 1, 2004; and 100% by April 1, 2005.⁴ In the *NPRM*, the Commission, for the first time since the rule's adoption,⁵ seeks comment on the simulcast requirement. Specifically, the agency asks whether it "should retain, revise or remove the simulcast requirement, how to define simulcasting, and whether the existing dates are appropriate."⁶ Implicitly recognizing potential weaknesses in its current rule, the Commission asks whether "the ultimate requirement of 100% simulcasting other than at the very end of the transition create[s] disincentives for broadcasters to innovate."⁷ The FCC also asks whether a regulatory requirement to simulcast is necessary "[i]f broadcasters have a market-based incentive

³ In addition to its current program offerings, HDNet is also working on a number of other initiatives designed to speed the digital transition. For example, HDNet is working with content providers to convert large quantities of 35mm film programming to an HD 1080i format, thus expanding the variety of HD programming available in the marketplace. HDNet's collegiate sports broadcast program, through which HDNet will provide full production capabilities and broadcast of select collegiate sporting events, and its producer partnership program, which will provide HD production and post-production facilities to qualified program producers, are similarly designed to achieve broad diversity in HD content. HDNet has also developed a retail partnership program that is aimed at helping consumer retailers and resellers increase sales of HD tuners and televisions.

⁴ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12833 (1997) ("*DTV Fifth Report and Order*"); 47 C.F.R. § 73.624(f).

⁵ In the Notice of Proposed Rulemaking initiating the first periodic review in March of 2000, the Commission stated that it was "too early in the transition" to address "the proper application of the simulcast requirement." *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, FCC 00-83, ¶ 14 (Mar. 8, 2000).

⁶ *NPRM*, ¶ 66.

⁷ *Id.*

to simulcast and currently are simulcasting.”⁸ In addition, the agency requests comment regarding whether “the simulcasting requirement [is] causing broadcasters to forego creative uses of digital technology.”⁹ As discussed in greater detail below, the mandatory simulcast rule stands as a significant impediment to the conversion to DTV and is destroying the market for innovative digital content like the programming HDNet produces and distributes. The Commission should therefore eliminate the simulcast requirement.

II. THE SIMULCAST RULE DOES NOT SERVE THE PUBLIC INTEREST AND SHOULD BE ELIMINATED.

A. The Current Status of the DTV Transition Precludes Retention of the Existing Simulcast Rule.

When the FCC adopted the simulcast rule in 1997, it assumed that under the timeframe adopted for implementation, the rule would not become effective until the transition was “near the end.”¹⁰ Indeed, it explicitly found that a simulcast requirement was “not warranted during the early years of the transition.”¹¹ Moreover, the agency recognized that developments during the DTV conversion might require modification of the simulcast rule, and thus stated that it would include “proper application of the simulcast requirement” in its periodic reviews of the status of the transition.¹²

As the Commission is well aware, the conversion to digital television has not progressed as quickly as planned, and the transition is *not* “near the end.” As of March 12, 2003, only 397 of the 1,578 television stations that have been granted DTV construction permits were on the air

⁸ *Id.*

⁹ *Id.*

¹⁰ *DTV Fifth Report and Order*, 12 FCC Rcd at 12833.

¹¹ *Id.*

¹² *DTV Fifth Report and Order*, 12 FCC Rcd at 12856.

with full power digital facilities.¹³ In the process of bringing the benefits of DTV to the American public, broadcasters have faced delays in tower construction and equipment delivery, as well as tremendous expenses. These issues have prevented many broadcasters from completing construction of their DTV stations. Moreover, according to a recent study by the General Accounting Office (“GAO”), there are “numerous [other] factors impeding the progress of the DTV transition.”¹⁴ These include low set sales¹⁵ and lack of consumer awareness;¹⁶ concerns about how digital content will be copy protected;¹⁷ uncertainty about cable carriage requirements; technical problems regarding the connections between DTV receivers and cable systems; and a dearth of compelling HD content being aired by broadcasters.¹⁸

¹³ Summary of DTV Applications Filed and DTV Build Out Status as of March 12, 2003, *available at* <http://www.fcc.gov/mb/video/files/dtvsum.html>. An additional 497 stations are broadcasting in digital, but are operating at reduced power pursuant to special temporary authority. *Id.*

¹⁴ General Accounting Office (“GAO”) *GAO Highlights, Additional Efforts Could Help Advance Digital Television Transition* (November 2002) (“*GAO Highlights*”); *see* General Accounting Office, *Additional Efforts Could Help Advance Digital Television Transition*, at 15 (November 2002) (“*GAO Report*”).

¹⁵ Only a very small number of DTV-ready receivers (*i.e.*, receivers that can display DTV programming but do not have the capability to tune over-the-air DTV signals or decode them for display) are being sold, and an even smaller number of set-top DTV tuners and receivers with an integrated DTV tuner are being sold. *Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 17 FCC Rcd 15978, 15993-94 (2002). In fact, only about one percent of television equipment sold in 2001 was capable of receiving a digital signal. *GAO Highlights*, at 1.

¹⁶ Indeed, according to a *GAO* survey, forty percent of Americans have never heard about the transition to DTV, and fewer than one in five are “very aware” of the DTV transition. *GAO Report*, at 15.

¹⁷ *GAO Report*, at 31. As the Commission is well aware, DTV presents special copy protection issues that do not exist with respect to analog broadcasts. Unlike analog programs, copies of DTV programs are exact replicas of the originals and can be distributed more easily and widely through the Internet. *Id.* Based on copy protection concerns, Viacom, for example, is threatening to cease high-definition programming. *See* Bill McConnell, *Critics Take Shots at Copy-Protection Plan; CBS threatens to yank HD fare if ‘flag’ is struck*, *Broadcasting & Cable* (Dec. 16, 2002).

¹⁸ Although the amount of digital content available today far exceeds that which was available only a short time ago, HD programming still represents “only a small portion of total television programming.” *GAO Report*, at 4. Despite the increase in the number of stations broadcasting in digital, most of the available programming is not true digital content, but rather programming that is merely duplicated from a station’s analog channel and converted to a digital format. *Id.* at 28. A survey by the GAO reveals that as of 2001, broadcasters were providing only an average of 23 hours per week of digital content, most of that dependent on programming provided to them by their affiliated

In light of these impediments to the rapid deployment of DTV, it is fairly well acknowledged that the transition is not “near the end.” Indeed, FCC Chairman Michael K. Powell,¹⁹ Senator John McCain, Chair of the Senate’s Committee on Commerce, Science, and Transportation,²⁰ Representative W.J. “Billy” Tauzin, Chair of the House Committee on Energy and Commerce,²¹ as well as numerous other members of Congress,²² have voiced severe skepticism that the transition will be completed by 2006. Accordingly, given the current status of the transition, application of the existing simulcast requirement would not only be premature, but, as discussed below, detrimental to the transition’s continued progress.

network. *Id.* The networks vary widely in terms of the amount of digital content provided, but none of them provide a full digital broadcast schedule, and Fox, UPN, and PAX provide virtually no HD programming. *Id.* at 29.

¹⁹ See *Transcript of Conversation Between Chairman Michael K. Powell and Sam Donaldson, NAB Convention* (April 24, 2001), available at <http://ftp.fcc.gov/Speeches/Powell/2001/spmcp102.pdf> (Chairman Powell stating that he is “openly critical that the [2006] date, as originally envisioned, will in any way be realized”).

²⁰ 148 Cong. Rec. S2221 (Daily Ed. Mar. 21, 2002) (Statement of Sen. McCain) (“I believe that there's not a snowball's chance in Gila Bend, AZ, that the broadcasters will vacate this spectrum by 2006.”); *Transcript of Hearing on The Transition to Digital Television Broadcasting Before the U.S. Senate, Committee on Commerce, Service and Transportation*, at 3 (Mar. 1, 2001) (“[T]his 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.”).

²¹ *Prepared Statement of Rep. Tauzin for Hearing on Staff Discussion Draft on the Transition to Digital Television Before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce, House of Representatives* (Sept. 25, 2002), available at http://energycommerce.house.gov/107/hearings/09252002Hearing719/The_Honorable_Billy_Tauzin.htm (“[W]e are not as far along as we need to be. . . . Unfortunately, many issues remain unresolved—creating uncertainty in the marketplace and for consumers. . . . [T]ime for the DTV transition is running out. Time is not on our side. Right now this transition is on a collision course with consumers and we must act now to turn things around.”).

²² *Transcript of Hearing on Staff Discussion Draft on the Transition to Digital Television Before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce, House of Representatives*, 107th Cong., 2d Sess. 3 (Sept. 25, 2002) (Statement of Rep. Markey) (“The digital television transition is woefully behind schedule, and quite simply will not conclude by the original target date of 2006.”); *id.* at 17 (“I am concerned that the May 2006 date might be too soon.”) (Statement of Rep. Terry); *id.* at 19 (“I am still concerned about the 2006 date in the bill. Realistically, is this enough time?”) (Statement of Rep. Shimkus).

B. Broadcasters Need Maximum Flexibility to Hasten Public Acceptance of DTV Technology.

When the Commission adopted the simulcast rule, it acknowledged that broadcasters needed flexibility to offer innovative digital content during the “critical launch phase of DTV,” because “many consumers’ decisions to invest in DTV receivers will depend on the programs, enhanced features, and services that are not available on the NTSC service.”²³ Indeed, innovative HD content has long been recognized as the necessary prerequisite to creating consumer interest in DTV technology, consumer willingness to purchase DTV sets, and, consequently, the successful completion of the DTV conversion.

Acknowledging the vital importance of HD content to the transition, the agency has “urge[d] broadcasters to increase the amount of digital and high definition programming” in an effort to help move the conversion to DTV forward,²⁴ and Chairman Powell has noted that the DTV transition will not “shift into high gear” until there is “a critical mass of compelling digital content” that is distributed to consumers.²⁵ The Chief of the FCC’s Media Bureau, W. Kenneth Ferree, recently characterized content as the “key” to the DTV conversion, noting that:

Consumers need a reason to invest in the digital transition. They have a very good analog system now. Why should they switch? Content. They will invest in digital when they see content that is significantly better than what they have available in analog today.²⁶

²³ *DTV Fifth Report and Order*, 12 FCC Rcd at 12832.

²⁴ *Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5946, 5950-51 (2001).

²⁵ *Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Separate Statement of Chairman Michael K. Powell, 17 FCC Rcd 15978, 16020 (2002). Thus, in April of 2002, Chairman Powell called on the top four broadcast networks to provide HD or other “value added DTV programming” in an effort to speed the digital transition. *Proposal for Voluntary Industry Actions to Speed the Digital Television Transition* (April 2002), available at http://www.fcc.gov/commissioners/powell/mkp_proposal_to_speed_dtv_transition.pdf.

²⁶ *Written Statement of W. Kenneth Ferree, Chief, Media Bureau, FCC, on “Copyright Protection and the Broadcast Flag, Before the Subcommittee on Courts, the Internet and Intellectual Property, Committee on Judiciary, U.S. House of Representatives*, at 4 (Mar. 6, 2003).

Representative Tauzin has similarly remarked that “Content is key. We all know it. If consumers are going to buy this equipment, sign up to these new broadband systems that are going to move it around, they want something rich and exciting in programming.”²⁷ Moreover, although the broadcast, cable, and consumer electronics industries have clashed over many issues relating to the digital transition, there is a large consensus that consumers need to be able to view a variety of unique digital content before they will adopt DTV technology.²⁸ Indeed, during a recent hearing before the House Committee on Energy and Commerce regarding the DTV transition, representatives from the broadcast, cable and consumer electronics industries all pointed to the carriage of high quality innovative digital content by broadcast stations as a significant issue in evaluating the transition to digital television.²⁹

²⁷ *Transcript of Hearing on Staff Discussion Draft on the Transition to Digital Television Before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce, House of Representatives, 107th Cong., 2d Sess. 6 (Sept. 25, 2002) (Statement of Rep. Tauzin).*

²⁸ *See, e.g., Comments of the Consumer Electronics Ass’n, CS Docket Nos. 98-120, 00-2, 00-96, at 7 (filed June 11, 2001) (“as a result of the dearth of digitally originated programming on the market today, most digital consumers experience marginal and highly duplicative programming”); Reply Comments of the National Cable & Telecommunications Ass’n, CS Docket Nos. 98-120, 00-2, 00-96, at 8 (filed Aug. 16, 2001) (suggesting that broadcasters should “invest in compelling digital programming to prompt viewers to obtain digital tuners”); see also id. at 10-11, Attachment A at 3, 8.*

²⁹ *Statement of Robert J. Wright, President and CEO National Broadcasting Company, Inc. before the Subcommittee on Telecommunications & the Internet, Committee on Energy & Commerce, U.S. House of Representatives, at 2-3 (Sept. 25, 2002) (noting that for the transition to proceed, “the consumer must get better content than their analog television experience,” and stated that “high quality content will drive consumer acceptance of digital television”); id. at 3 (“high definition will play an important role because of the dazzling video and audio clarity it offers viewers . . . [and] [D]igital technology . . . also creates the possibility of new programming forms”); Testimony of Michael Willner, Vice Chairman and CEO, Insight Communications on the Transition to Digital Television before the Subcommittee on Telecommunications & the Internet, Committee on Energy & Commerce, U.S. House of Representatives, at 5-6 (Sept. 25, 2002) (cable industry representative stating that Americans have been slow to adopt digital broadcasting because “few broadcasters are offering the compelling high definition content that was promised in exchange for free digital spectrum” and that “[t]he cable industry believes that compelling high definition programming is the key to the digital transition”); Statement of Alan McCollough, Chairman, President & CEO Circuit City Stores, Inc. for the Consumer Electronics Retailers Association, at 2 (Sept. 25, 2002) (listing content as the first item in a list of what consumers want and expect out of digital television, and noting that “what the consumer is excited about is access to high quality content”).*

The reality, however, is that “[u]ntil more consumers have purchased digital television sets, there is little incentive for networks to provide and cable systems to carry more digital programming.”³⁰ Thus, as Chairman Powell has put it, a classic “chicken-and-egg” problem lies at the heart of the DTV transition.³¹ Given the current low set penetration levels, many broadcasters are, quite reasonably, declining to invest the money necessary to produce or obtain high quality HD programming. The high costs of constructing DTV facilities have contributed to this problem, leaving broadcasters with little or no funds available to spend on HD content. The dearth of innovative digital content being broadcast has also had profound effects on the willingness of cable operators to carry broadcasters’ DTV signals. Cable operators have consistently stated that there is no reason for the FCC to require carriage of broadcasters’ digital signals, because those signals generally offer little more than the existing analog channels that cable operators are already required to carry.³²

The lack of innovative digital content thus stands as a significant impediment to the DTV conversion. Offering broadcasters flexibility to bring compelling HD programming to viewers is therefore even *more important* now than it was when the Commission adopted the simulcast

³⁰ *GAO Report*, at 29-30.

³¹ *Id.*; see *Transcript of Conversation Between Chairman Michael K. Powell and Sam Donaldson, NAB Convention* (April 24, 2001), available at <http://ftp.fcc.gov/Speeches/Powell/2001/spmcp102.pdf>

³² See *Reply Comments of the National Cable & Telecommunications Ass’n*, CS Docket Numbers 98-120, 00-2, and 00-96, at 13-14 (filed Aug. 16, 2001) (arguing that cable carriage of broadcasters’ digital signals will not increase consumer purchases of DTV sets where broadcasters offer only standard definition programming on their digital channels); see also *supra* note 28; *Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission’s Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999, Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2651 (2001) (requesting information regarding the amount of digital programming being aired in an HD format, and the amount of original digital programming being aired, in connection with the DTV must carry issue).

rule.³³ The simulcast rule, however, with its phased-in deadlines and strict requirement that broadcasters eventually simulcast all of their analog programming on their digital channel, is manifestly *inflexible* and is stifling innovation. Accordingly, the simulcast rule should be eliminated.

C. Elimination of the Simulcast Rule Will Do Much to Advance the DTV Transition and Will Not Have Any Adverse Effects.

By offering broadcasters access to an expansive library of HD content at a far lower cost than such content could otherwise be produced or obtained, HDNet can provide a solution to many of the problems discussed above. Because the ability to offer HDNet's programming does not require a large investment on the part of individual broadcasters, they will be more willing to offer HD content notwithstanding low set penetration levels and the existence of other impediments to the DTV transition. In turn, if high quality digital programming like that provided by HDNet is made widely available, it will do much to spur DTV set sales and increase consumer awareness, thereby significantly advancing the digital transition.

By mandating duplication of programming between analog and digital channels, however, the simulcast rule stands as a major obstacle to the very innovation and flexibility that is needed to drive the DTV transition forward. Indeed, the simulcast requirement provides no incentive for broadcasters to produce or obtain compelling HD content that differs from that aired on their analog channels. It also squeezes out program suppliers, like HDNet, that can meet the need for compelling digital program offerings. If broadcasters must eventually simulcast 100% of their analog programming in digital, then there is no room in the marketplace for a company that seeks to offer a wide variety of high definition programs. In addition, unless new programmers can offer broadcasters the equivalent of a full broadcast day for both their

³³ See *DTV Fifth Report and Order*, 12 FCC Rcd at 12832-33.

analog and digital channels, they cannot effectively compete with the established networks in the presence of a simulcast requirement. In short, the simulcast rule is stifling innovation and adoption of DTV programming and inhibiting the ability of broadcasters, and thus American television viewers, to reap the enormous benefits of DTV technology. The rule's elimination, by contrast, will allow program suppliers like HDNet to continue to offer innovative HD programming to television viewers through creative arrangements with DTV broadcasters.

In addition, elimination of the simulcast rule will cause no countervailing harms. When the Commission adopted the rule, it found that "a simulcast requirement during th[e] initial transition phase appear[ed] to be unnecessary because . . . market place forces w[ould] ensure that the best NTSC programming will be simulcast on the digital channel and broadcasters . . . indicate[d] that they w[ould] simulcast NTSC programs on the DTV channel even in the absence of a requirement."³⁴ The agency presumed, however, that there would be "benefits to a simulcast requirement near the end of the transition period,"³⁵ reasoning that such a mandate would help ensure that consumers "enjoy continuity of free over-the-air program service" when the Commission reclaims broadcasters' analog channels.³⁶

HDNet submits that a mandatory simulcast rule is entirely unnecessary to ensure that consumers do not lose access to popular programming. Just as when the FCC adopted the rule, marketplace forces will continue to ensure that broadcasters simulcast their best analog

³⁴ *Id.* at 12833.

³⁵ *Id.*

³⁶ *Id.* Without explanation, the FCC stated that it might "be difficult to terminate analog broadcast service if broadcasters show programs on their analog channels but not on their digital channels," and concluded that it would be "easier to terminate analog services and reclaim the spectrum at the end of the transition if most broadcast households . . . do not suffer the loss of a current program service only offered on analog channels." *Id.*

programming on their digital channels.³⁷ There is absolutely no reason to believe, and no credible suggestion in the record of any of the agency's prior DTV proceedings, that in the absence of a simulcast requirement broadcasters will cease airing programming that consumers demand. Indeed, it defies logic to suggest that broadcasters will stop offering the very programs that their viewers wish to watch as a result of the DTV transition. Thus, there is simply no risk that households will lose access to valuable programming even at the end of the transition.

III. CONCLUSION

The simulcast rule is entirely at odds with the Commission's previous recognition that broadcasters need "flexibility to program their DTV channels to attract consumers, especially during the critical launch phase of DTV."³⁸ We are, as discussed above, still very much in the midst of DTV's "critical launch phase" and broadcasters and programmers need more flexibility than ever. Stifling the development of new and enhanced digital services by requiring simulcasting will not ensure a speedy transition—to the contrary, the presence of the simulcast requirement is impeding the transition to DTV and preventing HDNet from offering its compelling and innovative HD digital programming to American viewers. HDNet submits, therefore, that the FCC should repeal the simulcast rule, and clear the way for the introduction and dissemination of a host of new digital television program offerings.

³⁷ *Id.*

³⁸ *Id.* at 12832.

Respectfully submitted,

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