



December 15, 2003

**EX PARTE**

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

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

Dear Ms. Dortch:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

**/s/ Daniel L. Brenner**

Daniel L. Brenner

Diane B. Burstein

Michael S. Schooler

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

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

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