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FILED ELECTRONICALLY

Chairman Michael J. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Submission in MB Docket 03-15 & 98-120

Dear Chairman Powell:

Recently the Media Bureau has discussed a potential plan to expedite the DTV Transition by allowing digital broadcast signals to be downconverted by the MVPDs and counting the television households that receive the downconverted digital signals towards the 85% penetration test (the "Plan"). We write now in support of the Plan which we believe is (1) legally sustainable, (2) protects the largest number of television households and analog sets at the least consumer cost, (3) enhances the universal availability of broadcast television programming, and (4) would have no adverse impact on consumer demand for digital television services. The Plan demonstrates the kind of innovative thinking at the Commission that will be necessary to bring the DTV Transition to a conclusion any time in the reasonably foreseeable future. We urge the Commission to adopt the Plan and proceed with bringing the DTV Transition to an end.

1. Downconversion of Digital Signals Not Illegal.

Allegations that the downconversion of digital signals is unlawful are wrong as a matter of law. The non-degradation provisions with respect to "must carry" of commercial television stations are contained in 47 USC 534(b)(4)(A) and clearly apply only to analog signals. Otherwise there would be no need for subparagraph Section 534(b)(4)(B) which addresses digital must carry and reads:

> At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding 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. (Emphasis added).

In addition, when enacting Section 309(j)(14)(B)(iii) Congress made it clear that "the *scope* of any MVPD's 'must carry' obligations for digital television signals" was left to the Commission.[1] This is consistent with 47 USC 534(b)(4)(B). Whether or not

[1] See, Balanced Budget Act of 1997, 105th Cong., 1st Sess. Conf. Rep. 105-217, 577 (1977)("Conference Report")(Emphasis added).

commercial broadcast digital signals are subject to "must carry" and, if so, to what extent and under what conditions are clearly within the ***scope*** of whatever digital must carry obligations the Commission should ultimately adopt in the advanced television must carry proceedings anticipated by Congress in Section 534(b)(4)(B). As such, downconversion of digital television programming signals of commercial broadcast television stations is not unlawful under 47 USC 534 nor is it prohibited or even addressed by implication in Section 309(j)(14).

Clearly Congress did not intend by Section 309(j)(14)(B) that 85% or more of the television households in a market had to be able to enjoy the better picture and audio offered by digital television as a condition precedent to the return of the analog spectrum. If they did then they would not have allowed digital-to-analog converters to count. Instead, the real Congressional concern was that after the DTV Transition at least 85% of the television households in the market could still watch the television programming offered by the local digital broadcast stations. Television households which are connected to cable or other MVPDs that downconvert digital signals would still be able to watch the television programming and therefore would not "go dark". Television households with digital sets or digital-to-analog converters would still be able to watch the television programming and not "go dark".

Congressional concern that after the transition a significant percentage of television households still have the ability to watch the programs they saw prior to the transition is demonstrated in the actual language of Section 309(j)(14)(B)(iii). Subpart (I) focuses on the percentage of television households which do not subscribe to a MVPD that "carries one of the *digital television service programming channels* . . ." In contrast, subpart (II) focuses on the ability of the television households to receive the "*digital television service signals*"[2] of local digital broadcast stations either on a digital set or by use of digital-to-analog converter. Through the use of different terminology Congressional intent is clear.

If a household subscribes to a MVPD and can watch at least one of the *programming channels* offered by the local digital stations, that household is not counted in the 15% traunch. It does not matter whether that household receives the digital stations' programming in digital or downconverted to analog. That household can still watch the *programming*. That household is unaffected by the transition. If that household does not subscribe to a MVPD, then the only way it can receive the *digital television service signals* of local digital stations is over the air. In that instance, in order not to be counted in the 15% traunch the non-subscriber household must be able to

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[2] The term "digital television service" is defined in 47 USC 153(49)(B) as "television service provided pursuant to the transmission standards prescribed by the Commission in Section 73.682(d) of its regulations (47 C.F.R. 73.682(b))." There is a clear and obvious distinction between carriage of a digital *programming channel* by a MVPD and receipt of a *digital television service signal* by a household with a digital set or converter.

receive the broadcast *digital television service signals* on a digital set or by a set top converter box.

Allegations that the Auction Reform Act ("ARA") demonstrates Congressional disdain for the "early return of spectrum at the cost of television service" are likewise overstated. In fact, the legislative history of the ARA demonstrates Congressional disdain with the lack of progress in the DTV Transition. The interference protection provisions of Section 6 of the ARA were inserted as an amendment to the original bill to prevent analog stations from reaping a windfall profit from the sale of spectrum given to them free and moving their analog operations to an in-core channel on the digital allocation also given to them free. Congress was also concerned with efforts to move analog stations to in-core digital allotments which had not been designed for analog operations. The Congressional concern was not with protecting analog viewers. That is why Section 6 of the ARA would not, for example, apply to an out-of-core analog or digital station seeking to relocate to an in-core channel and continuing thereafter to operate in digital, or relocating an out-of-core station analog station to an in-core analog channel.

2. Downconversion Protects Largest Number of Households From Going Dark.

The best way to protect the largest number of television households from "going dark", as well as the best way to protect the largest number of analog sets in operation, is to allow downconversion at the headend or otherwise by the MVPDs. That way the largest number of consumers would not have to purchase either a digital television set or a digital-to-analog converter in order to continue to be able to watch television. We believe it is safe to assume that a substantial number of television households have more than one analog set connected to their MVPD service[3]. Downconversion at the headend or at the cable entrance into the household protects *all* analog sets connected to the MVPD service. Absent downconversion the MVPD television households would be required to purchase a converter for *each* analog set connected to the service or a device that would be placed on the outside of the household that would downconvert the digital signals to analog throughout the house.[4]

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[3] We have not found data projecting the actual number of sets connected to MVPD services. We know for a fact, however, that many cable households have more than one set connected to the cable. So claims by some that a significant number of subscriber television households have only one set connected to the cable and many other sets unconnected seem to be unfounded. Even for those cable subscriber households that do have sets which are not connected to cable, all it would take to connect would be to purchase some cable and a splitter from the local hardware store, run the wiring and connect the unconnected sets. The cable company may even do that for free! When we moved into our current home in 1996 the local cable company recabled the entire house with connections to virtually every room for free! I now have 5 television sets connected to cable, all for a fee of slightly less than $50 per month. The ability to have multiple sets connected to the cable is the primary reason I have not switched to a lower priced satellite service. Satellite providers are now fighting back with multiple connection "specials".

[4] Arguments that a digital-to-analog converter must reside at each analog set would prevent the use of digital-to-analog converter devices designed to reside on the outside of a subscriber household, sometimes referred to as a Video Network Interface Unit ("VNIU"), as well as complete downconversion at the

The purpose of the DTV Transition is not to drive consumer demand for new electronics equipment. Consumer demand for new sets and equipment will be driven by compelling new digital programming and services that the broadcasters offer over the air and that the MVPDs offer over their systems, and affordable equipment pricing. A policy goal of the FCC with respect to the DTV Transition should be to ensure that it is accomplished in the lease intrusive fashion on consumers, and that means downconversion at the headend or with VNIU's or other devices developed by or for the MVPD industry to serve their analog customers until such time as the MVPDs themselves convert to all digital..

3. Downconversion Promotes and Preserves Free, Universally Available, Local Broadcast Television in a Digital World. The DTV Transaction is wrecking financial havoc on many of the nation's small stations and those not affiliated with the large networks. The longer the DTV Transition drags on the greater the losses these stations will suffer due to dual station operating costs and the fact that stations receive little if any additional advertising revenue from digital operations. The best way to protect the small stations and the local non-affiliated stations, and the best way to promote universal availability of free broadcast television, is to adopt policies that reduce the duration of dual station operations. The Plan would do that.

If stations are going to be required to broadcast in digital, then the best way to protect them is to ensure that they are given the opportunity to get their digital programming into the most television households. That means cable and other MVPD carriage of the digital programming downconverted to analog.[5] Carriage of digital programming in digital format at this time will not work. Too many MVPD subscribers still use analog sets so providing a digital signal to them only reduces the number of households with access to the digital station programming. Less viewer households means reduced ratings which mean less advertising income to the station which threatens the universal availability of free over-the-air broadcast television.

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headend. VNIUs are being considered through the efforts of Next Generation Network Architecture LLC ("NGNA") and others in the cable industries. See, "A Sneak Peek at Cable's Battle Plan for the Future", CED Magazine, May 2004, p. 24. This article demonstrates the proactive efforts of the cable industry to transition to digital while protecting the millions of analog only subscriber households.

[5] We offer no comment on the legality of multicast must carry or carriage of "all free bits". Both sides have valid arguments for and against. We do submit, however, that multicast must carry runs a risk of creating a competitive disadvantage to the smaller and independent local stations in favor of the larger and better financed stations. If, as claimed in recent cable industry filings, many smaller broadcast stations are not particularly interested in multicasting, then multicast must carry benefits only those few stations that can afford to undertake such activities. Maybe the best course of action at this time is to proceed with the Plan and defer action on multicast must carry until closer to the end of the transition when the Commission would have a better understanding whether or not it is really an important issue.

Notwithstanding downconversion the few but hopefully growing number of over-the-air television households that have digital sets or digital-to-analog converters could still watch the digital station programming, so downconversion has no impact on them. In fact, over-the-air digital viewership could increase as the digital station steps up to full power, full time operations with compelling programming and possibly other "ancillary and supplementary" digital offerings.

Notwithstanding downconversion the growing number of MVPD subscribers with digital sets or capability would still be able to watch the downconverted programming as well as the numerous and growing number of digital programming channels MVPDs make available. Furthermore, if digital MVPD subscribers demand local programming in digital, it is in the MVPD's best interest to make it available. Responses by the cable industry in these proceedings clearly demonstrates that many cable companies are already carrying both the analog and digital programming of many stations, and that number could be expected to increase as stations begin to provide more HDTV programming and compelling SDTV programming.

Some interested parties have asserted that absent multicast must carry very few stations would provide multiple digital programming streams. Others have disagreed with such assertions. We questions whether multicasting would be a driver of consumer demand for digital television at this time. Consumer demand seems to be driven by HDTV; however, HDTV is not the minimum required standard of digital television. Since MVPDs are going to be required to pass through HDTV signals in HDTV and since HDTV is the main driver behind consumer demand for digital television, then it seems efficient spectrum management requires digital broadcasting to be in HDTV format. This is especially true if broadcasters in general are not likely to engage in multicasting in the first place.

4. The 15% Left Behind. The only thing downconversion does not directly address is the 15% of television households that could possibly be left behind or "go dark" after the transition. The truth of the matter is, MVPD subscriber trends[6] are such that by the end of 2008 or 2009 the number of television households relying solely on over-the-air analog television most likely will be far less than 15%, both nationwide and in many markets. Still, however, a reasonable effort should be made to protect as best as reasonably possible those television households from going dark. But at the same time a statistically small number of households should not be allowed to frustrate the efficient use of valuable spectrum. **The answer lies cheap digital-to-analog converters**.

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[6] According to the Tenth Annual Report on the Status of Competition in the Market for Delivery of Video Programming, Released January 28, 2004 (10th Annual Report), at June 30, 2003 MVPD penetration was 85.25% of all television households. Although the cable industry had experienced recent declines in subscriptions, it did experience 2.5% growth in the past year. Satellite services are the main competitor to cable with 21.63% of all MVPD subscribers, and growing. It is clear that the over-the-air market is "diminishingly small".

Once the non-subscriber television households are faced with completely loosing the ability to watch television, then and only then will they seriously look for available options. Consumer demand for digital-to-analog converters that will convert over-the-air digital service signals will not develop until over-the-air reliant households realize that they are about to go dark. Consumer demand for converters is needed first to entice equipment manufacturers to make them, and second to drive down prices. There are virtually no broadcast capable digital-to-analog converters commercially available today because nobody needs one. Who needs or would even want a digital-to-analog converter if they can see the same programming in analog without one?

To help low income television households afford converters we urge the Commission to seek Congressional action that would provide for the subsidization of converters or digital sets using a portion of the proceeds from the auction of the remaining 60 MHz of 700 MHz band earmarked for commercial uses. According to the US Census Bureau, on May 14, 2003 the total US population was in excess of 293 million. With 60 MHz of spectrum auctioned at an average price of just $1.00 MHz/POP, total auction proceeds would be over $17.5 billion. In connection with Congressional consideration of the Commercial Spectrum Enhancement Act ("Enhancement Act"), the House Committee on Commerce and Energy concluded that the spectrum to be cleared for auction under the Enhancement Act could be expected to go for at least $1.50 MHz/POP in 2006. Using $1.50 MHz/POP for the remaining 60 MHz of 700 MHz spectrum, total auction proceeds would be over $26 billion.

The Tenth Annual Report estimates that at June 30, 2003 there were approximately 107 million television households. Even if every television household was given $50 towards the purchase of a converter or digital set the total cost would be less than $6 billion. If just 15% of the television households were given the $50 the total cost would be less than $1 billion.

Efforts to peg the value of the remaining 700 MHz spectrum at the prices paid in Auctions 44 and 49 are without merit. There are many reasons why the average price paid in those auctions for the C and D block licenses was so low. The main reason being the fact that the DTV Transition was stalled and apparently going nowhere anytime in our lifetimes. It should be safe to assume that the remaining 700 MHz spectrum would be auctioned at prices significantly higher than those of Auctions 44 and 49, and even higher than the assumed prices for the spectrum to be auctioned in connection with the Enhancement Act, *but only if* it is clear to auction participants that all or a significant amount of the spectrum would be freed of television interference in the reasonably foreseeable future. While the Plan is not as good as a firm transition date, it is better than what we have today.

5. One Possible Alternative.

One possible alternative to the Plan would be to clear the 700 MHz band of television incumbency by the end of 2006 and let the DTV Transition continue on the in-

core channels at whatever pace is driven by consumer demand. Is it absolutely necessary for the entire nation to convert to digital broadcasting before 18 television channels can be cleared?

While there are many different ways to clear the 700 MHz band, we offer the following potential steps for consideration:

- Immediately rescind all DTV allotments for unbuilt digital stations. Some of these stations might never get built.

- Require termination of all out-of-core DTV station operations by the end of 2006. These stations could flash convert to digital on their in-core analog channel at a later date or be granted new in-core DTV allotments when they become available. These stations were always supposed to be short term and in many instances the FCC would be doing them a favor by not requiring dual operations.

- Allow in-core digital stations to terminate digital operations by the middle of 2006 if it makes room for the relocation of an out-of-core analog station (or out-of-core digital station that desires to continue to operate two stations), or if the in-core station demonstrates financial need or meets some other criteria determined applicable by the FCC.

- Relocate all out-of-core analog stations to in-core channels by the end of 2006 and allow them to convert to all digital on an in-core channel at anytime prior to the end of the DTV Transition. If they move in-core and convert to all digital, provide digital must carry rights that provide for carriage of the digital signal in digital and downconversion for the analog subscriber households.

- For the rescinded or terminated DTV stations, grant them post-transition interference protection for their entire Grade B contour.

- Provide for digital set and converter subsidies.

There are numerous benefits of this proposal including, without limitation:

- While an over-the-air dependent analog television household might loose the ability to watch the programming of one or two analog television stations in a given market, they would still be able to watch all of the in-core station programming.

- MVPD households would not loose access to any local programming.

- Approximately 170 out-of-core digital stations would save a significant amount of money by being able to operate only one station for a period of time.

- There would be no detrimental impact on consumer demand for digital television because what demand is there is being driven primarily by cable and satellite providers and by HDTV.

- A date certain for clearing the 700 MHz band would be established and the FCC could proceed to auction the remaining spectrum with a realistic expectation of net auction proceeds in the billions of dollars.

- Valuable spectrum would be cleared for new third generation and above wireless services that would bring additional competition to the wireless marketplace, stimulate economic growth in the high-tech and telecommunication sectors, create (or save) jobs in the high-tech and telecommunication sectors, help bridge the digital divide by bringing high speed internet access to rural America, and last but certainly not least, clear Upper 700 MHz spectrum for state-of-the-art wireless first responder and other public safety networks.

In conclusion, we submit that the worst thing the FCC could do at this time is nothing. For over ten years the Commission has recognized that cable carriage of digital programming was going to be necessary to bring the transition to a close. There is no reason to delay any further the adoption of rules and regulations addressing "the scope" of digital must carry or the proper interpretation of Section 309(j)(14). There is no way to please both the broadcasters and MVPD industry with whatever rules or interpretations are adopted. Their positions are mutually exclusive. In the meantime vast amounts of prime spectrum remain dormant or underutilized. The Plan is legal, workable and would speed the DTV Transition to conclusion with minimal adverse impact on consumers. We urge the Commission to adopt the Plan and proceed with bringing the DTV Transition to an end.

Respectfully submitted,

CAVALIER GROUP, LLC

R. Nash Neyland

cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Mr. W. Kenneth Ferree