

Before the  
**Department of Commerce**  
**National Telecommunications and Information Administration**  
1401 Constitution Avenue, NW  
Washington, DC 20230

Rural and Small Market Access to Local            )  
Television Broadcast Signals                            ) Docket No. 000208032-0032-01  
  )  
  )

**COMMENT OF THE ASSOCIATION OF AMERICA’S PUBLIC TELEVISION  
STATIONS AND THE PUBLIC BROADCASTING SERVICE**

The Association of America’s Public Television Stations (APTS) and the Public Broadcasting Service (PBS) hereby submit their comments in the above captioned proceeding. APTS is a nonprofit organization whose members comprise nearly all of the nation’s 352 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch, as well as engaging in planning and research activities on behalf of its members. PBS is a nonprofit organization owned by its member public television stations, whose programming reaches over 97 million Americans each week. PBS distributes noncommercial programs and provides other program-related services to public television stations throughout the country and is a leader in the development of new and improved television technologies.

On February 14, 2000, the National Telecommunications and Information Administration (NTIA) issued a Notice of Public Meeting and Request for Public Comment to explore the most effective means to ensure that viewers in rural and small communities receive the benefit of access to local programming through new

technologies.<sup>1</sup> NTIA has solicited written comments on “any issue of fact, law or policy that may inform the U.S. Department of Commerce on rural and small market access to local television broadcast signals.”<sup>2</sup>

Consistent with their statutory mission of providing universal service, public television stations employ a wide variety of technologies – both broadcast and nonbroadcast – to deliver local, noncommercial educational services to rural areas. APTS and PBS therefore urge NTIA to recognize the importance of developing a policy that not only protects and permits the enhancement of local public broadcasting services, but also encourages universal access to these services by use of all appropriate distribution technologies. Additionally, APTS and PBS urge NTIA to support both digital carriage rules for cable, as well DBS must-carry obligations, to ensure the delivery of local, noncommercial public television services to rural and small markets. Moreover, APTS and PBS urge NTIA to recognize that the secondary status of, as well as the possibility of auctions for, public television translators may threaten the universal delivery of free, over-the-air public television services, especially to rural and small markets. Accordingly, public television urges NTIA to support an enhanced status for television translators and to oppose the auction of spectrum on which public television translators operate, or for which they have applied. Lastly, APTS and PBS submit that by establishing a policy that supports the transition of public television translators to digital technology— a policy which would include funding support—NTIA would be taking advantage of an efficient way to ensure the delivery of new technologies to rural communities.

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<sup>1</sup> Notice of Public Meeting, Request for Public Comment, 65 Fed. Reg. 7362-7363 (February 14, 2000).

<sup>2</sup> Id.

**I. The Statutory Mission of Public Television is to Serve Rural and Other Underserved Areas In Ways that Address Local as Well as National Concerns**

As part of its statutory mission to address the needs of unserved and underserved audiences,<sup>3</sup> public television is committed to the ubiquitous and universal delivery of local, noncommercial educational services. Indeed, one of the goals of public television stations is to “make public telecommunications services available to all citizens of the United States.”<sup>4</sup> Accordingly, nearly 99 percent of all television households have access to the free, over-the-air television programming offered by local public television stations, with each station offering a unique mix of national and local programming tailored to the specific needs of each community.<sup>5</sup>

Public television’s commitment to localism is second to none. Indeed, Congress recognized that the purpose of public television is in part to “constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs.”<sup>6</sup> This local focus was further recognized by Congress when it found that:

In recent years, public television ... [has] coalesced community action in a number of important areas, including drug abuse, the urban crisis, the disadvantaged, health, preserving and protecting the environment, strengthening the family structure, and improving education. The Committee recognizes the unique ability of local public television ... stations and public telecommunications services to bring together organizations, businesses, state

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<sup>3</sup> With regard to public television, Congress has established that “it is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities.” 47 U.S.C. §396(a)(6).

<sup>4</sup> 47 U.S.C. §396(a)(7) (emphasis added).

<sup>5</sup> PBS Spring 1999 National Audience Report (October 1, 1999).

<sup>6</sup> 47 U.S.C. §396(a)(8).

and local agencies, parents, and other individuals to examine problems and seek solutions through the use of electronic media.<sup>7</sup>

This local focus is further encouraged by the unique institutional policies that require, with limited exceptions, that public television stations possess diverse, representative governing boards as well as community advisory boards.<sup>8</sup> Because they are intimately connected to the communities they serve, public television stations have historically focussed on local issues of concern through the creation and dissemination of unique locally-produced programming—from local and regional news to local arts and events coverage, from coverage of state and local politics to adult education initiatives.

## **II. Public Television Uses a Variety of Technologies to Further Its Mission**

As part of its mission to deliver valuable telecommunications services to unserved and underserved constituencies, including those Americans living in rural and small markets, public television uses a variety of technological means, in addition to over-the-air broadcast technology, to distribute its services. Indeed, distribution of public television signals by both broadcast and non-broadcast technology is fostered by the Communications Act itself. For instance, Congress recognized that

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<sup>7</sup> H.R. Rep. No. 102-363, at 18 (1991). See also S. Rep. No. 102-221, at 6-7 (1991).

<sup>8</sup> See 47 U.S.C. §396(k)(8)(A) (requiring all public television stations, other than state licensees, to possess community advisory boards in order to receive federal grants through CPB). See also In re Applications of WQED Pittsburgh and Cornerstone Television, Inc., Memorandum Opinion & Order, FCC 99-393, ¶51 (December 15, 1999), partially vacated by Order on Reconsideration, FCC 00-25 (January 28, 2000) (requiring non-profit organization licensees to submit “evidence that officers, directors and members of the governing board are broadly representative of the educational, cultural and civic groups in the community.”).

[I]t is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.<sup>9</sup>

Further, Congress made clear that

[I]t is in the public interest to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services.<sup>10</sup>

And moreover, Congress encouraged the

delivery of public telecommunications services to as many citizens of the United States as possible by the most efficient and economical means, including the use of broadcast and nonbroadcast technologies.<sup>11</sup>

Public television primarily distributes its educational services through the use of traditional full-power analog, and now digital, broadcast technology.<sup>12</sup> To accomplish this goal in rural and mountainous areas, public television stations frequently rely on

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<sup>9</sup> 47 U.S.C. §396(a)(9). In adding this section to the Communications Act, Congress again emphasized the importance of public broadcasting access to all available technologies. “The Committee recognizes the tremendous expansion of telecommunications delivery systems made possible by technological advances. The Committee believes that the full potential of telecommunications as a means to address educational issues can be realized only if the public is provided access to public service programming through all distribution technologies – not just broadcast – that are available to them. .... The Committee believes that it is in the public interest to ensure that all citizens have access to public telecommunications services. The Committee strongly endorses a policy of broad access to the essential public services offered by public telecommunications, regardless of the technology used to deliver those services, in order to advance the compelling governmental interest in increasing the amount of educational, informational, and public interest programming available to the nation’s citizens.” H.R. Rep. No. 102-363, at 18 (1991). See also S. Rep. No. 102-221, at 6-7 (1991).

<sup>10</sup> 47 U.S.C. §396(a)(2).

<sup>11</sup> 47 U.S.C. §390.

<sup>12</sup> Digital technology will allow stations the expanded broadband capacity to deliver multiple streams of services on a single channel accompanied by data to enhance the delivery of the educational service to rural communities. Just one example of this service to rural areas involves Idaho Public Television. In addition to multicasting an Idaho PTV learning channel, the PBS Kids channel and an Idaho legislative and public affairs channel, Idaho Public Television is exploring opportunities with local businesses and governmental agencies to utilize their digital signal capacity for training and conferences. And by increasing their video hosting capabilities, Idaho Public Television is looking at video streaming services for school and government agencies alike, in addition to a variety of other digital services.

networks of low-power translator stations.<sup>13</sup> To deliver live local events, public television stations also rely on microwave links between remote mobile transmitters and the main station, using spectrum in the Broadcast Auxiliary Service (BAS). To deliver instructional material, such as telecourses for distance learning, public television stations also use spectrum in the Instructional Television Fixed Service (ITFS). In addition, public television stations employ satellite technology, including not only the PBS national feed,<sup>14</sup> but also regional satellite links designed to integrate state-wide systems. Moreover, public television stations rely on cable systems to deliver their over-the-air local signals to rural areas and locations in difficult terrain. Additionally, some public television stations operate their own cable systems, while others have programmed a second cable channel for specific educational purposes.<sup>15</sup> In addition to the above, public television stations also employ traditional telephone lines and fiber optics as well as the Internet to deliver their educational services to all Americans.<sup>16</sup>

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<sup>13</sup> Translator stations are low power transmitters that pick up a distant television (or radio) signal, “translate” that signal to another channel, and send the signal out again to rural and remote areas. In some cases, translators are part of an integrated system whereby one translator feeds another. At the latest count, 120 public television stations operate 787 television translator stations serving communities in 44 states. Most of the translators are in the sparsely populated areas of the western states, such as Arizona, Colorado, Nebraska, New Mexico and Utah, but there are a substantial number of public television translators operating in New Jersey, New York, Ohio, Pennsylvania and Virginia as well.

<sup>14</sup> The PBS national feed has been offered since the late 1980’s. It was originally intended for C-band home dish owners in rural areas. See 47 U.S.C. §605.

<sup>15</sup> For instance, KCSM, San Mateo, California, has a partnership with nine cities in San Mateo County and TCI to provide a community cable network. In addition, Nebraska ETV has a dedicated second cable channel in two of its markets, where it programs the channel, EduCable, with educational programming, gavel-to-gavel coverage of the state legislature and other special services. Moreover, WTVS, Detroit, operates the “College Cable Channel,” in which it offers 24 hours of telecourses daily. Several colleges and universities participate in the Southeastern Michigan Television Education Consortium that makes the educational service available. Other public television stations, such as KVIE, Sacramento, the Oklahoma Network and WXXI, Rochester operate cable channels to distribute local noncommercial educational programming to underserved audiences.

<sup>16</sup> Public television stations are currently considering the feasibility of designing a regional “Advanced Digital Distribution Entity” serving the predominantly rural states of Idaho, Montana, Oregon and Washington. This project would use Internet2 for various distribution and control applications, for collaborative production activities, and for the delivery of Internet Protocol based services, such as wireless broadband via DTV transmitters.

As the examples in Appendix A so clearly illustrate, public television stations use a wide range of technological means to distribute local and regional services to rural and underserved areas. In addition to the efforts of individual stations, many stations have created regional consortia to address local and regional needs on an integrated basis. Examples of these are described in Appendix A as well.

On the whole, therefore, public television stations have used a broad range of technologies, singly or in partnerships with other entities, to deliver valuable educational, noncommercial services to unserved and underserved communities, including rural communities that might otherwise not have access to such services. Consequentially, it is vitally important that when formulating its policy to encourage the delivery of local television signals to rural areas, NTIA should recognize the importance to public television of the ability to use a variety of broadcast and non-broadcast technologies to further the mission of universal access.

### **III. NTIA Policy Should Foster Universal Access to Public Telecommunications Service with Policy and Funding Support**

In addition to encouraging the broadest development and use of all available technologies for distribution of public television services, NTIA should also be aware of several potential actions it could take to encourage the universal access of citizens in rural areas to local public television services. First, NTIA should support cable digital must-carry rules. Second, NTIA should support DBS must carry of local television signals and oppose any effort to roll these requirements back. Third, NTIA should recognize that the secondary status of, and threat of auctions for, public television translators may impede the universal delivery of public television services to rural and

small markets. Accordingly, NTIA should support granting such translators some form of protected status and should oppose any attempt to require translators to participate in auctions when applying for new spectrum. Additionally, NTIA should support the transition of public television translators to digital by supporting a regulatory framework and funding that will enable public television to extend its broadband digital services to rural communities throughout this country.

**A. Cable Carriage of Local Public Television Digital Signals is Essential to Delivery of Public Television Services to Rural Areas**

Cable is still the key provider of television service in many communities, with 67 percent, or over two-thirds, of Americans subscribing to cable.<sup>17</sup> In addition, cable systems provide both the basic “pipeline” and much of the programming in an integrated, bundled service. As a consequence, cable service providers have possessed and still possess a strong economic incentive to prefer to carry their own programming (and advertising stream) over that of non-affiliated broadcasters, such as local noncommercial, public television stations. Because cable is often the primary means to deliver local signals to rural and isolated areas, the lack of cable carriage for public television stations’ digital services means that viewers in those areas will have less access to advanced educational telecommunication services than viewers in urban areas.

Nevertheless, it appears that the Federal Communications Commission may be planning to delay issuing digital must carry regulations to allow time to determine

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<sup>17</sup> Nielson Media Research, 1998.

whether an industry-driven, market place solution can be found.<sup>18</sup> However, public television stations are at a disadvantage when pursuing voluntary, negotiated digital carriage agreements with cable systems, because unlike commercial stations, public television stations cannot, as a matter of law, withhold their consent to a cable company's retransmission of its signal.<sup>19</sup>

Without cable carriage rules, significant numbers of citizens in rural areas will be unable to receive all of the noncommercial educational services that public television has to offer. And, as the Congressional Budget Office has recognized, without cable carriage rules, the transition to digital may be hindered resulting in significant national budgetary implications.<sup>20</sup> Consequentially, APTS and PBS urge NTIA to support digital must-carry rules specifically tailored to the unique needs and circumstances of public television stations.

Digital must carry is consistent with the Communications Act. Enacted in the 1992 Cable Act, Section 615 of the Communications Act requires cable carriage for public television signals and gives the Commission authority to promulgate regulations to implement those requirements.<sup>21</sup> On its face, the carriage requirement is not confined to analog signals, and applies to any signal broadcast by public television stations. Carriage rules for public television digital signals would conform to a consistent, content-neutral Commission practice of according public television stations special

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<sup>18</sup> "Cable Seen Favored in Delayed FCC Must Carry Rulemaking," Communications Daily, November 29, 1999.

<sup>19</sup> See 47 U.S.C. §325(b)(2) as amended by "Intellectual Property and Communications Omnibus Reform Act of 1999," 106 P.L. 113; 113 Stat. 1501, (Nov. 29, 1999), Sec.1009.

<sup>20</sup> "Completing the Transition to Digital Television," Congressional Budget Office, September 1999, p. 25-28.

<sup>21</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)("1992 Cable Act"), 47 U.S.C. §535.

relief based on their unique signal delivery method, close ties to the public, financial constraints and legal obligations. Appendix B to this comment contains a more detailed discussion of the statutory authority for such carriage regulations, while Appendix C discusses the constitutionality of digital carriage rules for public television.

**B. DBS Carriage of Local Public Television Stations is Essential for Those Rural Areas Not Served by Cable**

For the first time, the Satellite Home Viewer Improvement Act of 1999<sup>22</sup> granted DBS providers a statutory copyright license to retransmit the local signals of broadcast stations into their local markets.<sup>23</sup> DBS providers are permitted, but not required, to carry local broadcast stations until January 1, 2002. At that time, a satellite carrier that carries at least one local signal in a market must carry upon request all local broadcast stations' analog signals.<sup>24</sup> Without must carry of local signals via DBS, it will be especially difficult for those Americans living in rural areas and areas not reached by cable to receive local television signals. The DBS local-to-local must carry provision is an important public policy that will facilitate the delivery of public telecommunications services to rural areas. However, a recent attempt was made to amend the statute in a way that would have reduced the must-carry obligations of DBS service providers for public television stations.<sup>25</sup> APTS and PBS therefore urge NTIA to support the current

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<sup>22</sup> 106 P.L. 113; 113 Stat. 1501 (November 29, 1999).

<sup>23</sup> 17 U.S.C. §122.

<sup>24</sup> 47 U.S.C. §§338 (a)(1), (3).

<sup>25</sup> Representative Christopher Cox recently sponsored an amendment to the "Rural Local Broadcast Signal Act," H.R. 3615, that would reduced DBS must-carry requirements. Although this amendment passed the House Telecommunications Subcommittee, it was later stripped from the bill at the full House Commerce Committee markup.

must-carry obligations for DBS providers that would apply to public television stations and to oppose any attempt to weaken these obligations.

**C. NTIA Should Craft Policies that Support Public Television Translator Stations To Ensure the Delivery of Local Public Broadcast Signals to Rural Areas**

Public television stations frequently rely on networks of low-power television translator stations to deliver their free, over-the-air services in order to supplement subscription cable and satellite delivery systems in rural and mountainous areas. At the last count, 120 public television stations operate 787 television translator stations serving communities in 44 states. About 25 percent of these noncommercial translators operate on channels 60-69— spectrum which has been reallocated to other wireless services.<sup>26</sup> Other translator stations operate on channel 52-59, which the FCC plans on recovering at the end of the DTV transition. Most of the translators are in the sparsely populated areas of the western states, such as Arizona, Colorado, Nebraska, New Mexico and Utah, but there are a substantial number of public television translators operating in New Jersey, New York, Ohio, Pennsylvania and Virginia as well. In some cases, translators are part of an integrated system whereby one translator feeds another. Therefore the loss of one translator station would likely adversely impact several communities.

The maintenance of the public television translator service and the upgrade of that service to digital is an efficient, cost-effective way to provide free, over-the-air universal broadband digital services to all Americans.<sup>27</sup> NTIA therefore should support

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<sup>26</sup> Comments of the Association of America's Public Television Stations and the Public Broadcasting Service, MM Docket No. 87-268 (Nov. 22, 1996), p. 16.

<sup>27</sup> In addition, translators are frequently necessary to deliver emergency information to rural and isolated areas. See 47 C.F.R. §74.1231(g).

policies that ensure continued and upgraded translator service, including the upgraded status and continued availability of non-reserved spectrum for public television translators to ensure their viability.

**1. NTIA Should Support an Enhanced Status for Public Television Translators**

In general, the FCC still considers television translators to be a secondary service and requires them to protect all full-power stations against interference. As a consequence, many translators will be displaced as a result of the transition to digital broadcasting and will find it increasingly difficult, due to their secondary status and due to spectrum congestion, to find open allotments to replace their previous allotments on channels 60-69 and 52-59.<sup>28</sup> This will have a devastating effect on those Americans in rural and remote areas who could lose their only source for free, over-the-air noncommercial public television services.

For example, noncommercial stations KUED and KULC operate 110 translators that reach numerous households in rural and remote locations in the state of Utah. Nearly 20 percent of the state's population lives in 80 percent of the state's area.<sup>29</sup> The majority of KUED's translators operate on channels 55-69 and feed one another in a "daisy chain."<sup>30</sup> KUED has therefore estimated that because of the interconnection of translators, the loss of a single translator could multiply the loss of free, non-commercial

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<sup>28</sup> For an overview of how the DTV transition will affect television translators, see [www.fcc.gov/oet/faqs/dtv-tvtx.html](http://www.fcc.gov/oet/faqs/dtv-tvtx.html).

<sup>29</sup> Comments of the Association of America's Public Television Stations and the Public Broadcasting Service, MM Docket No. 87-268 (Nov. 22, 1996), pp. 16-17.

<sup>30</sup> See Declaration of Fred C. Esplin, Comments of the Association of America's Public Television Stations and the Public Broadcasting Service, MM Docket No. 87-268 (Nov. 22, 1996).

service to Utah households several-fold.<sup>31</sup> The inevitable result is that without adequate protection of translators during and after the DTV transition, numerous rural and remote households will find themselves stripped of the valuable, free, over-the-air local services that public television stations provide.

The precarious position occupied by public television translators derived from their secondary status is made even more worrisome by the FCC's recent Class A low-power television Order.<sup>32</sup> While other low-power stations may apply for quasi-primary status as Class A low power television stations, the FCC has determined that television translators do not qualify.<sup>33</sup> However, the FCC has recognized the importance of translators, namely that they often provide "the only source of free, over-the-air broadcasting in rural areas."<sup>34</sup> The FCC has therefore decided to initiate a new proceeding to determine whether television translator stations will be permitted to qualify for "some kind of primary status."<sup>35</sup> APTS and PBS therefore urge NTIA to consider the valuable service that television translators provide and to encourage the FCC to grant such stations a status that ensures their continuing viability.

## **2. NTIA Should Oppose the Auction of Spectrum on Which Public Television Translators Operate, or For Which They Have Applied**

Compounding the problem of secondary status of translators, the FCC has indicated its willingness to subject the spectrum upon which public television

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<sup>31</sup> Id.

<sup>32</sup> Establishment of a Class A Television Service, Report & Order, FCC 00-115, MM Docket 00-10 (Adopted March 28, 2000, Released April 4, 2000), ¶33.

<sup>33</sup> Id. at ¶33.

<sup>34</sup> Id., ¶35.

<sup>35</sup> Id.

translators operate to competitive bidding, absent a clear directive from Congress, because of the translators' allotment on non-reserved spectrum. On August 6, 1998, the FCC issued its First Report and Order regarding competitive bidding for commercial broadcast and other services.<sup>36</sup> In this Order, the FCC recognized that noncommercial educational broadcasters hold an explicit statutory exemption from auctions when applying for broadcast licenses in the reserved spectrum.<sup>37</sup> However, the FCC deferred to a later proceeding a decision regarding whether noncommercial educational broadcasters possess a similar exemption when applying for non-reserved spectrum.<sup>38</sup> Two months later, the Commission released a Further Notice in the noncommercial educational comparative standards proceeding.<sup>39</sup> In this proceeding, the Commission surveyed a range of options—including modified auctions, noncommercial reservation of additional spectrum, a ban on noncommercial applications for commercial spectrum, special processing tracks, and hybrid approaches—and solicited additional comment to assist its decision-making.<sup>40</sup> APTS and others filed comments and reply comments advocating use of a special processing track and a comparative point system when noncommercial educational entities file mutually exclusive applications for non-

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<sup>36</sup> In the Matter of Implementation of Section 309(j) of the Communications Act: Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, 13 FCC Rcd 15920 (1998) (“Competitive Bidding Order”); Memorandum, Opinion and Order, FCC 99-74, rel. April 20, 1999 (“Competitive Bidding Reconsideration Order”).

<sup>37</sup> See 47 U.S.C. §309(j)(2)(C), and Competitive Bidding Order, ¶ 24.

<sup>38</sup> Competitive Bidding Order, ¶25, referring this issue to the on-going proceeding In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31.

<sup>39</sup> In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants, MM Docket 95-31, Further Notice of Proposed Rule Making, FCC 98-269 (adopted October 7, 1998) (“Comparative Standards Further Notice”).

<sup>40</sup> Id. ¶35.

reserved frequency.<sup>41</sup> No final order has yet been issued in this proceeding, which remains open at this date.<sup>42</sup> Accordingly, APTS urges NTIA to oppose the auction of spectrum on which public television translators operate, or for which they have applied, and to support the comparative point system developed by public broadcasters to resolve mutually exclusive applications.

**3. NTIA Should Craft Policies That Ensure the Delivery of Broadband Digital Services to Rural Areas by Supporting the Already Existing and Efficient System of Television Translators**

Lastly, NTIA should support policies that ensure that broadband digital services reach rural areas. Support of the already existing public television translator system, which currently provides the only source of free, over-the-air telecommunications services in some rural areas, is an efficient mechanism for ensuring the delivery of broadband digital services to rural communities. As discussed earlier, public television stations, in conjunction with educational and community partners, are actively pursuing the most appropriate and cost-effective means for reaching rural communities.

One promising mechanism is the digital upgrade of the existing public television translator service. Because of their secondary status, translators did not receive digital

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<sup>41</sup> See Joint Comments of National Public Radio, Inc., the Association of America's Public Television Stations and the Corporation for Public Broadcasting, MM Docket No. 95-31 (January 28, 1999), and Joint Reply Comments of National Public Radio, Inc., the Association of America's Public Broadcasting Stations, and the Corporation for Public Broadcasting, MM Docket No. 95-31 (March 15, 1999).

<sup>42</sup> The FCC is also considering subjecting ITFS licensees to auctions as well, despite the fact that such licensees operate on spectrum specifically reserved for educational uses and that public television licensees are expressly exempt from auctions under Section 309(j) of the Communications Act (47 U.S.C. §309(j)). On December 23, 1999, Chairman Kennard wrote to Senator Hollings to express his reluctance to exempt ITFS licensees from auctions in the absence of a direct legislative command. Accordingly, public television urges NTIA to support H.R. 879 which exempts ITFS licensees from auctions. Alternatively, public television urges NTIA to express to the FCC that it has never been the intent of the Administration to subject noncommercial educational broadcasters to auctions in any form.

channels from the FCC, and in many cases these translators are being displaced from channels 60-69 and 52-59. Yet these same translators are the key potential source for the delivery of local broadband digital services to rural communities. APTS and PBS therefore urge NTIA to join with public television to work with the FCC toward creative solutions that will enable public television translators to deliver digital broadband services to rural communities. This would require modification of the FCC rules to provide for secondary digital allocations for translators where feasible.<sup>43</sup> Additionally, translators should have the opportunity to migrate from analog to digital services where no parallel allocation is feasible.

Public television stations would also need financial support for the construction of digital translator facilities. Currently, the administration's proposal for assistance for public television's transition to digital operations through the PTFP program does not include assistance for constructing or maintaining digital translators. APTS and PBS therefore hope to work with NTIA toward achieving use of PTFP funds for transitioning digital translator facilities.

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<sup>43</sup> One creative possibility would be to allow such allocations to be shared between commercial and noncommercial translator stations in certain rural and remote areas. This proposal would take full advantage of the ability of digital stations to multicast signals in a way that allow would multiple broadcasters to efficiently use a single 6 MHz channel allocation.

## **Conclusion**

Local public television stations use a wide variety of technologies to deliver both broadcast and non-broadcast services to rural areas. APTS and PBS therefore urge NTIA to recognize the importance of developing a policy that not only protects and permits the enhancement of local public broadcasting services, but also encourages universal access to these services by use of all appropriate distribution technologies. Additionally, APTS and PBS urge NTIA to support both digital carriage rules for cable, as well DBS must-carry obligations, to ensure the delivery of local, noncommercial public television services to rural and small markets. Moreover, APTS and PBS urge NTIA to recognize that the secondary status of, as well as threat of auctions for, public television translators may also threaten the universal delivery of free, over-the-air public television services, especially to rural and small markets. Accordingly, public television urges NTIA to support an enhanced status for television translators and to oppose the auction of spectrum on which public television translators operate, or for which they have applied. Lastly, APTS and PBS submit that by establishing a policy that supports the transition of public television translators to digital technology— a policy which would include funding support—NTIA would be taking advantage of an efficient way to ensure the delivery of new technologies to rural communities.

Respectfully submitted,

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## APPENDIX A

Public television stations use a wide range of technological means to distribute local and regional services to rural and underserved areas. The following are some examples.

- The Arkansas Educational Telecommunications Network (AETN) satellite network offers distance learning, on-line, and various other educational services throughout the state. AETN's interactive educational services include preschool, secondary, and graduate courses and programs, as well as continuing adult education courses, designed, among other things, to enhance educational curricula, provide college credit hours, and provide teacher training. Through its on-line services, AETN provides curriculum resources, interactive databases, local and national topic-specific discussion groups, and technology resources information to the citizens of Arkansas.
- The South Carolina Educational Television Network (SC ETV) launched a digital satellite network in 1993 which, using digital compression, provides up to 32 channels of programming simultaneously. The satellite transmissions are linked with an extensive terrestrial network of broadcast transmitters, ITFS stations, cable television distribution facilities, and microwave links. These facilities have enabled SC ETV to provide video and audio programming and live interactive teleconferences to locations throughout the state of South Carolina, and users in other states as well, on an extremely cost-effective basis. Some of the services SC ETV provides to the citizens of South Carolina and other states include: instructional television to its public schools, development courses for teachers, college credit courses, medical education courses, adult literary courses, early childhood instructional programming and professional development seminars, law enforcement in-service training courses, legal continuing education courses, and on-line services.
- The Iowa Communications Network (ICN) employs a state-wide fiber optic network capable of transporting interactive, two-way audio and video, data and voice services. The ICN facilitates the sharing of Iowa's outstanding educational resources among communities and school districts, large and small, and reaches at least one educational institution in each of Iowa's 99 counties. The ICN provides interactive connections that permit the served facilities to share educational resources, analog and digital transport capabilities, and affordable access to the Internet. Medical facilities use the ICN for diagnostic and consultative services and to provide education and training to their medical staff. Schools use the interactive distance learning classrooms to share instructional programming and to connect with experts, universities, state agencies, and other facilities that offer rich information resources. The high speed Internet connections offered by

the ICN bring world resources to each learner through his/her desktop computer.

- The NHPTV Knowledge Network, the educational arm of New Hampshire Public Television, operates a comprehensive educational service to all of the K-12 schools in New Hampshire. The purpose of the service is to provide quality instructional television and professional development resources to New Hampshire's educational community. Using its five-transmitter, statewide broadcast network as the delivery vehicle, NHPTV broadcasts instructional programming, and using its satellite receive capabilities, NHPTV sponsors satellite videoconferences so that educators and students can participate in live, interactive, satellite-delivered programs.
- Mississippi Authority for Educational Television (MAET) provides over-the-air educational television to all of Mississippi's elementary and secondary schools, community and junior colleges and four year colleges. In addition to over-the-air television-receive capabilities in virtually every school, many sites have satellite-receive facilities. Also, the Mississippi Fibernet 2000 Network now links several high schools, Mississippi ETV, the Mississippi Department of Education, two universities, the Waterways Experiment Station, and NASA Stennis with two way interactive capabilities.
- Idaho Public Television (IPTV) provides Instructional Television material for K-12 teachers and Adult Learning Services telecourses, offered for credit by Idaho institutions. In addition, IPTV provides a portion of its statewide microwave system to the higher education institutions of Idaho to offer classes to students at other in-state institutions, as well as offering the PBS Ready-to-Learn, National Teacher Training Institute and GED programs.
- Kentucky started its KET Star Channels in 1989 to address a critical shortage of courses in math, science, humanities and foreign language courses in Kentucky public schools. Every public school, vocational school, state park, community college and university in Kentucky has been equipped with a satellite dish. The Star Channel system utilizes a variety of technologies including computers, telephone lines and the Internet to provide interactivity between instructors and students.

In addition to the efforts of individual stations, many stations have created regional consortia to address local and regional needs on an integrated basis. These include the following.

- A broad consortium of educational organizations throughout Nebraska established NEB\*SAT in 1990 to distribute educational programming by satellite, broadcast, and microwave facilities. The network has since been

expanded by use of fiber optic and coaxial cable facilities. The fiber optic service, developed in cooperation with local telephone companies, has permitted NEB\*SAT to establish a regional network of elementary, secondary and post-secondary schools throughout the state of Nebraska to provide interactive instructional services in math, science, foreign languages, and other subject areas to K-12 classrooms.

- The MoKan Kids Network is a partnership between KCPT, Smoky Hills PTV, and 350 school districts across Kansas and Missouri. MoKan provides cutting-edge technologies to help teachers tap into resources that increase student achievement. Instructional television, online networking and professional development/ teacher training are all core activities of the service.
- Learning Link, operated by a consortium of more than 20 public television stations throughout the country, provides computer-based educational forums and program services to educators, librarians and students. Among other services, it provides curriculum material for teachers associated with public broadcasts as well as many forums for teachers, librarians and other educators to discuss topics of mutual professional interest. Local public television stations have customized Learning Link services to meet the educational needs of their communities.
- A consortium of state educational organizations and public broadcast stations in more than 20 states known as the Satellite Educational Resources Consortium (SERC) provides distance learning courses through direct broadcast satellite facilities.
- In addition to Learning Link and SERC, a number of other consortiums have been formed to facilitate use of public broadcasting educational services by schools and other facilities. For example, the Thirteen/WNET National Teacher Training Institute trains teachers to use educational television and other technologies in science and math courses. Another consortium, the Native American Public Broadcasting Consortium, partners the Nebraska Educational Telecommunications Commission and several Native American tribes by inter-linking schools and other facilities, providing educational and social services, and increasing access to educational, governmental, and other resources.

## APPENDIX B

### **The Federal Communications Commission Retains the Statutory Authority to Create Digital Carriage Obligations Tailored to the Unique Needs of Public Television Stations**

The authority to create digital carriage rules specifically tailored to meet the unique needs and circumstances of public television stations can be found in the plain language, structure, purpose and legislative history of the Communications Act, as amended in 1992, 1996 and 1997. Moreover, several traditional and well-accepted canons of statutory interpretation support the interpretation that, read as a whole, the Communications Act and its amendments grant the Commission authority to create digital carriage regulations to ensure the delivery of public television signals to the American people.

#### **1. The Plain Language of the Act Supports Carriage of Public Television's Digital Signals**

Passed as part of the 1992 Cable Act,<sup>44</sup> Section 614 (47 U.S.C. §534) and Section 615 (47 U.S.C. §535) of the Communications Act require cable carriage for commercial and public television signals, respectively, and give the Commission authority to promulgate regulations to implement those requirements.<sup>45</sup> On their face, the carriage requirements are not confined to analog signals. They apply to any signal broadcast by commercial and public television stations. For instance, Section 614 states:

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<sup>44</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

<sup>45</sup> See 47 U.S.C. §534(f) ("Within 180 days after October 5, 1992, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section.") and 47 U.S.C. §534(d) (discussing remedies available through the Commission for violations of commercial must carry rights). See also Section 47 U.S.C. §535(j) (discussing remedies for violation of noncommercial must carry rights).

Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.<sup>46</sup>

And in parallel fashion, Section 615 states:

[E]ach cable operator of a cable system shall carry the signals of qualified noncommercial educational stations in accordance with the provisions of this section.<sup>47</sup>

Both Section 614 and Section 615 refer to generic “signals” broadcast by qualified stations and do not specify whether these signals should be restricted to analog or digital transmission. Thus, the broad sweep of these legislative commands provides the Commission with authority to regulate cable carriage of both analog and digital broadcast signals.

## **2. The Structure, Purpose and Legislative History of the Communications Act Support Carriage of Public Television Digital Signals**

Reinforcing the broad scope of Sections 614 and 615, the policies underlying Section 615 clearly support the authority of the Commission to promulgate digital must carry regulations tailored to public television stations in particular. For instance, Congress stated that “There is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations,”<sup>48</sup> and that therefore “the Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems.”<sup>49</sup>

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<sup>46</sup> 47 U.S.C. §534(a)(emphasis added).

<sup>47</sup> 47 U.S.C. §535(a)(emphasis added).

<sup>48</sup> 1992 Cable Act, Section 2 (a)(7).

<sup>49</sup> 1992 Cable Act, Section 2(a)(8)(emphasis added).

In adopting carriage rules for noncommercial broadcasters, Congress was motivated by the facts that public television stations provide “educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens;”<sup>50</sup> that public television stations are intimately tied to their communities through local tax dollars and voluntary citizen contributions;<sup>51</sup> that the federal government has invested substantially in the public broadcasting system;<sup>52</sup> and that “absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.”<sup>53</sup> For all of the above reasons, Congress expressly stated that the Federal Government should make all nonduplicative public television signals available to the American public. Therefore, if the Commission were to limit required carriage solely to the analog signals of public television stations when such stations are broadcasting in both analog and digital, the Commission would not be ensuring access to all of a public television station's signals but only to some of those signals.<sup>54</sup>

In addition, Congress also stated unequivocally that “it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services throughout all appropriate available

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<sup>50</sup> 1992 Cable Act, Section 2(a)(8)(A).

<sup>51</sup> 1992 Cable Act, Section 2(a)(8)(B).

<sup>52</sup> 1992 Cable Act, Section 2(a)(8)(C).

<sup>53</sup> 1992 Cable Act, Section 2(a)(8)(D).

<sup>54</sup> In addition, public television stations have established unique plans for their digital broadcasting service, including the use of multicasting and data-enhanced programming, distinct from the programming it currently carries on its analog service. Therefore, the DTV service of public television stations would not duplicate the programming currently available in analog in any substantial way.

telecommunications distribution technologies.<sup>55</sup> Without digital carriage rules in place, nearly two-thirds of our citizens will not have access to public television services through the technology of digital broadcasting. Thus, without must carry, the American public would have access only to public television through some of the appropriate available telecommunications distribution technologies, not all of technologies, including digital broadcasting.

Moreover, Section 614(b)(4)(B) explicitly directs the Commission to initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of advanced television signals.<sup>56</sup> This provision requires the Commission to proceed with a cable carriage rulemaking “at such time as” it prescribes modifications of the standards for television broadcast signals to “ensure cable carriage” of digital signals.<sup>57</sup> Section 614 clearly does not authorize the Commission to restrict or eliminate carriage requirements for such signals. Rather, this section reflects Congress’s recognition that differences between analog and advanced television technology might require some revisions to the technical standards for cable carriage.<sup>58</sup> And by specifying that must carry rules be crafted “at such time as” prescribed rules for advanced television standards, Congress clearly intended the Commission to promulgate rules providing cable carriage requirements for digital broadcast signals promptly.

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<sup>55</sup> See 47 U.S.C. §396(a)(9).

<sup>56</sup> 47 U.S. C. §534(b)(4)(B).

<sup>57</sup> 47 U.S. C. §534(b)(4)(B).

<sup>58</sup> See H.R. Rep. No. 628, 102d Cong., 2d Sess. 94 (1992).

However, as the Commission notes,<sup>59</sup> Section 614(b)(4)(B) refers to commercial television stations, and Section 615 contains no parallel provision referring to noncommercial stations. Nevertheless, the Commission already has authority to implement requirements for the carriage of all public television signals under Section 615. Nothing in the legislative history indicates that Congress meant to negate the Commission's broad authority to modify its must carry rules applicable to analog to take account of the characteristics of digital signals.<sup>60</sup> The failure to include in Section 615 a provision that parallels Section 614(b)(4)(B) may have been an oversight.<sup>61</sup> Alternatively, it may have simply reflected the view that such a provision was unnecessary.

In any case, any uncertainty in this regard was eliminated by the Telecommunications Act of 1996. This Act added Section 336 to the Communications Act, which stated that ancillary or supplementary services provided by broadcast licensees on their digital spectrum shall not have rights to carriage under either the commercial must carry or noncommercial must carry provisions of the Act.<sup>62</sup> By explicitly mentioning the noncommercial provision in this context, Congress made it plain that, apart from the case of ancillary or supplementary services, it anticipated that the authority for the Commission to craft digital must-carry rules applied to the digital

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<sup>59</sup> Carriage of the Transmissions of Digital Television Broadcast Stations, FCC 98-153, CS Docket No. 98-120, Notice of Proposed Rulemaking ("Notice") (July 10, 1998) ¶157.

<sup>60</sup> In fact, the committee reports describing Section 4(b)(4)(B) refer broadly to cable carriage of advanced television signals without any apparent limitation to commercial stations. See H.R. Rep. No 862, 102d Cong., 2d Sess. 67 (1992); H.R. Rep. No. 628, p. 94; S. Rep. No. 92, 102d Cong., 1<sup>st</sup> Sess. 85 (1991).

<sup>61</sup> "In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." Cass v. United States, 417 U.S. 72, 83, 94 S.Ct. 2167, 40 L.Ed. 2d 668 (1974).

<sup>62</sup> 47 U.S.C. §336(b).

signals of public television stations as well as commercial stations.<sup>63</sup> Indeed, the legislative history of Section 336 stated Congress' recognition of the Commission's ongoing authority to conduct a determination of appropriate must-carry rules for digital signals.<sup>64</sup> In other words, while Section 336 directed the Commission as to what digital signals could not be subject to must carry, it reinforced the Commission's general authority to create digital must carry rules for both commercial and public television stations.

When passing the 1997 Balanced Budget Act, Congress again stated that the Commission possesses the authority to craft must carry regulations for the carriage of the digital signals of public television stations. As the Commission concluded in its NPRM,

In the BBA's [Balanced Budget Act] legislative history, Congress stated that it was "not attempting to define the scope of any MVPD's 'must carry' obligation for digital television signals" and that the digital broadcast television must carry decision is "for the Commission to make at some point in the future."<sup>65</sup>

The Commission stated further,

We read Section 614(b)(4)(B) of the 1992 Cable Act and Section 309(j) of the Balanced Budget Act, along with their respective legislative histories, to give us broad authority to define the scope of a cable operator's signal carriage requirements during the period of change from analog to digital broadcasting.<sup>66</sup>

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<sup>63</sup> For a discussion of this argument see Comments of the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting, CS Docket No. 98-120, filed October 13, 1998, p. 12-14.

<sup>64</sup> "Section 336 of the Act, added as part of the Telecommunications Act of 1996, provides that if the Commission determines to issue additional licenses for advanced television services, the Commission should "allow the holders of such licenses to offer such ancillary or supplementary services ... as may be consistent with the public interest, convenience and necessity." It then further provides that "no ancillary or supplementary service shall have any right to carriage under section 614 [commercial must carry] or 615 [noncommercial must carry]." In the legislative history of this provision, Congress stated that it did not intend to "confer must carry status on advanced television or other video services offered on designated frequencies" adding that the "issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act." Notice, ¶8, quoting Telecommunications Act of 1996, Conference Report, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Report 104-230 at 161.

<sup>65</sup> Notice, ¶12, quoting H.R. Conf. Rep., 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. No. 105-217, at 577 (1997)(emphasis added).

<sup>66</sup> Notice, ¶13.

Therefore, the Commission's authority to craft digital must-carry regulations for noncommercial television stations derives not only from the 1992 Cable Act, and the 1996 Telecommunications Act, but from the 1997 Balanced Budget Act as well.

### **3. Principles of Statutory Interpretation Support Carriage of Public Television Stations Digital Services**

Lastly, in addition to the plain language, structure, purpose and legislative history of the Communications Act, accepted principles of statutory interpretation also support the Commission's authority to adopt digital must-carry regulations for public television stations. One time-honored and frequently cited principle of statutory construction is that statutes are to be read as a whole.<sup>67</sup> Although Section 615 may not have specifically addressed the carriage of public television's digital signals, by exempting both commercial and public television ancillary and supplementary services from must carry, Section 336 recognizes and assumes that the Commission has the authority to promulgate must carry requirements for both commercial and public television stations.<sup>68</sup> Read as a whole, therefore, the Communications Act grants the

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<sup>67</sup> Beecham v. U.S., 511 U.S. 368, 372, 114 S.Ct. 1669, 128 L.Ed. 2d 383 (1993); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94, 114 S.Ct. 517, 126 L.Ed. 2d 524 (1993); Conroy v. Aniskoff, 507 U.S. 511, 515, 113 S.Ct. 1562, 123 L.Ed. 2d 229 (1993).

<sup>68</sup> Indeed the Commission itself has argued in a similar vein in another related proceeding. Recently it ruled that traditional home shopping, infomercials, and direct marketing services were not ancillary or supplementary services for fee purposes. It argued that Section 336, which states that "no ancillary or supplementary service shall have any rights to carriage under section 614 or 615," did not apply to home shopping, infomercials, and direct marketing services, because section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 directed the FCC to determine whether such stations served the public interest and were entitled to must carry rights. Importantly, the Commission appealed to a "basic principal of statutory construction," which was to seek to construe statutory provisions so that they are consistent with each other. In the Matter of Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, Memorandum Opinion and Order, FCC 99-362, MM Docket No. 97-247 (November 24 1999), ¶23. And, as public television is urging now, it construed the prohibitory language of Section 336 in a way that retained the Commission's authority to craft must carry rules for both commercial and public television stations. Id.

Commission the authority to create must carry regulations to accommodate the unique needs and circumstances of public television stations.

In addition, another accepted principle of statutory construction is that one must avoid interpretations of a statute that would result in absurd consequences.<sup>69</sup> First, given the strong congressional support for public television, it is absurd to think that Congress meant to direct the Commission to create digital carriage rules for commercial stations while ignoring the need for digital carriage rules for noncommercial stations. Second, as discussed above, Congress found that that there is a substantial government interest in making all nonduplicative local public television services available on cable systems. It would indeed be absurd if the Communications Act were to be interpreted to make it more likely that some local public television services—namely digital broadcast services—would not be available on local cable systems. Third, as we have already demonstrated, Congress’s policy has been that all citizens of the United States have access to public telecommunications services throughout all appropriate available telecommunications distribution technologies. Accordingly, it would be absurd to read the statute to allow only some of our citizens to have access to only some of the available telecommunications technologies by not requiring cable interests to carry public television’s innovative digital services.

Therefore, for the reasons articulated above, the Commission possesses ample authority to create digital carriage rules specifically tailored to meet the unique needs and circumstances of public television stations.

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<sup>69</sup> “[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), citing United States v. American Trucking Assns., Inc., 310 U.S., at 542-543; and Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940). See also Clinton v. City of New York, 524, U.S. 417, 429, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998).

## APPENDIX C

### **Creating Digital Carriage Obligations Tailored to Public Television Stations Would Survive Constitutional Scrutiny**

Digital carriage rules specifically tailored to the unique needs and circumstances of public television would survive a constitutional challenge based on free speech concerns. Such rules would conform to a consistent, content-neutral Commission practice of according public television stations special relief based on their unique signal delivery method, close ties to the public, financial constraints and legal obligations. Consequentially, a court would only require that an important government interest be served and that the rules not substantially burden more free speech than necessary.

#### **1. Digital Carriage Rules for Public Television Would be Content-Neutral**

In evaluating content-neutrality, the Commission should take its measure from the jurisprudence established by the U.S. Supreme Court. This Court has held that content neutral restrictions on speech are to be sustained if they further an important or substantial government interest unrelated to the suppression of free speech and do not substantially burden more speech than is necessary.<sup>70</sup> In explaining what restrictions on free speech are content-based as compared to content-neutral restrictions, the U.S. Supreme Court has repeatedly held that content-based restrictions on speech are those which distinguish favored speech from disfavored speech based on the ideas or views expressed by such speech or

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<sup>70</sup> Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662, 114 S. Ct. 2445 (1994) (“Turner I”) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). See also United States v. O’Brien, 391 U.S. 367, 377(1968).

which require an examination of the content of such speech by governmental authorities.<sup>71</sup> Conversely, “laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.”<sup>72</sup>

Digital carriage rules tailored to the unique needs and circumstances of public television stations would not require an examination of programming content, nor would it favor or disfavor speech based on the ideas or views expressed by such programming. Rather, the regulation would simply be triggered by what kind of license the applicant holds. Moreover, a special must carry rule for public television stations would be content neutral, because it would not be designed to favor or disfavor speech based on the government’s agreement or disagreement with the ideas or views expressed in public television

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<sup>71</sup> Turner I, 512 U.S. at 642-3 (1994), quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). See also Burson v. Freeman, 504 U.S. 191, 197, 119 L.Ed.2d 5, 112 S.Ct. 1846 (1992) (holding that restricting speech on the basis that it is related to a political campaign is content-based); Boos v. Barry, 485 U.S. 312, 318-319, 99 L.Ed. 2d 333, 108 S.Ct. 1157 (1988) (plurality opinion) (law forbidding picketing before an embassy where picket signs bring the foreign government into “public odium” or “disrepute,” was content-based); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (statute requiring newspaper to print candidates reply was content based, because triggered only when a newspaper elected to print matter critical of political candidates); Pacific Gas & Electric Co v. Public Utilities Comm’n of Cal., 475 U.S. 1, 13, 15 (1986) (plurality opinion) (law requiring privately owned utility to include insert in its bills published by consumer group is content-based, because it confers benefits to speakers based on viewpoint); Federal Communications Commission v. League of Women Voters of California, et al., 468 U.S. 364, 383-4, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) (ban on editorializing by noncommercial broadcasters is content-based, because authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern “controversial issues of public importance.”).

<sup>72</sup> Turner I, 512 U.S. at 643. See also City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (ordinance prohibiting posting of any signs on public property is content-neutral when silent concerning any speaker’s point of view); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (state fair regulation even-handedly requiring sales and solicitations to take place at designated locations is content-neutral); Boehner v. McDermott, 191 F.3d 463, 467, 1999 U.S. App. LEXIS 23135 (D.C. Cir. 1999) (law forbidding disclosure of all illegally intercepted communications is content-neutral, because “It reveals no governmental interest in distinguishing between types of speech based on content ... [and] neither favors nor disfavors any particular viewpoint”); Time Warner Entertainment Co v. FCC, 93F.3d 957, 977(D.C. Cir 1996) (DBS set-aside rules analogous to content-neutral cable must carry, because no restriction, burden or benefit imposed by reason of views, programs, or content of the stations that would benefit from the set-aside).

programming. By creating a must carry rule tailored to the unique needs and circumstances of public television stations, the Commission would be acting to preserve a unique signal delivery method supported by government funding and public donations. It would simply be accommodating the legal and economic restrictions that bind the public television service in this country, insofar as public television stations are forbidden from withholding the distribution of their signals from cable operators and operate without the benefit of a commercial advertising base. Must-carry regulation tailored to the needs of public television stations would be no different than actions the Commission has taken in the past to create both special privileges and unique responsibilities for public television.

**2. Digital Carriage Rules for Public Television Would Not Substantially Burden Free Speech More than Necessary**

Special carriage rules tailored to the unique needs of public television stations would not substantially burden any more speech than necessary to advance certain important government interests.<sup>73</sup> In addition to the government interests associated with carriage regulations generally,<sup>74</sup> Congress has identified several important government interests associated specifically with public television, including:

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<sup>73</sup> See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662, 114 S. Ct. 2445 (1994) (“Turner I”) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)) and United States v. O’Brien, 391 U.S. 367, 377(1968).

<sup>74</sup> Congress has identified several important government interests that sustain the need for must carry regulations generally. They are: (a) preserving the benefits of free, over-the-air local broadcast television; (b) promoting the widespread dissemination of information from a multiplicity of sources; and (c) promoting fair competition in the market for television programming. Turner I, 512 U.S. at 662. The U.S. Supreme Court has held that these interests are unrelated to the suppression of free speech, Turner I, 512 U.S. at 662, and that must carry regulations do not substantially burden more speech than was necessary to accomplish these interests. Turner Broadcasting, Inc. et. al. v. FCC, 520 U.S. 180, 117 S. Ct. 1174, 137 L.Ed.2d 369 (1997).

- Ensuring that cable subscribers have access to local noncommercial educational stations;<sup>75</sup>
- Making all nonduplicative local public television services available on cable systems;<sup>76</sup>
- The compelling governmental interest in educating its citizens;<sup>77</sup>
- Encouraging the growth and development of public television;<sup>78</sup>
- Effectively making public telecommunications services available to all citizens of the United States;<sup>79</sup> and
- Ensuring that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.<sup>80</sup>

To accomplish these important governmental interests, public television urges the Commission to create digital carriage regulations that are tailored to the unique needs of public television stations. Such regulations would be unrelated to the suppression of speech and would not burden cable systems more than necessary to accomplish these interests because:

- Cable systems have had a substantial time to prepare for the carriage of digital signals;
- The cable industry has been substantially investing in system upgrades to increase cable system capacity;
- The carriage of public television digital signals would require a relatively small amount of a cable system's bandwidth capacity;
- Public television will have a gradual roll-out of digital services;

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<sup>75</sup> 1992 Cable Act, Section 2 (a)(7).

<sup>76</sup> 1992 Cable Act, Section 2(a)(8). See also 47 C.F.R §76.56(a)(1)(iii).

<sup>77</sup> 1992 Cable Act, Section 2(a)(8)(A).

<sup>78</sup> 47 U.S.C. §396(a)(1).

<sup>79</sup> 47 U.S.C. §396(7).

<sup>80</sup> 47 U.S.C. §396(9).

- Cable systems can employ unused public educational and governmental (PEG) channels; and,
- Any hardship cases can be accommodated through an exemption/waiver process.<sup>81</sup>

Therefore, if the Commission were to create carriage regulations that are tailored to the special needs and circumstances of public television stations, it would not be burdening cable systems more than necessary and would be accomplishing the important governmental interests outlined above.

Consequentially, for the reasons articulated above, a court would rule that such regulations are constitutional.

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<sup>81</sup> For a full discussion, see Comments of The Association of America's Public Television Stations, The Public Broadcasting Service, and the Corporation for Public Broadcasting, CS Docket No. 98-120 (filed October 13, 1998), pp. 28-33.