
PRINCIPLES OR PUFFERY?

THE VALIDITY OF THE CABLE INDUSTRY'S DUAL CARRIAGE ARGUMENTS AND THEIR IMPACT ON PUBLIC TELEVISION IN THE DIGITAL TELEVISION FUTURE

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Federal Communications Commission (“FCC” or “Commission”) Chairman Michael K. Powell characterizes consumer adoption of digital television (“DTV”) as the “classic chicken and egg problem.”¹ The public is unwilling to purchase a new DTV set until there is enough programming available, while programmers delay digital programming production until there are enough consumers to pay for it.² However, Congress concluded that the DTV transition needed to begin, and so to initiate the process, the FCC decided that DTV broadcasts would have to predate viewer demand.³

DTV allows greater programming options, interactive capability, and improved picture quality.⁴ Its adoption will also free up the analog spectrum⁵

¹ PETER GUERRERO, ADDITIONAL FEDERAL EFFORTS COULD HELP ADVANCE DIGITAL TELEVISION TRANSITION, GAO REP. NO. 03-7, at 1 (2002) [hereinafter GAO REP: FEDERAL EFFORTS]; see also Daniel Patrick Graham, *Public Interest Regulation in the Digital Age*, 11 COMM.LAW CONSPECTUS 97, 116 (2003) (quoting Rep. Thomas Bliley, R-Va., echoing the “chicken and egg” characterization).

² See GAO REP: FEDERAL EFFORTS, *supra* note 1.

³ Graham, *supra* note 1, at 116.

⁴ For general information on DTV, see ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL FUTURE 3-5, at <http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf> (Dec. 18, 1992) [hereinafter CHARTING THE DIGITAL FUTURE]. See also *In re* Pub. Interest Obligations of TV Broad. Licensees, *Notice of Inquiry*, 14 FCC Rcd. 21633, para. 3 (Dec. 20, 1999). DTV promises enhanced quality, high-definition picture, multicasting capabilities and data-casting. *Id.*

⁵ Analog spectrum means the traditional delivery of a motion picture and sound through the use of radio waves. PATRICK R. PARSONS & ROBERT M. FRIEDEN, *THE CABLE AND*

and allow it to be used for other purposes.⁶ Therefore, in an effort to stimulate the rapid deployment and adoption of DTV, the FCC issued an Order in 1997 that required all television broadcasters to construct DTV facilities.⁷ Approximately half of the country's 357 public television stations were unable to meet the Order's May 1, 2003 deadline and were subsequently granted extensions to May 1, 2004.⁸ While lack of funding is an obvious reason for the beleaguered construction rate,⁹ a tantamount concern has arisen in the form of the FCC's reconsideration of the so-called "must-carry" rules.¹⁰

The must-carry rules were reinstated by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992") and mandated carriage of local broadcasters' programming.¹¹ However, in applying must-carry in a DTV context, the FCC has tentatively¹² concluded that requiring cable operators ("Cable")¹³ to carry both analog¹⁴ and digital¹⁵ signals during

SATELLITE TELEVISION INDUSTRIES, 78-79 (Paul Smith, ed., 1998).

⁶ "Other purposes" include wireless devices and emergency services. See <http://www.fcc.gov/cgb/consumerfacts/digitaltv.html> (last visited Nov. 19, 2004).

⁷ See generally *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, *Fifth Report and Order*, 12 FCC Rcd. 12809 (1997); see also *In re Public Interest Obligations of TV Broadcast Licensees*, *Notice of Inquiry*, 14 FCC Rcd. 21633, 21635 (Dec. 20, 1999). DTV promises enhanced quality, high-definition picture, multicasting capabilities and data-casting. *Id.*

⁸ *PBR Notes*, PUB. BROAD. DAILY, Mar. 5, 2004, available at LEXIS, News & Business Library. In addition, July, 2007 has been set as the deadline for "most" new television sets to include a tuner capable of receiving over-the-air digital broadcasts. GAO REP: FEDERAL EFFORTS, *supra* note 1, at 5.

⁹ *Corporation for Public Broadcasting Oversight and a Look Into Public Broadcasting in the Digital Era: Hearing Before the House Subcomm. on Telecomms. and the Internet*, 108th Cong. 22 (2002) [hereinafter *Public Broadcasting*] (testimony of John Lawson, President of the Association of Public Television, imploring Congress to contribute more to cover the conversion costs).

¹⁰ See generally *In re Carriage of Digital Television Broad. Signals; Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broad. Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broad. Signals*, *First Report and Order and Further Notice of Proposed Rule Making*, 16 FCC Rcd. 2598 (2001) [hereinafter *In re Carriage of Digital Television Broad Signals*]. "Must-carry" is the common term used to describe Cable's statute-based obligation to carry broadcasters, based on the size of the cable operator and the number of local stations in a market. See 47 U.S.C. §521 (2000).

¹¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §534(b)(3)(A)(2000) pertaining to commercial broadcasters and 47 U.S.C. §535(g)(1) (2000) pertaining to NCEs).

¹² *In re Carriage of Digital Television Broad. Signals*, *supra* note 10, at para. 3. The Commission issued its conclusion only on a tentative basis so that questions concerning mandatory dual carriage could be fully explored in a Further Notice of Proposed Rulemaking.

¹³ *Id.* Cable consists of a network of cable lines which deliver television signals. This is in contrast to traditional television delivery through an antenna or satellite which delivers

the country's transition to DTV overly burdens Cable's First Amendment rights.¹⁶ The Public Broadcasting Service ("PBS"),¹⁷ the Corporation for Public Broadcasting ("CPB")¹⁸ and the Association of Public Television Stations ("APTS")¹⁹ (collectively, "Public Television") have alternatively urged the FCC to treat Public Television differently due to "unique statutory, factual, economic and historical circumstances of public television stations."²⁰

If the Commission decides to affirm its tentative conclusion, both commercial and noncommercial educational broadcasters ("NCE") will be forced to resort to individual negotiations and agreements for dual carriage on a market-by-market basis. While this has proven to be a satisfactory alternative for the larger NCEs, overall, Public Television has been only marginally successful in securing carriage on this basis.²¹ Therefore, absent temporary dual carriage requirements, a percentage of Public Television will be left out of the DTV transition, and as a result its presence will diminish or even cease in many markets.²²

While the ramifications for Public Television are dire, the consequences for

programming from orbiting satellites received by the customer's dish. GAO REP: FEDERAL EFFORTS, *supra* note 1, at 4.

¹⁴ PARSONS & FRIEDEN, *supra* note 5.

¹⁵ Data-carrying signals are converted into ones and zeros akin to computer language. PARSONS & FRIEDEN, *supra* note 5, at 79-80.

¹⁶ See *In re Carriage of Digital Television Broad Signals*, *supra* note 10, at 2600; see also *Advancing the DTV Transition: An Examination of the FCC Media Bureau Proposal: Hearing Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce*, 108th Cong. (2004) [hereinafter *Exam. of Media Bureau Proposal*] (statement of Robert Sachs, Pres. and CEO of NCTA, making a distinction between must-carry and dual carriage).

¹⁷ PBS is a non-profit organization that is owned and operated by 349 public television stations nationwide. See generally PBS.org, at <http://www.pbs.org> (last visited Nov. 19, 2004).

¹⁸ Congress created CPB in 1967, now codified at 47 U.S.C. §396 (2000). CPB provides financial support to 560 broadcasters operating more than 1,000 television and radio stations. See generally CPB.org, at <http://www.cpb.org> (last visited Nov. 19, 2004).

¹⁹ APTS is a nonprofit trade organization that represents NCE interests at the national level. See generally APTS.org, at <http://www.pts.org> (last visited Nov. 19, 2004).

²⁰ Letter from Lonna M. Thompson, Vice Pres. and General Counsel, APTS, Donna Coleman Gregg, Vice Pres., General Counsel and Corp. Secretary, CPB, and Katherine Lauderdale, Sr. Vice Pres. and General Counsel, PBS, Michael K. Powell, Chairman, FCC, CS Dkt. No. 98-120, at 1 (Dec. 8, 2003).

²¹ See, e.g., *Public Broadcasting*, *supra* note 9, at 22 (testimony of John Lawson, Pres. of APTS) ("Our industry for three years has been negotiating in good faith with the largest cable MSOs, but we have only two national agreements in hand: AOL Time Warner and Insight Communications.").

²² See *Constitutional Issues Loom Large in Must-Carry HDTV Debate*, PUB. BROAD. REP., Feb. 6, 2004, available at LEXIS, News & Business Library. President of APTS John Lawson stated that the absence of mandatory carriage rules would be "fatal" to public television. *Id.*

Cable involve a temporary inconvenience. It is widely acknowledged that it could be years before broadcasters can cease their analog streams.²³ In contrast, any inconvenience caused by Cable's carriage of both digital and analog streams – such as additional financial or bandwidth costs – would only be temporary. However, the more markets that offer both streams, the faster the public will convert to DTV and the less time the transition period will take. Just as significantly, Cable assumes some public interest obligations of its own as the conduit to a broadcast licensee's delivery. Therefore, as de facto public trustees, Cable also has an obligation to the public that is best satisfied by carriage of the NCEs.²⁴

Because of the Communications Act of 1934, Congress and the FCC have always treated Public Television differently.²⁵ There has never been a mandate issued to Cable regarding the carriage of certain types of content since this would clearly violate its First Amendment rights.²⁶ However, there is long-standing precedent requiring carriage of public broadcasting in general.²⁷ Therefore, it would be appropriate to require temporary dual carriage of NCEs both to ensure stations' vitality in the digital era and to satisfy broadcast licensees' obligation to serve the "public interest, convenience and necessity."²⁸

²³ See, e.g., Norman Ornstein & Michael Calbrese, *While Nation Distracted by Sept. 11, FCC Chairman Announces Corporate Giveaway of UHF Channel Revenues*, WASH. POST, Oct. 14, 2001, available at <http://www.webcom.com/hrin/magazine/fcc.html> ("Digital broadcasting is moving at the pace of a glacier . . ."); see also Bill McConnell, *Powell Presses On*, BROAD. & CABLE, Sept. 27, 2004 (noting that Commission Chairman Michael K. Powell is continuing to push for a "hard date" of 2009 and the Senate Commerce Committee has passed a 2008 deadline that includes significant exceptions).

²⁴ The Communications Act of 1934, 47 U.S.C. §309 (2000), imposes a duty upon licensees to serve "the public interest, convenience and necessity." Additional public interest-type obligations are imposed on Cable through 47 U.S.C. §521 (2000), which prescribes an obligation to be "responsive to the needs and interests of the local community" and "to provide the widest possible diversity of information sources and services to the public." *Id.* at (2) and (4) respectively. See also *Must Carry Before the Senate Subcomm. on Commun.*, 101st Cong. (Oct. 25, 1989) (statement of Edward Fritts, President of the Nat'l Assn. of Broadcasters) "This system [of local television broadcasting] cannot function properly, of course, unless local television stations have access to the viewers they are licensed and required by the FCC to serve." *Id.* at 38.

²⁵ 47 U.S.C. §535 (2000) (specifying provisions for the mandatory carriage of noncommercial educational television).

²⁶ *Cf.* The Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified as amended in scattered sections of 47 U.S.C.) (regulating the amount of advertisement that can run in any given children's program and encouraging enriching shows, but not prescribing specific programming) "[A]s part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children . . ." *Id.* at Title I, §101(2).

²⁷ *E.g.*, Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. §396(a)(7) (2000)).

²⁸ 47 U.S.C. §309(a) (2000). See *supra* text accompanying notes 24 and 25.

This comment analyzes the opposing parties' arguments in the dual carriage battle. First, this comment will provide an overview of the government's commitment to Public Television, its regulation of Cable, the laws enacted to ensure Public Television's carriage by Cable and the court challenges to its continuation. Second, this comment will summarize and scrutinize the dual carriage arguments advanced by each side, with an emphasis placed on public interest obligations and First Amendment concerns. Third, this comment will analyze what measurable impact, or lack thereof, dual carriage would have on Cable. Finally, this comment will advocate that the Commission recognize the negative impact of its decision on Public Television and, by extension, the public it is mandated to serve.

I. HISTORY AND PRIOR LAW

A. The History of Public Television/CPB Funding

The Public Broadcasting Act of 1967, later codified in subsequent amendments to the Communications Act of 1934, authorized the creation of CPB.²⁹ The language added to the Communications Act, such as in the "public interest" and "furthers the general welfare," clearly identifies a need for CPB.³⁰ CPB was meant to address these needs through an annual appropriation of Congressional funds to Public Television designed to "to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control."³¹ Pursuant to these goals, CPB established PBS in 1969³² with the objective of creating "an essential national cultural institution that aspires to be of the highest quality with strict adherence to a balanced view of controversial issues."³³

B. The History of the Cable Acts and the Must-Carry Rules

In 1966, the Communications Act of 1934 was amended to stipulate the FCC's regulatory authority over Cable.³⁴ The Supreme Court confirmed this authority in *United States v. Southwestern Cable Co.*, construing the

²⁹ Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. §396 (b) (2000)).

³⁰ 47 U.S.C. §396(a)(1) and (5) (2000).

³¹ 47 U.S.C. §396(a)(10) (2000).

³² LAURENCE JARVIK, PBS: BEHIND THE SCREEN 23 (1997).

³³ See CPB.org, at <http://www.cpb.org/about/corp/goals.html> (last visited Nov. 19, 2004).

³⁴ PARSONS & FRIEDEN, *supra* note 5, at 43.

Communication Act's mention of "interstate communication by wire" as a sufficient basis for expanding FCC jurisdiction to include Cable.³⁵ Part of the 1966 amendment mandated that Cable "must-carry" NCEs.³⁶ According to its legislative history, this must-carry amendment assumed that broadcasting needed to be protected from the potential harm that could be created by Cable.³⁷ Specifically, it was meant to protect localism in all markets by requiring that the public would receive local news and programming.³⁸

The early 1970s brought a series of Commission proceedings to require the continued protection of local broadcasters by curtailing the ability of Cable to import signals from other markets.³⁹ However, in 1979, the FCC took a more deregulatory stance toward Cable with the issuance of two studies, the Syndicated Exclusivity Report and the Economic Inquiry Report.⁴⁰ Both studies concluded that there was no proof that Cable had a negative effect on local broadcasting; as a result, the Commission struck down its importation restrictions in July of 1980.⁴¹ This led to a period where Cable negotiated for exclusive franchise rights at the local municipal level, and cities adopted local rules which prescribed among other things system size, programming, rates and ownership.⁴² Ironically, Cable later sought federal relief from the patchwork of regulatory schemes.⁴³

In 1984, Congress passed the Cable Communications Policy Act, which

³⁵ 392 U.S. 157, 178 (1968); *see generally* 47 U.S.C. §§521-573 (2000) (articulating the regulation of cable).

³⁶ *In re* Amendment of Subpart L, Part 91, To Adopt Rules and Regulations To Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, *Second Report and Order*, 2 F.C.C.2d 725, 752-756 (1966) (presently codified at 47 U.S.C. §535 (2001)).

³⁷ *Southwest Cable*, at 728 (stating that the Commission needed to address "the increasing risk of adverse impact on the 'public interest in the larger and more effective use of radio' (sec. 303(g)) which accompanies the burgeoning CATV [cable television] development."); *see also* PARSONS & FRIEDEN, *supra* note 5, at 43.

³⁸ *See, e.g.*, S. REP. NO. 102-92, at 85 (1991) and H.R. REP. NO. 102-862, at 1-4, 12-17 (1992).

³⁹ PARSONS & FRIEDEN, *supra* note 5, at 49-50. By 1976, regulations were relaxed to allow distant signals into local markets during hours when the local station was not on the air. *Id.* at 51. In addition, smaller systems were exempted from the importation restrictions altogether. *Id.*

⁴⁰ *Id.* at 56; *see also In re* Cable Television Syndicated Program Exclusivity Rules, 71 F.C.C.2d 951 (1979) and *In re* Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632 (1979).

⁴¹ PARSONS & FRIEDEN, *supra* note 5, at 56. *See also* Cable Television Syndicated Program Exclusivity Rules and Inquiry into the Econ. Relationship Between Broad. and Cable Television, 79 F.C.C.2d 663 (1980); *see also* *Malrite TV v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (affirming the repeal of importation restrictions).

⁴² PARSONS & FRIEDEN, *supra* note 5, at 57.

⁴³ *Id.*

served as both a means to reassert the FCC's regulatory authority over the burgeoning industry and preempt in some areas the authority of state governments over cable-related matters.⁴⁴ Despite its overall pro-cable industry provisions, the Act also contained a must-carry provision that required cable operators of a prescribed size to carry a set number of local broadcast and Public Television stations in each market they serviced.⁴⁵ Cable fought these must-carry provisions, arguing that its First Amendment rights were abridged by such editorial impositions.⁴⁶ In 1986 and 1987, the D.C. Court of Appeals agreed and struck down the must-carry rules as unconstitutional.⁴⁷

Public dissatisfaction spurred Congress to pass the Cable Act of 1992, which ended the deregulatory period of Cable growth.⁴⁸ The Act also contained a number of provisions reasserting broadcasters' interests, which Cable fervently opposed. Among them was a reinstatement of the must-carry rules,⁴⁹ imposing requirements based on cable system size.⁵⁰ Broadcasters could either demand carriage, the natural choice of weaker broadcasters and NCEs, or negotiate for payment of their signal, the preference of more powerful local broadcasters.⁵¹

C. The Turner Cases

Cable attempted to strike down must-carry rules once again in the late 1990s. In the first case, *Turner Broadcasting System v. FCC* ("Turner I"), cable giant Turner Broadcasting was joined by a number of other Cable and production entities to challenge the FCC's must-carry rules as a violation of

⁴⁴ Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C., Title VI). See also HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THE BUSINESS OF TELEVISION* 140 (Billboard Books 2d ed. 1998).

⁴⁵ Cable Television Consumer Protection and Competition Act, at §614 for commercial broadcaster carriage and §615 for NCEs, respectively. Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴⁶ PARSONS & FRIEDEN, *supra* note 5, at 62.

⁴⁷ *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1438 (D.C. Cir. 1985), *Century Comm. Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

⁴⁸ PARSONS & FRIEDEN, *supra* note 5, at 62.

⁴⁹ Communications Act of 1934 §615, as amended by the Cable Act of 1992, 47 U.S.C. §535 (2000).

⁵⁰ BLUMENTHAL & GOODENOUGH, *supra* note 44, at 142. For example, systems with twelve channels or less are required to carry three local commercial stations and one public station; systems with thirteen to thirty-six channels are required to carry all local commercial stations and all non-duplicative local public channels. Systems with thirty-six channels or more must carry at least three public stations, regardless of duplication. 47 U.S.C. §535(b)(2)(A), (b)(3), and (e) respectively.

⁵¹ PARSONS & FRIEDEN, *supra* note 5, at 62.

their First Amendment rights.⁵² A plurality of the Court held that the record was not yet materially developed for this newly reenacted regulation, and, therefore, remanded it for further discovery.⁵³ After a year and a half of fact-finding, the D.C. Circuit granted summary judgment for the Commission.⁵⁴ On appeal to the Supreme Court, *Turner Broadcasting System v. FCC* (“*Turner II*”) decided whether must-carry furthered important governmental interests and whether the record contained enough evidence to determine that must-carry provisions substantially burdened more speech than necessary.⁵⁵ In order to reach its conclusions, the Court applied intermediate First Amendment scrutiny as the appropriate basis, requiring must-carry obligations to be a content-neutral regulation that advanced important governmental interests.⁵⁶ Applying these standards, the Court affirmed free local broadcast television to be an important governmental interest since it is one of the most powerful mediums available to disseminate information as widely as possible from a multiplicity of sources.⁵⁷ The Court also found that Cable failed to demonstrate any substantial burden on its speech in the furthering of those interests.⁵⁸

D. The Telecommunications Act of 1996⁵⁹

The Telecommunications Act of 1996 radically changed the landscape of

⁵² *Turner I*, 512 U.S. 622 (1994), *remanded to* 910 F. Supp. 759 (1994) (Jackson, J., dissenting).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Turner II*, 520 U.S. 180, 185 (1997).

⁵⁶ *Id.* at 186-93 (referring to the Court’s analysis in *Turner I*, 512 U.S. 622, 635 (1994), citing *United States v. O’Brien*, 391 U.S. 367, 377 (1994), as the basis for applying intermediate scrutiny). Within the schema of First Amendment jurisprudence, “content-neutral” means time, place and manner restrictions applied to speech which are subject to intermediate scrutiny. *See, e.g.*, *United States v. Grace*, 461 U.S. 171 (1983).

⁵⁷ *Turner I*, 512 U.S. at 662-663 (stating that 40% of households do not subscribe to cable, relying on over the air signals instead; some local broadcasters would disappear without carriage on cable, and thereby penalize those viewers who are entitled to free local television). *Turner I* and *II* have spurred a flurry of commentary from scholars. *See, e.g.*, Nancy J. Whitmore, *The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck “Rule” in the Turner Decisions*, 8 COMM. L. & POLICY 25, 26 (Winter 2003).

[T]he categorization of the must-carry rule as content-neutral is ‘peculiar’ to many scholars who believe that the provision is clearly a content-based regulation that favors certain speakers and certain programming over others and places impermissible burdens on the editorial discretion of cable operators by compelling them to carry certain messages. (citations omitted).

⁵⁸ *Turner I*, 512 U.S. at 664-68.

⁵⁹ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

communications regulation by favoring the return of free market policies over more intrusive regulation.⁶⁰ Specifically, the Act intended to “spur competition in the telephone and cable industries and to foster the development of new electronic media.”⁶¹ Notably, however, must-carry rules remained in place.

II. DUAL CARRIAGE’S STATUTORY MURKINESS

A. Overview

The combination of aging statutes that do not directly address DTV and the continually debated meaning of the *Turner* cases in the DTV context gives rise to multiple interpretations of the intended meaning behind “dual carriage.” This next section will give a brief summary of the two competing viewpoints (Public Television versus Cable) along with an analysis of the arguments.

1. *Public Television Wants Unique Treatment*

Public Television advances numerous arguments, with the consistent refrain that it should be granted dual carriage of its analog and digital streams regardless of the treatment its commercial counterparts receive.⁶² Specifically, Public Television cites its “unique statutory, factual, economic and historical circumstances of public television stations” to support its contentions.⁶³ The statutory argument centers on the fact that public broadcasting is governed by the Public Broadcasting Act of 1967, which mandates the government to “complement, assist and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States.”⁶⁴ Public Television points to similar sentiments reiterated in the Public Telecommunications Financing Act of 1978 and the Public Telecommunications Act of 1992.⁶⁵ Furthermore, the Cable Act of 1992

⁶⁰ PARSONS & FRIEDEN, *supra* note 5, at 265.

⁶¹ See CHARTING THE DIGITAL FUTURE, *supra* note 4, at 8.

⁶² See *infra* notes 63-70.

⁶³ Thompson, *et al.*, *supra* note 20.

⁶⁴ *Id.* at 1-2. (quoting the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, codified at 47 U.S.C. §396 (a)(7)).

⁶⁵ *Id.* at 5. The Public Telecommunications Financing Act of 1978 (Pub. L. No. 95-567, 92 Stat. 2405 (codified at 47 U.S.C. §396(a)(4))) states that “the encouragement and support of noncommercial educational radio and television broadcasting . . . [are] of appropriate and important concern to the Federal Government,” and the Public Telecommunications Act of 1992 (Pub. L. No. 102-356, 106 Stat. 949 (codified at 47 U.S.C. §396(a)(9) (2000))) states 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”

underscores putative governmental concern by characterizing its interest as “substantial” concerning subscribers’ “access to local noncommercial educational stations.”⁶⁶

Additionally, Public Television points out that Section 615 of the Cable Act of 1992 pertains exclusively to NCEs and has its own distinct legislative history apart from Section 614, which pertains to commercial broadcasters.⁶⁷ Moreover, Public Television argues that the differences in the language of the two sections indicate differing Congressional intents, with Section 615 explicitly granting broader carriage rights to Public Television than its commercial counterparts.⁶⁸ Thus, as a general principle Public Television contends there is ample support for the unique treatment from the Commission.⁶⁹

Finally, Public Television urges its unique service further buttresses their argument and, accordingly, it deserves the special treatment it has historically received from the Commission.⁷⁰ Thus, in Public Television’s eyes, it would be perfectly consistent for the Commission to mandate carriage of both analog and digital streams during the transitional phase, regardless of how it decides to treat commercial broadcasters.⁷¹

2. *Cable Wants to Treat Commercial and Non-Commercial Broadcasters Alike*

The National Cable and Telecommunications Association (“NCTA”), Cable’s largest trade organization, asserts that there is nothing statutorily unique about Public Television when it comes to dual carriage.⁷² It instead asserts that by the plain meaning of the Cable Act of 1992, any replicative material between analog and digital stations “substantially duplicates,” technically creating a “primary” station and another station.⁷³ Secondly,

⁶⁶ See Thompson, et al., *supra* note 20, at 6 (quoting The Cable Act of 1992, at §2 (a)(7)).

⁶⁷ *Id.* at 2-3, n.3.

⁶⁸ *Id.* at 3 (pointing out that the Commission had previously observed the differences in the statutory language between the sections particularly with regard to the phrase “program related” which is defined differently in § 615 by including reference to serving “handicapped persons or for educational or language purposes.”); see also *In re* Carriage of Digital Television Broad Signals, *supra* note 10, at 2651.

⁶⁹ See Thompson, et al, *supra* note 20, at 2-3.

⁷⁰ See *id.* at 8 n. 25 (enumerating special exemptions granted to NCEs by Congress and the Commission).

⁷¹ *Id.*

⁷² Letter from Daniel L. Brenner, Sr. Vice Pres., Law & Regulatory Policy, NCTA, to Michael K. Powell, Chairman, FCC, CS Dkt. No. 98-120, at 1 (Jan. 21, 2004) [hereinafter Brenner I].

⁷³ See *In re* Carriage of Digital Television Broad Signals, *supra* note 10, at 2626.

NCTA defines “local station” as a broadcast station that operates “a channel,” and therefore, dual carriage arguments fail on this basis as well.⁷⁴ Finally, NCTA contends that the differences in language between Sections 614 and 615 of the Cable Act of 1992 “undermine, rather than support, Public Television’s argument.”⁷⁵ It points out that Section 615, which pertains to NCEs, is “silent” on dual carriage, whereas the issue addressed in Section 614 applies to commercial stations.⁷⁶

NCTA further underscores Cable’s need to satisfy consumer demand for varied services by stating that “the real challenge for cable operators is how to allocate this valuable digital bandwidth among broadcast, digital cable, video-on-demand, HDTV, high speed data, cable telephony and other advanced broadband services. Part and parcel of this challenge is to offer services that consumers want in order to pay for this investment.”⁷⁷ A future of diminished consumer choice is clearly forewarned by stating that “[r]equiring. . . must-carry of every broadcast and public television station would significantly deplete that available bandwidth and require operators to drop other popular and viable cable networks.”⁷⁸

Furthermore, the NCTA contends that the section 614 “primary video” language of the Cable Act of 1992 echoes *Turner II*’s holding by preserving the free transmission of local broadcasts, but that “[t]he existing analog must carry rules ensure that interest is served.”⁷⁹ The NCTA finally argues that the Commission decided more than three years ago that carriage of digital programming was *not* mandated by the Cable Act of 1992 until broadcasters return their analog spectrum to the government.⁸⁰

C. Analysis Of The Arguments

While all parties have produced compelling arguments, no single point is dispositive. As a result, the only way to draw a sound conclusion is to scrutinize the legislative intent. On that basis, Congress accorded special

⁷⁴ *Id.* at para. 67 (quoting NCTA Reply Comments at 19) (quoting 47 U.S.C. § 534(h)(1)(A)).

⁷⁵ See Brenner I, *supra* note 72, at 2.

⁷⁶ *Id.*

⁷⁷ Letter from Daniel L. Brenner, Sr. Vice Pres., Law & Regulatory Policy, NCTA, to Michael K. Powell, Chairman, FCC, CS Dkt. Nos. 98-120, 00-96 and 00-2 (Mar. 20, 2003) [hereinafter Brenner II].

⁷⁸ *Pubcasters Seek to Leverage “Sentiment” on Local Control of Media*, PUB. BROAD. REP., available at LEXIS, News & Business Library (July 11, 2003) (quoting statement of an NCTA spokesman).

⁷⁹ See Brenner I, *supra* note 72, at 3.

⁸⁰ *Id.*

protection to Public Television, treating it differently from its commercial counterparts. Furthermore, Cable's position should be more closely scrutinized since it has a financial motivation for not wanting to carry the NCEs⁸¹ and has a history of questioning the FCC's regulatory authority concerning it.⁸² Many of the smaller NCEs, by contrast, will cease to exist without mandatory carriage.⁸³ Since the FCC is duty-bound to protect local broadcasters and local broadcast voices, the Commission must weigh its decision in light of this potential outcome.⁸⁴

If the Commission wishes to accord special protection to the NCEs, it need not look further than Section 615 of the Communications Act, which clearly illustrates Congressional recognition of the function NCEs serve and the special protection they deserve.⁸⁵ Indeed, the very existence of Section 615 underscores these legitimate differences. Otherwise, both commercial and non-commercial broadcasters could have been addressed by the language set forth in Section 614.

Second, in an effort to "ease the transition" to DTV,⁸⁶ Congress decided to provide all existing broadcasters a free license to also operate a digital broadcast.⁸⁷ With regard to NCEs, the grant of free spectrum was intended to safeguard its universal availability and ensure that "public broadcasting would remain a vital noncommercial venue."⁸⁸ It is impossible to conceive that in so doing Congress did not intend for both signals to be carried by Cable during the transition.⁸⁹ Otherwise, Congress could have either allowed the purchase of a digital license in a more traditional auction or lottery process or granted a digital license upon proof that the broadcaster was ready to return its analog

⁸¹ See *Must Carry Before the Senate Subcomm. on Commun.*, 101st Cong. 100 (Oct. 25, 1989) (statement of David Brugger, Pres., Nat'l Assoc. of Public Television Stations) ("The major factor cable operators consider in deciding which channels to carry is their ability to generate revenue . . . Public television services are unlikely to rate high on implicit or explicit criteria in this sort of decisionmaking."). *Id.* at 10 of prepared statement.

⁸² See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (holding that the Commission could validly assert its authority to regulate Cable).

⁸³ See *supra* note 9. See also *Pubcasters Seek to Leverage "Sentiment" on Local Control of Media*, PUB. BROAD. REP., available at LEXIS, News & Business Library (July 11, 2003) (APTS President John Lawson characterizes Cable's failure to carry smaller public television stations as a "life and death proposition.").

⁸⁴ See 47 U.S.C. §309 (2000).

⁸⁵ See §II. of text; cf. Brenner I, *supra* note 72, at 2 (arguing that differences in §§614 and 615 actually undermine Public Television's argument).

⁸⁶ See CHARTING THE DIGITAL FUTURE, *supra* note 4, at 9.

⁸⁷ Telecommunications Act of 1996, *supra* note 59, at §201.

⁸⁸ See CHARTING THE DIGITAL FUTURE, *supra* note 4, at 9.

⁸⁹ *Id.* at 3. ("[B]roadcasters will be able to develop a diverse range of new digital programming and services while continuing to transmit conventional analog television programming on their existing allotments of spectrum.") (citation omitted).

license. Such scenarios, however, are contrary to the very term “transition.”⁹⁰

Third, evidence that the system is out-of-balance can already be found. Thus far, in the absence of digital must-carry rules, cable operators have “cherry picked” highly rated public broadcasters while denying carriage to smaller ones whose programming is designed to serve underserved and minority communities.⁹¹ In the January 2001 ruling, Chairman Powell directed the conflicted groups to resolve their differences privately through negotiated agreements.⁹² In 2003, Public Television sent a letter to the Chairman with an update, stating that “the single most important issue – carriage during the digital transition – languishes” and “market forces are not sufficient to achieve the statutory 85% DTV penetration level anytime in the foreseeable future.”⁹³ In fact, Public Television pointed out that after three years of private negotiations, only three national cable agreements have occurred.⁹⁴ Not only does this negatively impact the public, it also runs afoul of the Communications Act, which mandates the development of programming that “addresses the needs of unserved and underserved audiences, particularly children and minorities.”⁹⁵ Therefore, the Commission has upset the balance Congress intended, and in so doing, caused a market failure.

By leaving market forces to determine dual carriage rights, the Commission ignores legislative intent. Requiring carriage of public, governmental and educational channels was meant to respond to the local needs of the community, thus creating airtime for voices that might not otherwise be heard or commercially viable.⁹⁶ For example, PBS seeks out programming that

⁹⁰ See GAO REP: FEDERAL EFFORTS, *supra* note 1, at 2. This is clearly not the case, as is underscored by the statement, “Once the transition is complete, broadcast stations will operate solely in digital.” *Id.*

⁹¹ See Thompson, et al., *supra* note 20 at 4. (“[Public broadcasters] told Powell they had made ‘strenuous overtures to MSOs, visits to cable company headquarters and meetings with NCTA,’ with more than 3 years of negotiation in reaching only 2 carriage agreements – with AOL Time Warner and Insight.”); see also *Must-Carry Help Sought*, TELEVISION DIGEST 1 (Mar. 3, 2003).

⁹² See Letter from Marilyn Mohman-Gillis, Vice Pres., Policy and Legal Affairs, APTS, Donna Gregg, Vice Pres., General Counsel and Corp. Secretary, CPB, and Katherine Lauderdale, Sr. Vice Pres. and General Counsel, PBS, Michael K. Powell, Chairman, FCC, CS Dkt. Nos. 98-120, 00-96, and 00-2, at 2 (Feb. 27, 2003).

⁹³ *Id.*; cf. Brenner II, *supra* note 77, at 1 (arguing that government-mandated carriage is unnecessary since voluntary agreements have been entered into by Cable and Public Television stations for both analog and digital signals).

⁹⁴ E-mail from Andrew D. Cotlar, Assistant General Counsel, APTS (Aug. 31, 2004, 16:51 EST) (on file with author).

⁹⁵ 47 U.S.C. §396 (a)(6) (2000).

⁹⁶ See 47 U.S.C. §532 (2000) and H.R. Rep. No. 98-934, at 19-20 (1984). Cf. Commissioner Jonathan S. Adelstein. Address at the Minority Media and Television Council (July 22, 2003), at <http://www.fcc.gov/commissioners/adelstein/speeches2003.html> (noting the dwindling opportunities for women and minorities through commercial broadcast media

“represents the diversity of this country”⁹⁷ and “embrace[s] new ideas, new filmmakers and new points of view,”⁹⁸ handling “complex social issues completely.”⁹⁹ These are hardly the mantras of commercial broadcasting. Recent shows illustrating these goals include the “P.O.V.” series¹⁰⁰ and “Evening Exchange with Kojo Nnamdi.”¹⁰¹

Finally, although Cable’s arguments against transitional mandatory carriage are based on legitimate scarcity of spectrum concerns, cooperation and carriage would shorten the time needed for dual carriage,¹⁰² as it would hasten the public’s overall adoption of DTV.¹⁰³ Thus, spectrum capacity would be burdened for less time and facilitate its return to the government as Cable desires.¹⁰⁴

III. PUBLIC INTEREST ARGUMENTS¹⁰⁵

The Communications Act of 1934 states that licensees are granted the privilege of using the broadcast spectrum to “serve the public interest, convenience and necessity.”¹⁰⁶ The public interest requirement has been described as a “supple instrument” that is not limited to any one medium.¹⁰⁷ The FCC has specifically articulated public interest obligations in the DTV age by stating that “digital broadcasters remain public trustees with a responsibility to serve the public interest” and “existing public interest requirements continue to apply to all broadcast licensees.”¹⁰⁸

outlets).

⁹⁷ PBS.org, at <http://www.pbs.org/producers/mission.html> (last visited Nov. 19, 2004).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ PBS.org, at <http://www.pbs.org/pov/> (last visited Nov. 19, 2004).

¹⁰¹ WHUT.org, at <http://www.howard.edu/tv/> (last visited Nov. 19, 2004).

¹⁰² *Must-Carry Help Sought*, TELEVISION DIGEST 1 (Mar. 3, 2003). “Cable systems have powerful incentives to install the necessary equipment to reach this sunset. It would free them from the dual carriage obligation.” (quoting Public Television).

¹⁰³ *Id.*

¹⁰⁴ See Brenner II, *supra* note 77, at 4.

¹⁰⁵ For an overview of public interest obligations in connection with DTV, see Graham, *supra* note 3, at 97 (arguing that digital television should not bring added public interest obligations); Cf. CHARTING THE DIGITAL FUTURE, *supra* note 4, at 3 (considering whether “additional public interest obligations may be appropriate . . . through digital broadcasting.”).

¹⁰⁶ See 47 U.S.C. §309 (2000).

¹⁰⁷ *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

¹⁰⁸ See *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, *supra* note 7, at 12809-811.

A. Cable's De Facto Public Interest Obligation

Since Cable is not a licensee of the spectrum, it is not ascribed the same role of public trustee. However, it also has statutory obligations to be “responsive to the needs and interests of the local community” and to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”¹⁰⁹ Moreover, 70% of Americans receive their local broadcast stations via Cable, and as a result, Cable becomes the *sine qua non* of the broadcast licensee’s public interest mandate fulfillment.¹¹⁰

Many commercial cable stations have voiced their opposition to the special protections accorded to Public Television on the basis of serving the public interest since they believe that they too serve the public equally well, if not better. Specifically, they first argue that content-based distinctions should not be made as grounds for continuation of must-carry rules. Alternatively, they argue, if content-based distinctions are made, stations such as A&E, Court TV and the History Channel all satisfy the “public interest” just as well.¹¹¹ In addition, cable operators have argued that must-carry rules defy free market principles of demand driving innovation because guaranteed carriage chills the incentive to be creative.¹¹²

B. Public Television's Fulfillment of Its Mandate

Conversely, the former president of CPB claims that Public Television broadcasters are uniquely qualified to exploit and optimize the new opportunities that DTV offers and thus serve in the role of public trustee more competently than ever before.¹¹³ In his statement before the House Telecommunications and Internet Subcommittee, he underscored Public Television’s unique qualification in this regard by stating, “[w]ith their long experience in providing exciting educational, cultural, and public service programming, they are uniquely positioned to use the various digital

¹⁰⁹ 47 U.S.C. §521(2) and (4) (2000).

¹¹⁰ See Press Release, Public Broadcasters’ Response to FCC Rule Making on Digital Must-Carry, at http://www.pbs.org/aboutpbs/news/20010124_digitalmustcarry.html (Feb. 18, 2001).

¹¹¹ *More Must Not Carry*, CABLEFAX, available at LEXIS, News & Business Library (Nov. 10, 2003).

¹¹² See, e.g., *Public Broadcasting*, supra note 9, at 23 (testimony of Michael Willner, Pres. and CEO, Insight Communications).

¹¹³ *Id.* at 2. (statement of Robert Coonrod, former President and CEO, CPB) (“The new technology presents the opportunity to address some of the nation’s biggest domestic challenges. We can truly revolutionize the way we use the airwaves not just to entertain, but also to teach, and to work.”).

technologies to serve the needs of millions of viewers and listeners of all ages and ethnic backgrounds.”¹¹⁴ As one example, KAET-DT in Phoenix, Arizona is already multicasting three channels of children’s and educational programming.¹¹⁵ Another station, WXXI-TV in Rochester, New York, plans to simulcast four channels during the daytime hours, which may include two children’s programs for different ages on two of the channels and distance learning programs on various topics on the other two.¹¹⁶

C. Analysis: The Enduring – Perhaps Expanding – Public Interest Obligations of Broadcasters

In order for DTV to make its anticipated contribution to public interest objectives of increased diversity, political discourse and more enriching cultural programming, policymakers need to ensure that industry squabbles do not derail these potentialities.¹¹⁷ Despite some quality contributions of other aforementioned commercial programmers, Public Television has undisputedly contributed greatly to serving the public interest, especially when compared to its commercial counterparts.¹¹⁸ In addition, according to Roper Reports, public broadcasting ranks as one of the five best values Americans receive for their tax dollars.¹¹⁹

More than just perceived value in the public’s eye, however, it is hardly fair for taxpayers to continue to pay the same in taxes toward Public Television and actually receive *less* in the DTV world. But, in addition to the loss of smaller stations, there are four segments of consumers who also stand to lose their programming if both analog and digital are not offered during the transition. They are consumers who do not subscribe to a pay service (approximately 22% of households), those who subscribe to a service but own more than one television not connected to the subscription service, those who subscribe to analog-only cable, and those satellite subscribers who receive analog local stations in a digitized format.¹²⁰

¹¹⁴ *Id.*

¹¹⁵ KAET.asu.org, at <http://www.kaet.asu.edu/dtv/multicast.htm> (last visited Nov. 19, 2004).

¹¹⁶ WXXI.org, at <http://www.wxxi.org/dtv/faqindex.html#multicasting> (last visited Nov. 19, 2004).

¹¹⁷ See Philip M. Napoli, *The Public Interest Obligations Initiative: Lost in the Digital Television Shuffle*, 47 J. OF BROAD. & ELEC. MASS MEDIA 153 (Mar. 1, 2003).

¹¹⁸ See 47 U.S.C. §521(2) and (4) (2000); see also Graham, *supra* note 3, at 126-27 (quoting former FCC Chairman Reed Hundt in his address to the Nat’l Assn. of Broadcasters, scolding, “Gentleman, your trust accounting with your beneficiaries is long overdue. Never have so few owed so much to so many.”).

¹¹⁹ See *supra* note 9, at 1 (quoting Robert Coonrod, former President and CEO, CPB).

¹²⁰ Comments of APTS, *In re Media Bureau Seeks Comment on Over-the-Air Broad-*

By both the statutory language of the Communications Act underscoring its obligations and by virtue of it serving as the primary conduit for the majority of Americans to receive local broadcasters, Cable should perceive Public Television as a means to fulfill its own obligations.¹²¹ Arguably, as Chairman Powell stated, no new public interest obligations arise with the advent of DTV,¹²² but Cable's cooperation and carriage of Public Television during the transition needs to be mandatory in order to continue to satisfy the original, basic requirements.¹²³ Even those who do not view the advent of DTV as a reason to add new public interest obligations believe that the potential to better fulfill the original mandate will be best realized by NCEs.¹²⁴ Specifically, Public Television provides "thousand[s] of hours of programming and services to address the needs of children and to enhance public discourse," with DTV presenting numerous opportunities for Public Television to satisfy the public interest mandate in an even fuller way, including broadband educational offerings and safety information.¹²⁵ Loss of carriage during the transition could mean a total loss of these enriching possibilities.

cast Television Viewers, MB Dkt. No. 04-210, at i, (Aug. 11, 2004).

¹²¹ See Graham, *supra* note 3, at 126 ("Accordingly, a better approach to public interest regulation in general would be to extract resources from commercial use of the spectrum that can be channeled to public broadcasting.").

¹²² *In re Public Interest Obligations of TV Broadcast Licensees, Notice of Inquiry*, 14 FCC Rcd. 21633 (Dec. 20, 1999) (concurring statement of Michael K. Powell, Chairman of the FCC) (emphasis in original).

¹²³ See *supra* text and note 24; see also *Blame Game on DTV Continues With Comments to FCC*, COMMUNICATIONS DAILY, Apr. 23, 2003, available at LEXIS, News & Business Library [hereinafter *Blame Game*].

¹²⁴ See Graham, *supra* note 3, at 126-27 ("[D]igital television's greatest potential to further the public interest may be the new and innovative ways to reinforce and expand the services provided by noncommercial-educational television."); see also, e.g., *Public Broadcasting*, *supra* note 9, (statement of Rep. Thomas C. Markey) ("Digital broadcasting will allow [public] television stations to partner in extraordinary and innovative ways with universities to offer continuing education and job training programs, will help local schools to receive educational content, and . . . the ability to establish and unite the nation in a national homeland security public safety network."); see also *Blame Game*, *supra* note 123, at 2 (paraphrasing joint comments of APTS and PBS that no new public interest obligations arise from DTV because Public Television had taken the public interest obligation seriously in the analog context.).

¹²⁵ *Blame Game*, *supra* note 123, at 2 (quoting joint comments of APTS and PBS).

IV. THE FIRST AMENDMENT ARGUMENTS – CONTENT REGULATION AND BOTH SIDES’ CITATION OF THE TURNER CASES TO SUPPORT THEIR POSITIONS.

A. Cable’s First Amendment Contentions

Cable contends that the dual carriage issue does not fall within the ambit of the must-carry rules, as it fails to advance the governmental interests that Congress contemplated, or further the interests asserted by the Supreme Court in *Turner I* or *Turner II*.¹²⁶ As such, dual carriage imposes an undue burden on Cable’s First Amendment rights.¹²⁷ For example, in *Turner II*, Cable argues that the Court merely affirmed the existing must-carry rules from the Cable Act of 1992, affirming the importance of free local broadcasting, but nothing more.¹²⁸ In addition, Cable points out that finite spectrum concerns of the past do not vanish in the digital context.¹²⁹ While Cable acknowledges that techniques have been developed to sufficiently overcome most digital broadcast capacity concerns,¹³⁰ these innovations hardly create infinite bandwidth.¹³¹

B. Public Televisions’ Dismissal of Cable’s First Amendment Arguments

In contrast, Public Television makes several arguments to support its contention that Cable’s First Amendment rights are not substantially burdened with dual carriage. First, a dual carriage requirement, like the Supreme Court held in *Turner II*, is also content-neutral and therefore deserving only

¹²⁶ *Id.* at 2; see also *Exam. of Media Bureau Proposal*, *supra* note 16, at 27 (testimony of Robert Sachs, Pres. and CEO of NCTA) (making a distinction between must-carry and dual carriage, and pointing out that the *Turner II* decision was premised on the former and not the latter).

¹²⁷ See Brenner II, *supra* note 77, at 2-3 (citing *Turner II*, 520 U.S. at 215).

¹²⁸ See Brenner I, *supra* note 72, at 3 (citing *Turner II*, 520 U.S. 180).

¹²⁹ See Brenner II, *supra* note 77, at 2 (“Given the limits on Cable’s digital bandwidth, such a requirement [dual carriage] is neither practicable nor in the interest of consumers during the transition to digital television.”).

¹³⁰ PARSONS & FRIEDEN, *supra* note 5, at 81-82. Compression techniques must be implemented to “squeeze” a picture into a narrower bandwidth, for without it, a digital channel would consume five times the bandwidth versus an analog channel’s transmission. See also Graham, *supra* note 3, at 128 (“Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium.”).

¹³¹ *Exam. of Media Bureau Proposal*, *supra* note 16, at 27 (statement of Robert Sachs, Pres. and CEO of NCTA, warning that if dual carriage is mandated, it would be at the expense of other services because capacity is still limited).

intermediate scrutiny.¹³² As such, Congress has clearly deigned access to Public Television services as an important governmental interest including language in the Cable Act of 1992 such as “there is substantial governmental and First Amendment interest in ensuring that cable subscribers have access to noncommercial educational stations.”¹³³ Furthermore, must-carry rules have also been held to be content-neutral, which amounts to a “well-settled government policy of ensuring public access to noncommercial programming.”¹³⁴

C. The Commission Sides With Cable

The FCC has indicated that it finds Cable’s arguments to be more compelling by stating, “[o]n this point, we tentatively conclude that, based on the existing record evidence, a dual carriage requirement appears to burden Cable’s First Amendment interests substantially more than is necessary to further the government’s substantial interests of preserving the benefits of free over-the-air local broadcast television” However, in order to evaluate the issue thoroughly, the Commission stated that a Further Notice of Proposed Rulemaking is needed.¹³⁵ Specifically, the Commission stated that it would be inappropriate to act without a further understanding of the constitutional issues raised and the economic impact of its ruling.¹³⁶

D. Analysis: Whose Freedom of Speech is *More* Burdened?

In his concurrence in *Turner II*, Supreme Court Justice Breyer pointed out that “compulsory carriage that creates the ‘guarantee’ extracts a serious First Amendment price” and that “the ‘price’ amounts to a ‘suppression of

¹³² Comments of Public Television to *In re* Carriage of Television Broad Signals, Amendments to Part 76 of the Commission’s Rules, CS Dkt. No. 98-120, 4-5 (Mar. 20, 2003).

¹³³ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

¹³⁴ *Time Warner Ent. Co. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996).

¹³⁵ See *In re* Carriage of Digital Television Broad. Signals, *supra* note 10, at 2598-99.

¹³⁶ *Id.* at 2605.

“[W]e find it unjustified for the Commission to act at this time in light of the constitutional questions the subject presents, including the related issues of economic impact.” The Commission has, however, confirmed that mandatory carriage of broadcasters’ digital signal is a given. “[I]t is important to clarify that broadcast stations operating only with digital signals are entitled to mandatory carriage We find that the burden on a cable operator to carry such stations is *de minimis*”

Id.

speech.”¹³⁷ However, it is the inevitable nature of all decisions involving First Amendment speech concerns that one party’s speech is curtailed so that the other party’s can be supported.¹³⁸ Since the dual carriage debate is no different in this regard, the question necessarily centers on whether there is an important governmental interest being advanced without substantially burdening the interests of the other party.¹³⁹ Clearly, the burdens that Cable must bear are only temporary: the more expediently Cable acts, the less time the transition will take. In this sense, Cable’s own actions determine the degree of “burdensomeness” of dual carriage.¹⁴⁰ By contrast, some public broadcasters will lose their First Amendment right to speak altogether should dual carriage not be mandated. Not only will this impact the public stations’ futures, but it also negatively affects Cable’s subscribers with whom Cable is ostensibly concerned.

Furthermore, the idea that the government is within its rights to require carriage of Public Television is consistent with the public trustee model of disseminating broadcast licenses.¹⁴¹ By taking issue with dual carriage, Cable is in effect denying any carriage at all to smaller NCEs and therefore, failing to comply with the must-carry rules in general. Since mandatory carriage of the analog signal has been held to be constitutionally permissible under *Turner II*, so too should mandatory dual carriage during the transitional phase. Without it, there will be fewer stations in existence to serve Cable’s subscribers when the DTV conversion is finally complete.¹⁴²

Lastly, the Commission’s initial position lumps all broadcasters together—commercial and noncommercial alike—in its tentative dual carriage determination.¹⁴³ Upon subsequent analysis of the economic impact on NCEs, the FCC must recognize that the combination of Public Television’s overall fundraising efforts and some stations’ precarious financial predicament

¹³⁷ *Turner II*, 520 U.S. at 226 (Breyer, J. concurring in part).

¹³⁸ *The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck “Rule” in the Turner Decisions*, 8 COMM. L. & POLICY 27, 39 (Winter 2003) (“The result is that someone’s freedom is enhanced and someone’s freedom is restricted in the adjudication of every free speech case.”).

¹³⁹ Based on a *Turner II*, the assumption is that a First Amendment intermediate scrutiny test would be applied to any dual carriage abridgement claim.

¹⁴⁰ See Mohman-Gillis, *supra* note 92, at 2 (discussing sunset proposal) and 4-5.

¹⁴¹ See, e.g., *CBS Inc. v. FCC*, 453 U.S. 367 (1981) (“A licensed broadcaster is ‘granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.’”) (quoting *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (1966)). *Id.* at 395.

¹⁴² See *supra* notes 21-22.

¹⁴³ See *supra* note 10 and text accompanying note 126.

requires unique treatment apart from their commercial counterparts.¹⁴⁴

V. MEASURABLE IMPACT OF DUAL CARRIAGE

A. Fiscal Costs

1. *Public Television's Fundraising Needs*

Public Television has sought to cover the more than \$1.8 billion price tag of conversion through a combination of fundraising efforts at the state legislature level, as well as federal funding and private donations.¹⁴⁵ Of this amount, stations have raised nearly \$750 million.¹⁴⁶ Thus, without dual carriage, not only is the potential adverse impact on the smaller NCEs of concern, but Public Television's fundraising efforts will also be negatively impacted.¹⁴⁷ Specifically, public broadcasters solicit underwriting dollars from many of the same companies who advertise on commercial stations. Without carriage in some markets, public broadcasters' ability to compete would be necessarily minimized.¹⁴⁸

2. *Cable Does Not Wish to Foot Public Television's Bill*

Cable operators have invested more than \$70 billion to create spectrum capacity for DTV.¹⁴⁹ The NCTA argues that Public Television has made some imprudent business decisions and now wants the government to make Cable assume the cost: "If funding was sought by Public Television on the basis that dual carriage was mandated prior to the transition, then that is a problem of public television's own making."¹⁵⁰

¹⁴⁴ See Comments to *In re Carriage of Television Broad. Signals*, *supra* note 132, at 8 ("The economic realities facing public television are of course relevant to the constitutional analysis of digital must-carry because these realities determine what will and will not inflict substantial harm on the service provided by public broadcast stations.").

¹⁴⁵ See *Public Broadcasting*, *supra* note 9 (statement of Robert Coonrod, former President and CEO, CPB).

¹⁴⁶ *Id.*

¹⁴⁷ See Comments to *In re Carriage of Television Broad Signals*, *supra* note 132.

¹⁴⁸ *Id.*

¹⁴⁹ See *Blame Game*, *supra* note 123, at 1.

¹⁵⁰ Brenner I, *supra* note 72, at 3.

3. Analysis: Commensurate Shared Costs Do Not Overly Burden Cable

While Cable has obviously incurred considerable expense to convert to DTV, it was not based on some altruistic public service; it was a business decision meant to increase revenues.¹⁵¹ Furthermore, since Public Television was operating in reliance of previous FCC rulings concerning the transition, it is understandable that funds were raised based on carriage assumptions.¹⁵²

In addition, the costs of the digital transition are not borne by Cable and broadcasters alone; the public must also bear expense for this change-over to occur.¹⁵³ The public will be forced to either purchase new televisions with digital signal capability or purchase converter boxes that will convert the digital signal back to analog for viewing on their existing television sets.¹⁵⁴ Moreover, Americans should be entitled to access the public broadcasting services that their tax dollars support.¹⁵⁵ If the public has no access to their market's public broadcasters on their cable system, it is highly unlikely that the public would support that station.

The transition to DTV requires some degree of burden for everyone who watches television. As such, it is reasonable to expect Cable, which serves as the prime source of signal to American households,¹⁵⁶ to bear costs to ensure that consumers' mandatory purchases are not without immediate purpose and function. Since the FCC held carriage of broadcasters' digital signal to be a *de minimus* burden, then surely requiring a temporary transitional carriage of both signals cannot rise much above that.¹⁵⁷

B. The Cost of a Constitutional "Taking"

Cable has also argued that dual carriage imposes an unconstitutional "taking" of its property by "condemn[ing] a portion of cable operators' property and *turn[ing] it over to third parties* who are entitled to exclusive use of the channels in question on a continuing basis."¹⁵⁸ This so-called "land

¹⁵¹ See Gigi B. Sohn & Andrew J. Schwartzman, *Pretty Pictures or Profits: Issues and Options for the Public Interest and Non-Profit Communities in the Digital Broadcast Debate*, at <http://www.benton.org/publiclibrary/pretypics/working13.html> (Oct. 1995).

¹⁵² *Must-Carry Help Sought*, TELEVISION DIGEST 1 (March 3, 2003); see also Thompson, *et al*, *supra* note 20, at 6.

¹⁵³ See GAO REP: FEDERAL EFFORTS, *supra* note 1, at 6.

¹⁵⁴ *Id.*

¹⁵⁵ See *Must Carry Before the Senate Subcomm. on Commun.*, 101st Cong. 96 (Oct. 25, 1989) (statement of David Brugger, Pres., Nat'l Assoc. of Public Television Stations).

¹⁵⁶ Two-thirds of American households with a television receive their television signal via Cable. GAO REP: FEDERAL EFFORTS, *supra* note 1, at 3, 7.

¹⁵⁷ See *supra* note 136.

¹⁵⁸ Essay from Professor Laurence H. Tribe to the FCC, *Why the Commission Should*

grab”¹⁵⁹ was briefly addressed in *Turner I*, with four Justices acknowledging the issue.¹⁶⁰ Professor Laurence Tribe argues on the NCTA’s behalf that it is inconsequential whether the government takes Cable’s property “wholesale or piece by piece.”¹⁶¹ However, this takings analysis falsely suggests a permanence of property shifting, which is not the case with transitional dual carriage.

VI. PROPOSED SOLUTIONS

Public Television’s latest proposal is termed “PTV Now,” meaning that the Commission is within its authority to accord dual carriage to NCEs regardless of what it chooses to do with commercial television.¹⁶² Once analog use ceases, APTS advocates full carriage of both digital stream and a “down-converted” version for those consumers who are still lacking the proper equipment and/or subscribing to analog cable.¹⁶³

Another alternative to mandatory dual carriage has been termed “date-certain,” meaning a date would be set as a deadline where broadcasters would all at once have the must-carry rule apply to their digital channels, dropping their analog channels as a result.¹⁶⁴ This “solution” has not been well-received by either side.¹⁶⁵ Date-specific equipment purchases would burden consumers, and in general, the NCTA feels a date-specific deadline overly burdens Cable and its subscribers instead of broadcasters, who asked for the transition in the first place.¹⁶⁶

The Commission’s Media Bureau’s latest proposal will require Cable to “down convert” digital signals so all subscribers can receive it, whether or not they are equipped to receive a digital stream.¹⁶⁷ Under this plan, broadcasters would be permitted to negotiate voluntary carriage of their digital signal, and once a broadcaster returns its analog spectrum, it could choose whether to

Not Adopt a Broad View of the “Primary Video” Carriage Obligation, at 12 (emphasis in original).

¹⁵⁹ *PBR Notes*, PUBLIC BROAD. REP., available at LEXIS, News & Business Library (Dec. 12, 2003) (quoting Adam Thierer of the Cato Institute).

¹⁶⁰ *Turner I*, 512 U.S. at 684.

¹⁶¹ Tribe, *Supra* note 158, at 15.

¹⁶² See APTS.org Public Television Presents PTV Now Case, at http://apts.org/stories/ptv_first.cfm (last visited Nov. 19, 2004).

¹⁶³ Comments of APTS, *supra* note 120.

¹⁶⁴ See, e.g., GAO REP: FEDERAL EFFORTS, *supra* note 1, at 3.

¹⁶⁵ *Id.* at 12.

¹⁶⁶ *Id.*

¹⁶⁷ See generally *Exam. of Media Bureau Proposal*, *supra* note 16, at 9 (testimony of Ken Ferree, Media Bureau Chief, FCC).

down-convert or offer its signal in digital only.¹⁶⁸ This “solution” has also not been well-received, with the exception of Cable’s measured support.¹⁶⁹

IX. CONCLUSION

Despite legitimate, well-reasoned arguments from each side of the debate, it is natural to favor Public Television because it is they who stand to lose the most. It would be difficult to reconcile how siding with the Cable industry over an interim transitional policy in the interest of their First Amendment concerns benefits the public in any way. Just as the Supreme Court held must-carry rules to be content-neutral, so too is dual carriage.¹⁷⁰ Furthermore, if one of the First Amendment’s goals is to produce “an informed public capable of conducting its own affairs,”¹⁷¹ then the public’s need to be informed and the ability of Public Television to contribute to this goal should outweigh Cable’s concerns of total editorial freedom – a freedom it does not currently enjoy anyway.

Cable has also failed to advance any argument as to how much appreciable, measurable impact interim dual carriage would actually have. Although there are undeniable costs involved, they are commensurately borne by broadcasters, including Public Television, and the public alike. Moreover, perhaps more than any of the parties, Cable stands to reap the greatest financial reward from the transition in the first place.

Most importantly though, dual carriage is merely a transitional phase necessitated by slow DTV adoption, and it would only behoove Cable to try and make this period as short as possible. The earlier Cable agrees to dual carriage, the faster the public will purchase new equipment, and the faster broadcast licensees can cease to transmit in analog and return the spectrum to the government. However, if the FCC denies NCEs carriage during the transitional phase – a period that many experts estimate to be more than four years – it will be “fatal”¹⁷² to many smaller stations and the promise of a richer, more diverse DTV future will be circumscribed in turn.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (statement of Robert Sachs, Pres. and CEO of NCTA, stating that Cable, not broadcasters, should decide which stream to carry).

¹⁷⁰ *Turner I*, 512 U.S. 622, 647 (1994).

¹⁷¹ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969).

¹⁷² *See Constitutional Issues*, *supra* note 22.