The Road Not Yet Traveled: Why the FCC Should Issue Digital Must-Carry Rules for Public Television "First"

Andrew D. Cotlar*

* J.D., Pennsylvania State University, Dickinson School of Law; M.A. University of Wisconsin—Madison; Assistant General Counsel, Association of Public Television Stations. The views stated in this Article are solely those of the Author and do not necessarily reflect the views of the Association of Public Television Stations. The Author also wishes to thank Karen H. Cotlar as always for her kind support and loving patience.

After having recently adopted a variety of complex and controversial decisions concerning the digital television transition, the Federal Communications Commission ("FCC") may be poised this year to address the issue of mandatory cable carriage of digital broadcast television signals.[1] This issue has been a matter of hot contention in Washington for three years since the FCC issued its last decision on this topic in 2001. The final resolution of the issue was repeatedly delayed, apparently due to a deadlock among the FCC Commissioners. As the FCC considers the issues, it should recognize that it may decide the critical issue of cable carriage in a careful and incremental manner. In this regard, it may reasonably consider the possibility of crafting digital carriage rules for public television stations first without ruling positively or negatively on carriage of commercial stations. This action may legitimately be based on the unique legislative and factual differences between the noncommercial and commercial service and would be constitutionally permissible. In fact, a stronger constitutional case can be made for carriage of public television stations than for commercial stations. Nor would such a distinction constitute content-based discrimination, for the FCC has made, and may continue to make, valid distinctions based on the differences in the purpose, support, and operation of the various classes of licensees under its jurisdiction. Moreover, such an approach has the additional advantage of accommodating public television stations without harming commercial interests. In this regard, the FCC need not decide either for or against commercial carriage until it has, perhaps, conducted a study of the market conditions and need for commercial carriage: an approach that would guarantee the regulatory support public television stations need while realistically respecting the political sensitivities of commercial broadcasters.

This Article sets forth the legal basis for a "public-television-first" approach. Part I discusses the digital television build-out. Part II describes the role of public television stations in the digital build-out. Part III

1. Tania Panczyk-Collins, Terry Lane, *Powell Wants to Wrap Up Outstanding DTV Issues by Year End*, COMM. DAILY, Oct. 5, 2004.

explains the FCC's 2001 ruling on digital cable carriage, describes the state of the record since the order was issued, and explains the impact of the order on public television stations in particular. Lastly, Part IV argues that a "public-television-first" approach is a reasonable, content-neutral, and therefore constitutionally permissible, exercise of the FCC's authority to address the unique needs and circumstances of public television stations.

I. THE DIGITAL TRANSITION: BUILD-OUT OF THE INFRASTRUCTURE

Federal law requires that after December 31, 2006, all television licensees must broadcast solely in digital[2] unless the FCC extends the deadline in a particular local television market because direct digital television ("DTV") reception or indirect reception of DTV signals via cable or satellite is not widely available to at least 85 percent of households in that market.[3] At the end of the DTV transition, the spectrum not necessary for digital operation must be returned to the federal government for reallocation.[4]

To initiate this conversion, the FCC allocated nearly all full-power broadcast television stations an additional 6 MHz channel with which to begin digital broadcasts,[5] required these stations to construct DTV facilities

2. "A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006." 47 U.S.C. § 309(j)(14)(A) (2001).

3. *See* 47 U.S.C. § 309(j)(14)(B). In this regard, extensions of the deadline occur under any one of the three following circumstances: (A) one or more of the stations in that market licensed to or affiliated with one of the four largest national television networks is not broadcasting a digital signal; (B) "digital-to-analog converter technology is not generally available in that market; or" (C) 15 percent or more of the television households in the market do not subscribe to a "multichannel video programming distributor" that carries the DTV signal of each of the television stations broadcasting in DTV in the market, and do not have either (1) at least one DTV television receiver or (2) at least one analog television receiver equipped with digital-to-analog converter technology. *Id.*

4. 47 U.S.C. § 309(j)(14)(C). In encouraging the development of DTV and in managing the statutory mandate to convert all television broadcasting to digital, the FCC has articulated a number of goals. They are: "1) preserving a free, universal broadcasting service; 2) fostering an expeditious and orderly transition to [DTV]…; 3)…recovering contiguous blocks of spectrum; 4) ensuring that the spectrum…will be used in a manner that best serves the public interest." Advanced TV Sys. and Their Impact on the Existing TV Brdcst. Serv., *Fifth Report and Order*, 12 F.C.C.R. 12809, para. 4 (1997) [hereinafter *Fifth Report and Order*]. The FCC also set forth the following goals: 1) to ensure confidence and certainty in the DTV transition; (2) to increase the availability of new products and services to consumers; (3) to encourage technological innovation and competition; and (4) to minimize regulation and to ensure that those regulations that are adopted do not last any longer than necessary. *Id.*

5. Advanced TV Sys. and Their Impact on the Existing TV Brdcst. Serv., *Sixth Report and Order*, 12 F.C.C.R. 14588 (1997) [hereinafter *Sixth Report and Order*].

according to a graduated schedule,[6] and set forth operational rules governing the nature of digital broadcast operations, including requirements concerning replication of the analog coverage area,[7] maximization beyond the analog coverage area,[8] analog-digital simulcasts,[9] minimum hours of operation,[10] and penalties for unexcused failure to construct digital facilities on time.[11] A key feature of the FCC's plan to migrate television broadcast operations solely to digital operation was a transition period during which television licensees would be required for a period of time to operate both their analog and their digital stations. In this regard, it was determined that a transitional period was necessary to ensure continuity of service until digital reception capability becomes so widespread that the cessation of analog service would create a minimal adverse impact on the public.[12]

While a successful transition to a fully digital broadcast service may seem to simply be a matter of time and consumer acceptance, there are a number of factors affecting the pace of the digital transition. Such factors include the widespread distribution of digital programming content, an effective means by which digital programming content is protected against illegal copying and distribution, the inclusion of over-the-air receivers in all DTV sets or related devices, standards for the connection of "cable-ready" sets to cable systems, and carriage of local broadcast DTV signals by multichannel video programming distributors, such as cable or satellite. Recently, the FCC has made great strides to address all of these issues, save the remaining issue of cable carriage. It has encouraged the production of quality digital content.[13] It has concluded a proceeding designed to protect digital broadcast content from illegal piracy and unauthorized distribution on the Internet.[14] It has mandated the phased-in inclusion of over-the-air

6. *Fifth Report and Order*, *supra* note 4, para. 76; 47 C.F.R. § 73.624(d) (2003).

7. *Sixth Report and Order*, *supra* note 5, para. 33; *Fifth Report and Order*, *supra* note 4, paras. 74 n. 161, 91 (allowing initial broadcast of low power signal).

8. *Sixth Report and Order*, *supra* note 5, para. 31; 47 C.F.R. § 73.622(f)(5) (2003).

9. This requirement has since been deleted. Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Report and Order*, 2004 FCC LEXIS 5129, para. 131 (2004).

10. *See id.* § 73.624(b); Second Periodic Review of the Comm'n's Rules and Policies Affecting the Conversion to Digital TV, *Order,* 18 F.C.C.R. 8166 (2003).

11. Remedial Steps for Failure to Comply with Digital TV Constr. Schedule, *Order and Notice of Proposed Rulemaking,* 17 F.C.C.R. 9962, paras. 16-19 (2002).

12. *Fifth Report and Order*, *supra* note 4, paras. 2-4.

13. *See* Letter from Michael K. Powell, Chairman, FCC, to W.J. Tauzin, Representative, La., CS Dkt. No. 98-120 (Apr. 4, 2002), *at* http://ftp.fcc.gov/commissioners/powell/tauzin_dtv_letter-040402.pdf [hereinafter Tauzin Letter].

14. *See* Digital Brdcst. Content Prot., *Report and Order and Further Notice of Proposed Rule Making*, 18 F.C.C.R. 23550 (2003).

digital tuners in all television sets over a certain size.[15] It has also conditionally approved an industry agreement to facilitate the connection of consumer electronics reception equipment and digital cable systems.[16]

Regarding cable carriage, over three years ago, the FCC tentatively decided that full mandatory carriage of both the analog and digital signals of local television broadcasters during the transition was unconstitutional and that after the transition broadcasters could elect mandatory carriage of only one of their multicast streams.[17] This decision has been the subject of multiple petitions for reconsideration and heavy lobbying by broadcasters, cable industry representatives, public interest advocates, and many others. Since its decision was issued, the FCC has neither reconfirmed nor reconsidered its tentative conclusions, creating considerable uncertainty and potentially undermining what progress has been made to advance the digital transition.

This issue, however, may be one of the most important of the factors affecting the transition to digital. Indeed, as the Congressional Budget Office and the U.S. General Accounting Office have concluded, digital carriage is essential to successfully complete the digital transition.[18] With approximately 66 percent of American homes subscribing to cable,[19] and 20 percent subscribing to satellite-delivered programming services,[20] it is a mathematical impossibility that the country will achieve the 85 percent digital penetration required for the digital transition to be complete without

15. *See* Review of the Comm'n's Rules & Policies Affecting the Conversion to Digital TV, *Second Report and Order and Second Memorandum Opinion and Order*, 17 F.C.C.R. 15978 (2002).

16. *See* Implementation of Section 304 of the Telecomm. Act of 1996, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 20885 (2003).

17. *See* Carriage of Digital TV Brdcst. Signals, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 2598 (2001) [hereinafter *DTV Carriage Order*].

18. *See* CONGRESSIONAL BUDGET OFFICE, COMPLETING THE TRANSITION TO DIGITAL TELEVISION 27-29 (Sept. 1999), *at* http://purl.access.gpo.gov/GPO/LPS33464 [hereinafter CONGRESSIONAL BUDGET OFFICE PAPER]; U.S. GENERAL ACCOUNTING OFFICE, ADDITIONAL FEDERAL EFFORTS COULD HELP ADVANCE DIGITAL TELEVISION TRANSITION 4 (Nov. 2002), *at* http://www.gao.gov/new.items/d037.pdf [hereinafter GENERAL ACCOUNTING OFFICE PAPER].

19. As of June 2003, 70,490,000 households subscribed to basic cable services out of 106,641,910 households in the United States, a total of 66 percent. Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, *Tenth Annual Report*, 19 F.C.C.R. 1606, app. B, tbl. B-1 (2004) [hereinafter *Video Programming Competition Assessment Report*].

20. The FCC has reported that there are 20,360,000 subscribers to direct broadcast satellite and an additional 502,191 C-Band subscribers. In total, satellite television serves 20.86 million households, or 20 percent of all television households. *Id*.

cable carrying broadcasters' digital signals in the interim.[21]

Moreover, as this Article attempts to demonstrate, cable carriage is the single most important factor for determining the success of the digital transition as it affects this nation's public broadcasters. Without carriage of their digital broadcast signals, public television stations are placed in a position that is even worse than what occurred in the mid-1980s when the FCC's analog must-carry rules were temporarily ruled unconstitutional. As discussed below, the digital transition offers private and public broadcasting the promise of newly enhanced educational services in ways that could not be accomplished with analog technology. But the transition comes with a cost to public broadcasting that is unique. Without cable carriage, a number of public television stations may not survive the digital transition. Public television's unique position therefore requires a unique remedy tailored to its needs.

II. THE DIGITAL TRANSITION: PUBLIC TELEVISION'S ROLE

Since the inception of the digital proceedings, Public Television has played a leadership role in digital television.[22] With its higher-quality images and sound, and its inherent flexibility to broadcast either a high-definition or multiple standard-definition streams, along with additional streams of data, digital television gives public television stations new and exciting tools to expand their educational mission in ways that were not possible in the analog world.

For instance, public television stations are regularly producing new and exciting high-definition digital programming for national, regional, and local distribution.[23] In addition, multicasting will bring new services to the public that could not be made available under the constraints of a single analog program stream, including an expanded distribution of formal

21. *See* 47 U.S.C. § 309(j)(14)(B).

22. Public Television played an active role in developing the transmission standard for digital television and served on the Commission's Advisory Committee on Advanced Television Service, whose recommendations gave rise to the adoption of the "ATSC Standard." In addition, PBS was one of the founding members of the Advanced Television Test Center, which conducted laboratory tests of the Grand Alliance System. PBS also conducted field tests of the Grand Alliance system in Charlotte, North Carolina. WMVT, the public television station in Milwaukee, was the first broadcaster to provide an HDTV satellite test signal. And in 1998, KCTS in Seattle was the first public broadcaster to begin transmitting digital signals using the ATSC standard and was the first station in the United States to produce HDTV programming. Second Periodic Review of the Comm'n's Rules and Policies Affecting the Conversion to Digital TV*, Comments of the Ass'n of Pub. TV Stations, the Corp. for Pub. Brdcst. and the Pub. Brdcst. Serv.*, MB Dkt. No. 03-15, at 2, n. 3 (2003), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513983342 [hereinafter *Second Periodic Review*].

23. *Id*. at 3.

educational services, workforce development services, children's programming, locally-oriented public affairs programming, and programming addressed to traditionally underserved communities. For instance, "[m]ore than 95 percent of public television stations have committed to broadcast at least one multicast channel dedicated to formal educational programming."[24] Several stations are partnering with state departments of education to develop supplemental educational programming that promotes state standards of learning and accountability.[25] Moreover, 77 percent of public television stations plan to provide a channel dedicated solely to children's programming.[26] Other public television stations plan to multicast a digital channel dedicated to local issues and public affairs to cover state legislatures, local town meetings and debates, and highlight local business, lifestyle, and political issues.[27] Still other multicast plans include targeting broadcasts at traditionally underserved communities. In this regard, several public stations will dedicate a multicast channel to foreign language programming, while other public stations are also considering channels dedicated to the needs of the senior community.[28]

Moreover, a number of public television stations have plans to provide various educational services over their digital allotment through "datacasting." Datacasting involves the distribution of data files (e.g., maps, text, video, or animation) over the air and can be directed either to the public at large or to a select portion of the public through subscription or other restricted technological means (e.g., encryption). "Recognizing the power of digital technology to educate, public television stations have dedicated a portion of their digital bandwidth (4.5 megabits per second, or one-quarter of the average digital channel capacity) to providing universal access to educational services."[29] Digital capacity set at this rate can deliver data eighty times faster than 56K dial-up modems and fifteen times faster than digital subscriber line ("DSL") connections.[30] In this regard, some public television stations, such as Wisconsin Public Television, the New Jersey Network, and KCPT in Kansas City, Missouri, have explored opportunities for schools to download educational material, such as video segments, lesson plans, maps, photographs, historical documents, audio

24. *Id.*
25. *Id.* at 4.
26. *Id.*
27. *Id.* at 4-5.
28. *Id.* at 5.
29. *Id.* at 6.
30. *Id.*

clips, and other material, over the air during non-peak times for retrieval later during the course of instruction.[31]

Yet, despite the promise that digital broadcasting holds to enhance and expand the educational mission of public television, public television stations are facing a number of obstacles to completing the digital build-out, not the least of which is lack of funding.[32] It has been estimated, for instance, that the cost of digital conversion for public broadcasting (including radio) will total $1.8 billion.[33] While public television stations have raised a substantial amount of digital conversion funds, totaling $733 million, from state, local, and private sources,[34] to date, the federal government has allocated only $313.84 million.[35]

> In addition, a number of public television stations are facing severe financial challenges due to current economic conditions and state budget crises. Meanwhile stations throughout the nation are simultaneously facing the increased operations cost associated with operating two stations—one analog and one digital—until the DTV transition has run its course.[36]

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31. *Id*. at 6-7.

32. Among the 356 public television stations in the nation, the Association of Public Television Stations reports that 289 stations, or 81 percent, are broadcasting in digital. CORPORATION FOR PUBLIC BROADCASTING, *CPB Creates Digital Services Fund for Public Television*, *at* http://www.cpb.org/programs/pr.php?prn=384 (last visited Nov. 24, 2004).

33. CORPORATION FOR PUBLIC BROADCASTING, *CPB Digital Television Station Grants*, *at* http://www.cpb.org/digital/tv/stations/grants.html (last visited Sept. 26, 2004).

34. Approximately $473 million in state funds have gone to aid in the digital conversion and approximately $260 million in private funds have been raised for the digital transition. CORPORATION FOR PUBLIC BROADCASTING, *Funding for Digital Public Television*, *at* http://www.cpb.org/digital/funding/dig_funding.html (last visited Sept. 26, 2004). The Association of Public Television Stations reports a slightly different number of $771 million for private and state funding for the digital conversion. ASSOCIATION OF PUBLIC TELEVISION STATIONS, *Funding for Digital Public Television*, *at* http://www.cpb.org/digital/funding/dig_funding.html (last visited Oct. 27, 2004) [hereinafter *Digital Funding*].

35. This includes approximately $131.87 million in digital funds through the Department of Commerce for Public Telecommunications ($14.1 million for FY 2000, $34.7 million for FY 2001, $36.2 million for FY 2002, $25 million for FY 2003, and $21.87 million for FY 2004), PUBLIC TELECOMMUNICATIONS FACILITIES PROGRAM, NATIONAL TELECOMMUNICATION & INFORMATION ADMINISTRATION, *PTFP Awards from 2002-1994*, *at* http://www.ntia.doc.gov//ptfp/awards/earlieryears.htm (last visited on Sept. 22, 2004); $153.05 million for CPB digital appropriations ($20 million for FY 2001, $25 million for FY 2002, $48.4 million for FY 2003, and $59.65 million for FY 2004), *Digital Funding*, *supra* note 34; and $28.92 million through the Rural Utilities Service for digital upgrades in rural areas ($15 million for FY 2003 and $13.92 million for FY 2004), News Release, United States Department of Agriculture, USDA Announced $15 Million in Public Television Station Digital Transition Grants (Feb. 20, 2004), *at* http://www.usda.gov/Newsroom/0079.04.html; S. REP. NO. 107-223, at 123 (2002) (appropriating $15 million); H. REP. NO. 108-401, at 23-24 (2003), *available at* http://thomas.loc.gov (appropriating $14 million).

36. *Second Periodic Review*, *supra* note 22, at 10.

While lack of funding is certainly a significant issue for public television stations as they try to comply with the digital mandate, even more pressing is the lack of mandated cable carriage rules as applied to digital signals. Without cable carriage, public television stations cannot reach a sufficient audience share to ensure that the promise of digital educational services reaches all Americans. Nor will such stations long be able to survive a protracted transition where stations must operate both in analog and digital until 85 percent of Americans have access to digital broadcast signals either directly or through subscription to either cable or satellite services.

III. THE FCC RULING ON CABLE CARRIAGE AND ITS IMPACT ON PUBLIC TELEVISION

The FCC initiated its inquiry into the obligations of cable systems to carry digital broadcast signals with its first Notice of Proposed Rulemaking in July of 1998.[37] In this proceeding, the FCC considered a number of transitional carriage proposals, including immediate dual carriage, carriage triggered by cable system upgrades, carriage phased-in as DTV broadcasters went on the air, carriage of either the analog or digital signal at the broadcaster's election, carriage triggered by sufficient digital equipment penetration, deferred transitional carriage, and no dual carriage at all.[38] This proceeding immediately generated a massive record of hundreds of pleadings filed by a wide range of interested parties.

For two-and-a-half-years, the issue remained deadlocked and unresolved until the late hours of then Chairman Kennard's administration. In a flurry of activity just a few days prior to President George W. Bush's inauguration (and not coincidently, Chairman Kennard's resignation), the FCC approved and released its long-awaited carriage order.[39] In this order, the FCC held that a cable system must carry the digital signal of a qualified local digital-only broadcast station,[40] and set forth a number of rules

37. Carriage of the Transmission of Digital TV Brdcst. Stations, *Notice of Proposed Rulemaking*, 13 F.C.C.R. 15092 (1998).

38. *Id*. at paras. 39, 41, 44, 46-50. *See also* Albert N. Lung, Note, *Must-Carry Rules in the Transition to Digital Television: A Delicate Constitutional Balance*, 22 CARDOZO L. REV. 151 (2000).

39. *DTV Carriage Order*, *supra* note 17.

40. *Id.* at paras. 12, 22. In addition, the FCC has stated elsewhere that "cable systems are ultimately obligated to accord 'must-carry' rights to local broadcasters' digital signals," and that "[e]xisting analog stations that return their analog spectrum allocation and convert to digital are entitled to mandatory carriage of their digital signals consistent with applicable statutory and regulatory provisions." Serv. Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Comm'n's Rules, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 20845, para. 65 (2000). *See also* Serv. Rules for the 746-764 and 776-794 MHz Bands, *Third Report and Order*, 16 F.C.C.R. 2703,

concerning the manner and scope of such carriage.[41] The FCC, however, deferred deciding whether cable systems will be required to carry both the digital and analog signals of a local broadcast station during the transition to DTV and whether a broadcaster could elect to substitute carriage of its digital signal for its analog signals while both were on the air.[42] Instead, the FCC sought further comment on the need for dual carriage, on the extent of cable system capacity upgrades and on the success of digital retransmission consent agreements to build a more complete record upon which to base a decision.[43] In the absence of this information, the FCC tentatively concluded that dual carriage would unconstitutionally burden cable systems' First Amendment interests, and it sought further comment on this position.[44] In the same ruling, the FCC also held that where digital carriage is mandatory, a cable system is required to carry only one program stream among many if a digital station is broadcasting multiple standard-definition program streams.[45]

This ruling on transitional carriage and the companion ruling on post-transition carriage of multiple program streams was the subject of many comments and petitions for reconsideration. For nearly three additional years, the new Republican FCC, headed by Chairman Michael Powell, was deadlocked and no decision ensued. During that time, cable and broadcast interests continued to aggressively lobby the FCC staff and commissioners while the FCC continued to consider a variety of approaches.

One significant development that occurred during the Spring of 2001,

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para. 52 (2001). The FCC also ruled in a separate document that DTV-only television station WHDT-DT in Stuart, Florida, was entitled to mandatory carriage rights on cable systems in its local area. *See* WHDT-DT Channel 59, Stuart, Florida, *Memorandum Opinion and Order*, 16 F.C.C.R. 2692 (2001).

41. *DTV Carriage Order*, *supra* note 17, at paras. 37-43.

42. *Id.* at para. 12. In a separate decision, the FCC has made it clear that until it decided the issue of dual DTV-analog carriage, it would not entertain any proposal whereby a broadcaster transmitting in both analog and digital may choose which signal it would like carried on its local cable system.

> The Commission has stated that television stations that broadcast only in a digitalformat may immediately assert their digital cable carriage rights. However, those television stations that broadcast in both analog and digital modes, like Paxson, cannot assert digital carriage rights under Section 614 or Section 615 until the resolution of the matter in the pending proceeding in CS Dkt. 98-120. In this instance, although Paxson has requested its digital signal to be substituted for its analog signal, it still holds 12 MHz of spectrum and has given no indication that it intends to return its analog spectrum.

Paxson Chicago License, Inc., v. 21st Century TV Cable, *Memorandum Opinion and Order*, 16 F.C.C.R. 2185, para. 8 (2001).

43. *DTV Carriage Order*, *supra* note 17, at paras. 12, 112.

44. *Id*. at paras. 112, 117.

45. *Id*. at para. 57.

was an effort by the FCC Media Bureau to solicit additional information regarding cable upgrades and capacity. This resulted in another round of filings and the creation of a record that demonstrated how many cable systems were actively upgrading their digital plant in ways that could accommodate digital carriage with little burden.

It is generally accepted that an upgraded 750 MHz cable plant represents the minimum capacity needed for carriage of analog and digital signals in a typical local market.[46] Based on Securities and Exchange Commission filings, the National Association of Broadcasters ("NAB"), the Association for Maximum Service Television ("MSTV") and the now defunct Association of Local Television Stations ("ALTV") projected that by the end of 2001, over 50 percent of cable subscribers would have been served by cable systems with 750 MHz bandwidth, and projected at least 67.78 percent of cable subscribers would be served by cable systems of 750 MHz by the end of 2002.[47] Using a slightly different measure of roll-out, the National Cable and Telecommunications Association ("NCTA") itself estimated that for 2001, 68 percent of cable homes would be passed by systems with 750 MHz capacity or more.[48] In 2002, the FCC reported that approximately 73 percent of cable systems had facilities with bandwidth of 750 MHz or above.[49]

In response to a survey request by the FCC's Mass Media Bureau, many individual cable systems have admitted that they either have, or anticipated having, cable capacity above the national predicted average.[50]

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46. *See Video Programming Competition Assessment Report*, *supra* note 19, at para. 25.

> Based on current consumer demand for our various services, our typical upgraded 750 MHz plant is designed to provide 84 analog video channels, 216 digital video channels, 8 HDTV channels, VOD service for 400 digital video customers at any one time, high-speed data service for 400 subscribers, and telephone service for 300 customers.

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Comments of Comcast Corporation*, MB Dkt. No. 03-172, at 15 (Sept. 11, 2003), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515082140.

47. Carriage of Digital TV Brdcst. Signals, *Comments of NAB/MSTV/ALTV*, CS Dkt. No. 98-120, at 30-33 (June 11, 2001), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512569244 [hereinafter *Comments of NAB/MSTV/ALTV*].

48. Carriage of Digital TV Brdcst. Signals, *Comments of National Cable & Telecommunications Association on the Further Notice of Proposed Rulemaking*, CS Dkt. No. 98-120, at 17 n.31 (June 11, 2001), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512568995.

49. *Video Programming Competition Assessment Report*, *supra* note 19, at para. 25.

50. Only AT&T figures closely resemble the national predicted average. AT&T reported to the SEC that only a majority of its systems had been upgraded to 750 MHz by the end of 2000. *Comments of NAB/MSTV/ALTV*, *supra* note 47, at 31. Moreover, it reported

For instance, in June of 2001, Time Warner reported to the FCC that 94 percent of its subscribers were served by a system that was at or exceeded 750 MHz,[51] and by September 11, 2003 it reported that "virtually all" of its systems had been upgraded to 750 MHz or greater.[52] At the same time, Comcast reported that by the end of 2001, 85.5 percent of its subscribers would have access to systems equal to or exceeding 750 MHz.[53] Similarly, Cox reported 83 percent of its plant would be upgraded to 750 MHz or greater by the end of 2001.[54] This figure rose to over 90 percent as of September 11, 2003.[55] Likewise, Adelphia reported that by the end of 2001, 82 percent of its systems would be upgraded to greater than 750 MHz,[56] while Cablevision reported that nearly 70 percent of its plant would be upgraded to 750 MHz by that time as well.[57] In addition, Insight Cable reported to the FCC that by the end of 2000, over 80 percent of its subscribers had access to systems at 750 MHz.[58] Previously, Insight Cable had reported to the SEC that it was in the process of upgrading over 99

to the FCC that 63 percent of its plant would be upgraded by the end of 2001. Letter from Richard D. Treich, Senior Vice President, AT&T Broadband, LLC, to Ron Parver, Assistant Division Chief, Cable Services Bureau, CS Dkt. No. 98-120, Attachment at 1 (May 31, 2001), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512660158.

51. *See* Carriage of Digital TV Brdcst. Signals, *TWC's Response to Questions on Cable System Capacity and Retransmission-Consent Agreements*, CS Dkt. No. 98-120, at 1 (June 19, 2001), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512660786.

52. *See* Annual Assessment of the Status Competition in the Mkt. for the Delivery of Video Programming, *Comments of Time Warner Cable*, MB Dkt. No. 03-172, at 4 (Sept. 11, 2003), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515082827.

53. Letter from James P. Coltharp, Senior Director, Comcast, to Kenneth Ferree, Chief, Cable Services Bureau, CS Dkt. No. 98-120, Attachment at 1 (June 13, 2001), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512660163.

54. *Comments of NAB/MSTV/ALTV*, *supra* note 47, at 31.

55. Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, *Comments of Cox Communications, Inc*., MB Dkt. No. 03-172, 4 (Sept. 11, 2003) *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515082153.

56. *Comments of NAB/MSTV/ALTV*, *supra* note 47, at 31.

57. Letter from Elizabeth A. Losinski, Vice President, Cablevision, to Ron Parver, Cable Services Bureau, CS Dkt. No. 98-120, Attachment 1 (May 29, 2001), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512660164.

58. Letter from Elizabeth M. Grier, Vice President, Insight, to Ron Parver, Cable Services Bureau, CS Dkt. No. 98-120, Attachment 1 (June 4, 2001), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512660165. No figures were provided regarding anticipated upgrades for the year ending 2001.

percent of its subscribers to 750 MHz by the end of 2002.[59] In fact, the record indicated at the time that several cable systems had anticipated upgrades beyond 750 MHz, approaching capacity of 870 MHz in some instances.[60] Most recently, the NCTA reported that by the end of 2002, 79 million homes were passed by systems with 750 MHz or higher capacity.[61]

A year later, in a second significant development, FCC Chairman Powell, in an exercise in regulatory jaw-boning, attempted to quicken the pace of the digital transition by advancing his own voluntary plan to encourage inter-industry cooperation. This plan called on the top commercial broadcast networks, HBO and Showtime, to provide high-definition or other "value-added DTV programming" during at least 50 percent of prime time; called on broadcast licensees in the top 100 markets to install equipment that allowed pass-through of network digital signals; called on consumer electronics manufacturers to produce television sets with over-the-air DTV tuners on a gradual phased-in basis; and called on cable systems with capacity of 750 MHz or higher to provide up to five broadcast or other digital programming services during at least 50 percent of prime time (a similar request was made of satellite program providers).[62] By June of 2002, the top ten cable multiple system operators had complied with the carriage provisions of Chairman Powell's request.[63] Yet, because compliance could be accomplished by carrying digital *cable* programming, few cable systems were regularly carrying the digital signals of local commercial or noncommercial *broadcast* television stations.

Throughout the digital carriage proceeding, Public Television played a prominent role in advocating for full and fair carriage of both the analog and digital broadcast signals during the transition. Advocates for public television stations argued that given the financial challenges such stations face during the transition to digital, public television stations could ill-afford to limit the distribution of their broadcast digital signals to households that only receive television service over-the-air. With nearly 70 percent of American homes subscribing to cable, public television stations

59. *Comments of NAB/MSTV/ALTV*, *supra* note 47, at 32.

60. *Id.* (citing Insight and Mediacom as examples).

61. Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, *Comments of the National Cable & Telecommunications Association*, MB Dkt. No. 03-172, 44 (Sept. 11, 2003) *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515082057 (citing Kagan World Media, a Media Central/Primedia Co., CABLE TELEVISION INVESTOR DEALS & FINANCE, June 30, 2003, at 4).

62. *See* Tauzin Letter, *supra* note 13.

63. *See* Press Release, Statement by FCC Chairman Powell, DTV Plan Update—Progress for Consumers (July 11, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-224218A1.doc.

argued that they could not afford to lose access to such a large group of members, the donations that their membership represents, and the corporate support for programming that such a figure represents for the time that it would take to complete the digital transition.[64]

Most importantly, however, advocates for public television stations repeatedly demonstrated that there was no free market for the carriage of noncommercial educational stations, as distinguished from the market for the carriage of commercial stations, making reliance on FCC mandated carriage especially critical for public stations. Advocates pointed out that unlike commercial stations, public stations do not possess the legal authority to withhold access to their signals in exchange for remuneration—a process called retransmission consent that applies only to commercial stations and that creates a market for the carriage of broadcast signals.[65] Thus, public television stations must rely on either mandatory cable carriage pursuant to FCC rules or voluntary agreements for carriage of their digital signals. Without mandatory cable carriage rules that apply to digital signals during the digital transition, public television stations have attempted to engage in voluntary agreements for transitional digital carriage, but have reported only limited success. At present, only Time Warner, Cox and Insight Cable have signed national cable digital carriage agreements with representatives of public television stations.[66] Other local systems, such as those affiliated with Comcast, had signed a handful of carriage agreements with what were perceived as the "primary" public television station in some of the larger markets, leaving cable subscribers without access to the digital signals of some of the more innovative and distinctive public television stations that frequently broadcast programming of interest to international or ethnic audiences and instructional programming in lieu of the PBS national programming service.[67]

Cable's lack of interest in carrying the digital signals of public television stations should come as no surprise to those who recall what happened the last time cable systems had the right, but not the obligation,

64. *See, e.g.*, Carriage of TV Brdcst. Signals, *Ex Parte Comments of Public Television*, CS Dkt. No. 98-120, 10-11 (Mar. 20, 2003), *available at* http://www.apts.org/members/legal/public/loader.cfm?url=/commonspot/security/getfile.cfm&pageid=1052_1.pdf [hereinafter *Comments of Public Television*].

65. *See* Carriage of the Transmissions of Digital Television Broadcast Systems, *Comments of the Association of America's Public Television Stations, the Public Broadcasting Service and the Corporation for Public Broadcasting*, CS Dkt. 98-120, 23 (Oct. 13, 1998), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6005540609 [hereinafter *Comments of the Association of America's Public Television Stations*].

66. *Broadcast*, COMM. DAILY, Apr. 15, 2004.

67. *Comments of Public Television, supra* note 64, at 12.

to carry over-the-air broadcast signals. Between 1985 and 1988, when the FCC analog cable carriage requirements were inoperative, public television stations faced a disproportionate number of carriage denials and/or repositionings that seriously imperiled their survival. During this time, 153 public television stations (nearly half of all such stations) were dropped or denied carriage 463 times by 347 cable systems.[68] By the end of 1992, exactly 314 public television stations had been dropped from carriage by 1,616 different cable systems located within fifty miles of the public television station dropped.[69]

The effect on public television stations was nearly catastrophic, but public television stations recovered their footing when the United States Supreme Court definitively held that analog must-carry rules are constitutionally permissible.[70] This time, however, the situation may be more dire, as public television stations face the prospect of operating two stations—analog and digital—with two sets of electricity bills and program costs for an uncertain period of time that it will take to transition the country to digital-only broadcast operations.

Public television advocates have argued that the same public policy reasons that the United States Supreme Court found to be sufficiently weighty to justify analog carriage applied with "equal or greater force" for digital carriage. These included "[p]reserving the benefits of free, over-the-air local broadcast television; [p]romoting the widespread dissemination of information from a multiplicity of sources; and [p]romoting fair competition in the market for television programming."[71] Advocates also pointed out that digital transitional carriage served the additional governmental purposes of furthering the digital transition by "[a]llow[ing] the government to reclaim and auction . . . the analog spectrum; [a]void[ing] the waste of indefinite dual analog/digital broadcast operations; and achiev[ing] a more efficient use of the spectrum."[72] In this regard, these advocates emphasized that without digital carriage on cable, it would be mathematically impossible to reach the 85 percent digital

68. Monroe E. Price & Donald W. Hawthorn, *Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65, 84 n. 63 (1994) (citing FCC MASS MEDIA BUREAU CABLE SYSTEM BROADCAST SIGNAL CARRIAGE SURVEY, *Staff Report by the Policy and Rules Division* 10 (Sept. 1, 1988)). *See also Turner Brdcst. v. FCC*, 520 U.S. 180, 204 (1997); *Turner Brdcst. v. FCC*, 910 F. Supp. 734, 742 (D.D.C. 1995); *Comments of the Association of America's Public Television Stations*, *supra* note 65, Exhibit D.

69. *Comments of the Association of America's Public Television Stations*, *supra* note 65, Exhibit D at 2.

70. *Turner Brdcst.*, 520 U.S. at 185.

71. *Second Periodic Review*, *supra* note 22, at 19.

72. *Id.* at 19.

penetration required to allow the cessation of analog broadcasting.[73]

Until the end of 2003, public television advocates had continued to propose an industry-wide solution that accommodated both commercial and noncommercial carriage.[74] Advocates for public television may have been displaying an admirable political opportunism that, at least in the interim, failed to yield results. Yet, by allying themselves with commercial broadcasters, advocates for public television necessarily made key concessions and placed less emphasis on the statutory and factual uniqueness of public television, which would otherwise have assisted their case. Recognizing this quandary, on December 8, 2003, public television advocates transmitted a carefully worded letter to Chairman Powell, arguing that while it continued to support carriage for both commercial and public broadcasters, the FCC could legitimately create digital must-carry rules for the DTV transition that were uniquely tailored to the needs and circumstances of public television stations.[75] The next section of this paper examines this proposal and argues that it is indeed an appropriate and

73. *Id*. at 19-20.

74. Concerned about the pace of the transition generally and its effect on the operational costs of public television stations, advocates for public television proposed a novel transitional plan for both commercial and noncommercial carriage. The proposal would require cable systems to carry both the analog and digital signals of a local broadcaster during the transition to digital, subject to four limiting conditions. First, the requirement would initially apply only to cable systems with 750 MHz of capacity, but by a certain date it would apply to all systems regardless of capacity. Second, small systems—those with fewer than a specified number of subscribers—would be exempt from the transitional carriage requirement. Third, a 28 percent cap would be imposed on the amount of capacity that a cable system would be required to devote to carriage of all broadcast stations' signals—both analog and digital and both commercial and public. The proposal represented a significant concession for public television, because in analog, noncommercial educational stations are exempt by statute from the current cable capacity cap of one-third of activated channels. In this regard, it is difficult to discern how this proposal would have been implemented, as it would have required the FCC to override an express provision in federal law. *See* 47 U.S.C. § 534(b)(1)(B) (2000); 47 U.S.C. § 535(b) (2000). Fourth, a cable system would no longer be required to carry a local station's analog signal when all of the cable system's subscribers would be able to view the station's digital signal, either in digital or converted to analog. *See* Letter from Association of Public Television Stations, to Michael K. Powell, Chairman, FCC, CS Dkt. No. 98-120, Attachment A at 1 (Feb. 27, 2003), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513584160 ; *Second Periodic Review*, *supra* note 22, at 19; Carriage of Digital Television Broadcast Signals, *Comments of Public Broadcasters,* CS Dkt. No. 98-120 (June 11, 2001), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512569124.

75. Letter from Association of Public Television Stations, to Michael K. Powell, Chairman, FCC, CS Dkt. No. 98-120 (Dec. 8, 2003), *at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515292791.

constitutional means of remedying a unique market failure for the distribution of noncommercial educational services.[76]

IV. DIGITAL CARRIAGE FOR PUBLIC TELEVISION "FIRST"

Rather than ruling on digital carriage, as if commercial and noncommercial stations represented the same public interests and operated in the same market for services (which they do not), the FCC should require full and complete carriage for public television stations *first* in recognition of the unique statutory and factual context of the noncommercial educational broadcast service. By way of contrast, the FCC may defer a ruling on carriage of commercial broadcasters until it has, perhaps, conducted a more thorough study of the market conditions for commercial carriage within the context of retransmission consent.

The overarching key issue is that public broadcasting in the United States is uniquely governed by the Public Broadcasting Act and a series of statutory amendments that were enacted over a period of more than thirty years. Taken together, this statutory context mandates the universal distribution of noncommercial educational services to all Americans.[77] The statutory framework of the Public Broadcasting Act makes it clear that it is in the public interest for the Federal Government to ensure that all citizens have access to public television services by all technological means.[78] Additionally, and more to the point, public television's cable carriage rights arise under a unique statutory provision (Section 615 of the Communications Act) with its own distinctive language, statutory context, and history.

In the following, Section A describes how Section 615 of the Communications Act, the noncommercial carriage statute, is separate and distinct from the Section 614, the commercial carriage statute, and includes unique terms that indicate Congressional intent to give public television broader carriage rights. Section B explains that the noncommercial carriage statute is properly understood as part of a unified federal scheme governing public television that balances cable operators' royalty-free, compulsory copyright license rights against mandatory carriage obligations. Without

76. As a matter of disclosure, the Author of this paper was the principal architect of the legal arguments supporting the letter in question and was its principal drafter.

77. *See* 47 U.S.C. § 396(a).

78. *See* § 396(a)(7) (stating that "it is necessary and appropriate for the Federal 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"); § 396(a)(9) (stating that "[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").

digital must-carry rules, this balance is upset in a way that leads to a market failure for the distribution of noncommercial educational digital broadcast services. Section C argues that the noncommercial carriage statute is best understood in the context of over thirty years of congressional mandates expressing a strong governmental interest in ensuring the broadest access to all available telecommunications technologies in order to facilitate universal service. Section D presents further evidence that public television is the unique beneficiary of decades of federal, state, and local funding—a substantial investment that itself demonstrates a compelling government interest in the preservation of the medium, and counsels careful stewardship of the resources already dedicated. Lastly, Section E argues that a policy of full carriage for public television stations would recognize a legitimate, content-neutral, structural difference between the commercial and noncommercial broadcast service and as such, would pass constitutional muster in a way that presents little burden on cable's First Amendment rights.

A. Plain Language Statutory Differences

While it is true that Section 615, the noncommercial carriage statute,[79] and Section 614, the commercial carriage statute,[80] have similar wording in places, they are entirely separate and distinct from one another, with substantial differences in language and are predicated upon different legislative histories.[81] As a result, the substantive carriage obligations imposed by Section 615 are in many respects significantly broader than those imposed by Section 614. For example, the statutory language that describes "program related" material in the context of public television stations differs in substance from the language regarding program related content for commercial television stations. Specifically, the Commission has observed that while Section 615(g)(1) generally tracks Section 614(b)(3)(A), the public television provision includes in the definition of "program related" additional material that "may be necessary for [the] receipient of programming by handicapped persons or for educational or language purposes."[82] The absence of such language in the commercial

79. Cable Television Consumer Protection & Competition Act of 1992, 47 U.S.C. § 535 (2000).

80. 47 U.S.C. § 534.

81. "The two sections have different histories, purposes, degrees of tailoring of means to ends, and different roles to play in a democratic society." Price and Hawthorn, *supra* note 68, at 83. In fact, Section 615 was enacted to substantially reflect an independent agreement reached between the national representatives of public television licensees and the NCTA.

82. Carriage of Digital TV Brdcst. Signals, *First Report and Order and Further Notice*

counterpart clearly indicates congressional intent to grant broader carriage rights to public television stations in view of public television's historical commitment to serve these constituencies.

Similarly, there are unique and special provisions in Section 615 that were intended by Congress to ensure the carriage of multiple but differentiated public television services. For example, Section 615(e) mandates that restrictions on the carriage of duplicative programming are to be triggered only if a typical cable system is already carrying three noncommercial broadcast television stations.[83] Moreover, the statute uniquely requires the FCC to define "[s]ubstantial duplication…in a manner that promotes access to distinctive noncommercial educational television services."[84]

Other important statutory differences between the carriage obligations imposed on noncommercial and commercial stations, respectively, include differences in the definitions of markets for purposes of determining carriage obligations, and the amount of bandwidth individual cable systems must devote to carriage.[85]

These differences are strong evidence of Congress' intent to treat noncommercial and commercial stations differently in the context of digital carriage obligations.

B. The Historical and Economic Context: There Is a Market Failure for Noncommercial Educational Services that Derives from Public Television's Reliance on Mandatory Carriage as the Sole Counterweight to Cable's Compulsory Copyright License

It is indisputable that the cable compulsory copyright license and federal must-carry requirements were part of a single, integrated federal policy in 1992 that created a balance between cable rights and cable obligations. As early as 1966, the Commission had in place its own cable must-carry rules to ensure the fair carriage of all local stations on a local cable system.[86] In 1974, in the face of uncertainty regarding the copyright

of Proposed Rulemaking, 16 F.C.C.R 2598, para. 122 (2001) (comparing 47 U.S.C. §§ 535(g)(1) [public television] and 534 (b)(3)(A) [commercial television]).

83. § 535(e).

84. *Id*.

85. *Compare* 47 U.S.C. § 534(h)(1)(C) (commercial cable markets defined in terms of viewing patterns) *with* § 535(l)(2) (50 mile/Grade B rule for noncommercial cable market definition); *compare* § 534(b)(1) (one-third cap on all local commercial stations) *with* § 535 (no equivalent for noncommercial stations).

86. *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1440 n.11 (D.C. Cir. 1985). *See also* Rules re Microwave-Served CATV*, First Report and Order*, 38 F.C.C. 683 (1965);

implications of cable retransmissions of broadcast signals, the United States Supreme Court ruled that cable systems could carry broadcast signals without seeking the broadcasters' consent or paying them for the use of the signals.[87] Two years later, when cable was still an emerging and relatively young industry, Congress affirmatively decided to support cable's development by letting it retransmit, with virtually no compensation, locally originated programming and a mix of regional and national programming through a relatively new legal device: the compulsory copyright license.[88] Significantly, Congress did not modify the Commission's must-carry rules. However, in 1985 the Commission's must carry rules were invalidated by the D.C. Circuit, and in 1987 the Commission's revised rules were again invalidated.[89] The Commission later observed that during this period when cable enjoyed the benefits of the cable compulsory copyright license without must-carry obligations—as is the case now with digital—this created a critical imbalance between broadcasters and cable.[90] The Commission recommended that Congress enact must-carry rules tied to cable's use of its compulsory copyright license:

> In the current environment, the lack of must carry obligations, especially when combined with the effect of the compulsory license, creates an imbalance between broadcasting and cable television. The nature and effects of this imbalance are a matter of immediate public policy concern and need to be addressed expeditiously. Accordingly, Congress should enact must carry rules tied to cable's continued enjoyment of the compulsory copyright license.[91]

Alternatively, in the absence of must-carry legislation, the Commission recommended that Congress eliminate the compulsory license entirely.[92]

Regarding public television stations, the Commission at that time recognized that market forces affecting noncommercial television stations were quite different from those affecting their commercial counterparts. Because of that difference, mandatory carriage obligations were appropriate. The Commission stated, "The continued viability of

CATV, *Second Report and Order*, 2 F.C.C.2d 725 (1966).

87. Teleprompter Corp. v. Columbia Brdcst. Sys., Inc., 415 U.S. 394 (1974).

88. *See* The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2550, (codified at 17 U.S.C. § 111 (2000)). *See also* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 67 Rad. Reg.2d (P&F) 1771 (1990) [hereinafter Competition and Rate Deregulation] (relating the history of the cable copyright compulsory license).

89. *See Quincy Cable TV, Inc.*, 768 F.2d at 1434; Century Comm. Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987).

90. Competition and Rate Deregulation, *supra* note 88, para. 147.

91. *Id*. para. 154.

92. *Id*. para. 162.

noncommercial television (which by its very nature is affected by market forces in different ways than is commercial broadcasting) may depend on targeted mandatory carriage obligations for multichannel video providers."[93] The Commission stated further that the goal of universal access to public television services also required mandatory carriage requirements. The Commission asserted, "Because of the unique service provided by noncommercial television stations, and because of the expressed governmental interest in their viability, we believe that all Americans should have access to them. We believe that mandatory carriage of noncommercial television stations would further this important goal."[94]

In 1992, Congress acted on the Commission's recommendations to restore the balance that was missing. Congress created a regime where the compulsory copyright license was balanced against the combination of retransmission consent and mandatory carriage. The legislative history of the 1992 Cable Act reveals that Congress agreed with the Commission that the benefits of the compulsory license were to be intimately related to the must-carry obligations:

> The Committee strongly supports reinstitution of the must carry requirements. These requirements further the Committee's longtime view, reflected in [T]itle III of the 1934 Act, that television broadcasting plays a vital role in serving the public interest. The Committee finds that this role is in jeopardy if cable operators can use their market power either to refuse to carry local television broadcast signals or to extract favorable terms as consideration for carriage of these signals. The Committee also finds that the must carry rules are part and parcel of the Congressionally-mandated compulsory copyright license for cable operators and that provides an additional reason for codification of these rules.[95]

What resulted was a bifurcated carriage regime. Commercial broadcast stations retained the option to either demand mandatory carriage or negotiate for carriage as a counterweight to cable's royalty-free, compulsory copyright license. Public broadcasters, for various political reasons associated with their universal service mission, were not given the option to withhold their signals in exchange for favorable terms; rather the sole counterweight to the cable compulsory copyright license was mandatory carriage for public television stations.

Today, the absence of that counterweight with regard to digital carriage clearly upsets the balance restored by Congress in 1992. Without retransmission consent and without full and adequate mandatory carriage of

93. *Id.* para. 13.
94. *Id*. para. 163.
95. Cable Consumer Protection Act of 1991, S. REP. NO. 102-92, at 41 (1991).

their digital signals, public television stations must rely on a "must-convince" strategy: a "please-carry" rather than "must-carry." In the face of the substantial market power that vertically and horizontally integrated cable media outlets possess, it is no wonder that, as described above, few public television stations have been able to successfully negotiate for voluntary carriage of their digital signal.

The current imbalance caused by the Commission's 2001 decision has in essence created a market failure for noncommercial educational digital services. By denying digital must-carry rights to public television stations, the Commission has upset the balance that was deliberately restored by Congress in the 1992 Cable Act to address the invalidation of FCC cable must-carry rules at the time. To rectify this market failure, the Commission should construe Section 615 not in isolation, but in *pari materia* with the unified federal policy governing public television that conjoins cable operators' compulsory license rights with their mandatory carriage obligations.[96]

C. The Universal Service Mandate of the Public Broadcasting Act

As described above, the commercial and noncommercial carriage statutes differ in terms of historical context, economic objectives, and plain language. These differences are best understood in the context of over thirty years of Congressional mandates expressing a strong governmental interest in ensuring the broadest access to all available telecommunications technologies in order to facilitate universal service.

For over thirty years, Congress has repeatedly stated and reaffirmed its intent that, as a matter of federal telecommunications policy, public television should have the broadest access to all available telecommunications technologies to ensure universal distribution to all Americans.[97] This policy is predicated on Congress' determination that there are additional, unique, unmistakable, and strong governmental interests associated with the carriage of public television stations. Indeed, the House Report on the 1992 Cable Act stated, "Congress long has advocated broad access to public television services, regardless of the technology used to deliver those services, in order to advance the

96. *See* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.02 (6th ed. 2000) (stating that statutes on same subject should be construed together).

97. In fact the Commission explicitly recognized this in 1990 when it was making recommendations to Congress: "Because of the unique service provided by noncommercial television stations, and because of the expressed governmental interest in their viability, we believe that all Americans should have access to them. We believe that mandatory carriage of noncommercial television stations would further this important goal." Competition and Rate Deregulation, *supra* note 88, para. 163.

compelling governmental interest in increasing the amount of educational, informational and local public interest programming available to the nation's audiences."[98]

In the original Public Broadcasting Act of 1967, Congress stated that "it is necessary and appropriate for the Federal 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."[99] In 1978, Congress again stated that "the encouragement and support of public telecommunications . . . [are] of appropriate and important concern to the Federal Government,"[100] and that it is in the public interest to "extend delivery of public telecommunications services to as many citizens . . . as possible by the most efficient and economical means, including the use of broadcast and nonbroadcast technologies. . . ."[101] In the Public Telecommunications Act of 1992, Congress stated 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 through all appropriate available telecommunications distribution technologies."[102]

This national policy was reiterated and further developed by Congress in 1992, when the cable carriage provisions at issue in this proceeding were established. In enacting cable carriage obligations as part of the 1992 Cable Act, Congress reaffirmed the importance of public television, stating that "[t]here is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations. . . ."[103] In this regard, Congress explicitly concluded that

> The Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems because—(A) public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens; (B) public television is a local community institution, supported through local tax dollars and voluntary citizen contributions . . . ; (C) the Federal Government . . . has invested [substantially] in public broadcasting since 1969; (D) absent carriage requirements there is a substantial likelihood that citizens, who have supported local public

98. H.R. REP. NO. 102-628, at 69 (1992).

99. The Public Broadcasting Act of 1967 § 201, 47 U.S.C. § 396(a)(7) (2000).

100. § 396(a)(4).

101. § 390.

102. § 396(a)(9).

103. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(7), 106 Stat. 1460, 1461 (1992).

television services, will be deprived of those services.[104]

In construing the nature and scope of digital carriage requirements under the 1992 Cable Act, the Commission should give full breadth to Congress' historical and repeatedly affirmed governmental interest in ensuring the widest possible distribution of public television services.

D. Public Television Has Uniquely Received Federal, State, and Local Support

In addition to over thirty years of support for access to non-broadcast technologies, there is further evidence that public television is the unique beneficiary of decades of federal, state, and local funding—a substantial investment that itself demonstrates a compelling government interest in the preservation of the medium and counsels careful stewardship of the resources already dedicated. In the 1992 Cable Act, Congress identified the governmental interest in carriage of public television services as "compelling" stating:

> Congress and the American taxpayer have given public television unprecedented support over the last three decades, and public television stations have developed a wide variety of distinctive, award-winning program services. The government has a compelling interest in ensuring that these services remain fully accessible to the widest possible audience without regard for the technology used to deliver these educational and information services.[105]

Without cable carriage of digital services, the educational promise of digital services will lie fallow, and the federal, state, and local funds committed to upgrade public television stations in anticipation of providing such services on a widespread basis will have been wasted. This substantial investment at all levels of government indicates a compelling government interest in the preservation of the medium and demands a careful stewardship of the resources already dedicated.

104. § 2(a)(8). Even after the creation of analog cable must-carry requirements, Congress continued to ensure that noncommercial educational television services are accessible through many different media, including Open Video Systems and most recently Direct Broadcast Satellite Systems. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 302, 110 Stat. 56, 122-23 (codified at 47 U.S.C. §§ 573(b)(1) and (c)(1) (2000)) (open video systems); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 25, § 335(b)(1), 106 Stat. 1460, 1501 (codified at 47 U.S.C. § 335(b)(1) (2000)) (DBS noncommercial set-aside); Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, § 1008, § 338, 113 Stat. 1501, 1501A-532 (codified at 47 U.S.C. § 338(c)(2) (2000)) (DBS local must carry).

105. H.R. REP. NO. 102-628, at 69 (1992).

E. A Public-Television-First Approach Would Be Constitutionally Defensible

It is well-established that content-neutral regulation of cable will be upheld provided that the regulation furthers an important or substantial governmental interest "unrelated to the suppression of free speech" and that any incidental restrictions on speech do not "burden substantially more speech than necessary to further those interests."[106]

The constitutional case for a public television-centric carriage rule is, in fact, stronger than a hypothetical commercial carriage rule because (a) the governmental interests associated with public television carriage are more extensive than the interests associated with commercial carriage; and (b) public television stations are in a much more dire position regarding their reliance on cable carriage for their survival than their commercial counterparts and thus the need for cable carriage is greater. Moreover, while it may seem on first blush that favoring public television stations might be a matter of impermissible content-based regulation, in fact an acceptable content-neutral carriage rule that favors public television can be crafted, based on the existing statutory and factual differences between the commercial and noncommercial service.

1. The Governmental Interests in the Preservation of Public Television are Greater Than Those Associated with the Preservation of Commercial Television, As Is the Need for Carriage

Arguably, the same public policy reasons that the United States Supreme Court found to be of sufficient importance to justify analog carriage applies with equal or greater force for digital carriage. These included "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[107] In addition, as the Congressional Budget Office and United States General Accounting Office have observed, digital transitional carriage is one of the key factors in driving the digital transition, which comes with its own set of important governmental interests.[108] Such interests include "[a]llow[ing] the government to reclaim and auction . . . the analog spectrum; [a]void[ing] the waste of indefinite dual analog/digital broadcast operations; and [a]chiev[ing] [a] more

106. *Turner Brdcst.,* 520 U.S. at 189.

107. *Id.*

108. *See* CONGRESSIONAL BUDGET OFFICE Paper, *supra* note 18, at 27-29; GENERAL ACCOUNTING OFFICE PAPER, *supra* note 18, at 4.

efficient use of the spectrum."[109] Most importantly for purposes of this Article, however, are the set of additional important government interests that are uniquely served by carriage of public television stations on cable. These include the government interest in educating its citizenry through the universal distribution of noncommercial educational services and the preservation of a more than thirty-year federal investment in public broadcasting.

As Monroe Price and Donald Hawthorn observed in 1994 regarding the reasons for passage of analog carriage in the 1992 Cable Act, "Congress' power to impose any carriage requirement springs from the roles assigned to broadcasters in a democratic society. Because noncommercial educational broadcasters clearly have such responsibilities and because of the social significance of their role, the case for mandatory carriage of their signals is stronger than for commercial broadcasters."[110] Professors Price and Hawthorn further explained the reasons:

> It seems intuitively apparent to us that Congress acted because it recognized that in a decent society there should be an organ of cohesiveness called public service broadcasting. Such an entity exists and is favored with federal funds and frequencies precisely because it performs important functions in society: functions of instruction, general cultural education, and furtherance of plural views. Congress had these criteria in mind when it compelled cable systems to carry otherwise marginal, relatively infrequently viewed channels.[111]

In developing their argument for the special constitutional status of public television carriage, Professors Price and Hawthorn observed that mandatory carriage not only served a compelling government interest in educating its citizenry, but also served interests at the core of First Amendment values:

> Public education is of course one of the central functions of modern American government, and an educated populace is a cornerstone of democratic self-governance. But it is significant that education also serves the same purposes commonly ascribed to the First Amendment itself: facilitating democratic discourse and the search for "political truth," as well as encouraging individuals to "develop their faculties." Hence, mandating carriage of educational programming may further First Amendment values, even if it comes at the expense of the "speech" of cable operators and their preferred programming sources.[112]

109. CONGRESSIONAL BUDGET OFFICE PAPER, *supra* note 18, at 19.
110. Price & Hawthorn, *supra* note 68, at 75-76.
111. *Id*. at 76.
112. *Id*. at 83-84 (citations omitted).

Yet, one need not subscribe to this theory to recognize that Congress itself has identified the important interest in preserving a more than thirty year financial investment it has made in public broadcasting. Additionally, Congress has recognized the importance of advancing its repeatedly stated policy that public television should have access to the broadest range of telecommunications technologies to further its universal service mission. Indeed, Congress has explicitly stated that cable must-carry rules for public television stations involve a "substantial governmental and First Amendment interest."[113]

The governmental interests associated with mandatory carriage of public television stations are arguably greater than the interests associated with mandatory carriage of commercial stations. Likewise, the need for mandatory carriage of the former is apparently greater as well. Thus, when crafting a carriage rule that does not burden cable speech any more than necessary to advance the interests described above, the FCC should consider the more pressing need that public television stations have for mandatory carriage as compared to their commercial cousins. As described above, the critical lack of retransmission consent authority has traditionally caused a market failure in the market for the distribution of noncommercial educational broadcast services—a market failure that does not affect commercial broadcasters. In addition to this, because public television stations typically operate on the margins of financial health, they are disproportionately affected by the lack of carriage for their signals, which translates into a lack of viewership and a decrease in donations.

The precarious financial health of public television stations is just as true now as it was in the mid-1990s when stations were broadcasting only in analog. As Professors Price and Hawthorne observed, "Public broadcasters are…endemically in a marginal financial position. Reductions in viewership, and hence in the pool of contributors, will have a dramatic effect on the viability of stations already teetering on the financial brink."[114] With stations now required to shoulder the burden of dual analog/digital operations for an indefinite period of time, public television stations are now facing a funding crisis of even greater proportions than when they simply operated one analog station.

Once the unique needs of public television stations are compared to the minimal burdens on cable capacity that carriage would entail, it becomes increasingly clear that carriage rules tailored to the needs of public stations would be no more burdensome than necessary. Indeed, as

113. Cable Television Consumer Protection and Competition Act of 1992 § 2, 47 U.S.C. § 521(a)(6) (2000); H.R. REP. NO. 102-862, at 56 (1992).

114. Price & Hawthorn, *supra* note 68, at 93.

discussed above, there is substantial evidence in the administrative record that cable capacity has exploded in recent years due to cable plant upgrades and advances in digital compression technology. In fact, while a 6 MHz analog over-the-air signal has typically occupied a full 6 MHz of analog cable capacity, a 6 MHz digital over-the-air signal will occupy substantially less cable capacity (measured in bit-rates) depending on the use to which the channel is put.[115] While the bandwidth consumption will be variable, on the whole, no one in the record before the FCC disputes that digital signals are more efficient and represent less of a drain on cable capacity than analog signals. During the transition to digital, the addition of digital broadcast carriage would, of course, represent *some* additional burden on cable capacity. In light of cable capacity upgrades, however, the additional burden may in fact be less as a proportion of total cable capacity than that represented by analog-only carriage. More importantly, however, a rule that would favor public television for digital cable carriage would impose even less of a burden on cable capacity and would serve a greater need.

2. Carriage Rules Favoring Public Television Would Not Be Impermissibly Content-Based

In explaining what restrictions on free speech are content-based, as compared to content-neutral restrictions, the United States Supreme Court has repeatedly held that content-based restrictions either distinguish favored speech from disfavored speech based on the views expressed or require governmental authorities to examine the content of the speech.[116] Conversely, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."[117] Favoring public television would not be impermissibly content-based under the *Turner* line of cases.

115. For instance, a high-definition program with substantial movement (e.g., a sports event) requires a higher "bit-rate" than a high-definition program with little movement (e.g., a documentary). Similarly, a standard-definition, wide-screen digital program would occupy even less bandwidth.

116. Turner Brdcst. Sys. v. FCC, 512 U.S. 622, 642-43 (1994), *aff'd,* 520 U.S. 180 (1997); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Boos v. Barry, 485 U.S. 312, 318-19 (1988); Miami Herald Publ'g v. Tornillo, 418 U.S. 241, 256 (1974); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 13 (1986); FCC v. League of Women Voters of Cal., 468 U.S. 364, 383-84 (1984).

117. Turner Brdcst. Sys., 512 U.S. at 643. *See* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981); Boehner v. McDermott, 191 F.3d 463, 467 (D.C. Cir. 1999); Time Warner Entm't v. FCC, 93 F.3d 957, 977 (D.C. Cir. 1996); Satellite Brdcst. & Commun. Ass'n v. FCC, 275 F.3d 337, 354 (4th Cir. 2001).

In their article concerning the constitutionality of the analog must-carry statute, Professors Price and Hawthorn stated their belief that the separate must-carry statute for noncommercial educational licensees was motivated by the quality of the content that such licensees provided the public, and that the Supreme Court should have taken the opportunity to move away from what they termed its "fixation" on content-neutrality to seriously consider the conditions under which content-based regulation of the media is appropriate.[118] Instead, professors Price and Hawthorne argued, the Court committed a number of errors and exaggerations to fit the facts within its content-neutrality doctrine.[119] The proposed alternative was to affirm that in some circumstances, content-based regulation was constitutionally appropriate: "We believe that Congress should be able to mandate access for educational broadcasters precisely because of their content . . . ."[120] This approach was foreclosed, however, by the second *Turner* case and subsequent case law that reaffirmed the importance of the distinction between content-neutral and content-based action in Supreme Court First Amendment jurisprudence.[121]

Nevertheless, a properly content-neutral rule favoring carriage of public television can be crafted by focusing on the unique economics of the noncommercial educational service flowing naturally from the unique statutory and factual context discussed above. Thus, public television's distinctive purpose, means of support, and operation—and not the perceived value of its programming—would provide a content-neutral and constitutionally-permissible basis for favoring public television cable carriage over commercial carriage.

Indeed, for substantially similar reasons, the FCC has consistently granted public television a special regulatory status, not to support particular viewers or programs, but to preserve a unique media that possesses a special relationship with the federal, state, and local government as well as the American people.[122] This is especially true in

118. Price & Hawthorn, *supra* note 68, at 66-67.

119. *Id*. at 67.

120. *Id*. at 83.

121. *See generally, e.g.* Turner Brdcst. Sys. v. FCC, 520 U.S. 180; U.S. v. Playboy Entm't Group, 529 U.S. 803 (2000); U.S. v. Am. Library Ass'n, 539 U.S. 194 (2003).

122. *See* Amendment of Section 3.606 of the Commission's Rules and Regulations, *Sixth Report and Order*, 41 F.C.C. 148, paras. 36-62 (1952) (initial reservation of spectrum solely for noncommercial educational use); 47 C.F.R. § 1.1162(e) (2003) (exempting public television from annual regulatory fees); 47 C.F.R. §§ 1.1114(c) and (e)(1) (2003) (exempting public television from applications fees); 47 C.F.R. § 73.621 (2003) (forbidding the broadcast of commercials); 47 U.S.C. § 399 (2002) (banning support or opposition for a candidate for political office); 47 U.S.C. § 396(k)(12) (2002) (banning exchange or rent of donor names to political entities); 47 U.S.C.S § 312(a)(7) (2002) (exempting public

matters affecting the digital transition.[123] As the Commission has stated before, "The current dual system of broadcasting consisting of commercial and noncommercial stations is dependent upon differences in the purpose, support, and operation of the two classes of stations."[124] Accordingly, the FCC may extend this tradition of special but content-neutral treatment to the issue of digital carriage.

In fact, in 1996 the D.C. Circuit specifically upheld just such a distinction in the context of satellite carriage.[125] Section 25 of the 1992 Cable Television Consumer Protection and Competition Act[126]—the same Act that created today's cable must-carry statutes—and the FCC's implementing regulations[127] require satellite program service providers to reserve four percent of their channel capacity exclusively for noncommercial, educational, and informational programming of a national nature.[128] Reviewing the constitutionality of this provision, the D.C. Circuit specifically held that the set-aside for noncommercial educational programming was merely a content-neutral policy that "represent[ed] nothing more than a new application of a well-settled government policy of ensuring public access to noncommercial programming."[129] Although the Court ultimately dispensed with the constitutional challenge using the reduced level of scrutiny associated with broadcast jurisprudence[130]—a level of scrutiny that does not apply to cable regulation[131]—the core finding

broadcasters from free airtime requirements for qualified candidates and the free airtime requirements of Communications Act).

123. The FCC stated:

> We . . . acknowledge the financial difficulties faced by noncommercial stations and reiterate our view that noncommercial stations will need and warrant special relief measures to assist them in the transition to DTV. Accordingly, we intend to grant such special treatment to noncommercial broadcasters to afford them every opportunity to participate in the transition to digital television, and we will deal with them in a lenient manner.

Fifth Report and Order, *supra* note 4, para. 104.

124. Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, *Second Report and Order*, 86 F.C.C.2d 141, para. 15 (1981).

125. Time Warner v. FCC, 93 F.3d 957, 997 (D.C. Cir. 1996).

126. 47 U.S.C. § 335(b) (2002).

127. 47 C.F.R. § 25.701(c) (2003), *amended by* 69 Fed. Reg. 23157 (2004). *See also* Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 13 F.C.C.R. 23254 (1998).

128. "DBS providers shall reserve four percent of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature." 47 C.F.R. § 25.701(c).

129. *Time Warner*, 93 F.3d at 976.

130. *Id*. at 975.

131. *Turner Brdcst.*, 520 U.S. at 185-86.

of content-neutrality remains, regardless of the standard of review used.[132]

Accordingly, a legitimate, constitutionally-acceptable content-neutral distinction can be made between commercial and noncommercial broadcasters when crafting a digital carriage rule that accommodates the unique status of public broadcasting. All that remains is to examine the government interests in relation to the minimal burdens associated with a public television "first" proposal. And as discussed above, the governmental interests are quite substantial, while the burdens are commensurately low.

V. CONCLUSION

A strong case is therefore made that it is fully within the FCC's authority to decide the critical issue of cable carriage in a careful and incremental manner. In this regard, as the FCC considers the issue of digital carriage, it may reasonably consider the possibility of crafting digital carriage rules for public television first, without ruling positively or negatively on carriage of commercial stations. The FCC could, for instance, defer the issue of commercial carriage until a thorough study of the market for retransmission consent has been conducted. This action may legitimately be based on the unique legislative and factual differences between the noncommercial and commercial service and would be constitutionally permissible. In fact, a stronger constitutional case can be made for carriage of public television stations than for commercial stations.

132. Moreover, a 1995 D.C. Circuit case concerning the channeling of indecent material on public broadcast stations is not to the contrary. Action for Children's TV v. FCC, 58 F.3d 654 (D.C. Cir. 1995). In this case, the Court considered whether Congress could allow public broadcasters that sign off at midnight to broadcast indecent material from 10 p.m. until 6 a.m. while allowing all other broadcasters (including 24-hour public broadcasters and all commercial broadcasters) to broadcast indecent material only from midnight to 6 a.m. The D.C. Circuit struck down this provision because Congress had neglected to articulate any relationship between this provision and the compelling government interests served by banning the broadcast of indecent material at certain times. *Id.* at 668. The Court reasoned that there was little evidence that indecent material had any less effect on minors when broadcast by public stations between 10 p.m. and midnight (when they signed off), and that Congress had misunderstood the Court's prior rulings by assuming that it was necessary to afford all stations an opportunity to air indecent material, even those that ceased operations before the indecency "safe-harbor" times. *Id.* at 667-68. The case does not stand for the proposition that any distinctions between the noncommercial and commercial service are *per se* illegitimate but relies on a specific set of facts not present here. By way of contrast, as explained above, there is an extraordinary and compelling record of legitimate differential treatment for public television stations when it comes to cable carriage. For over thirty years, public television has been treated differently by Congress and the FCC, not solely because of its perceived value, but mainly because of public television's unique purpose, means of support, and operation.

Nor would such a distinction constitute content-based discrimination, for the FCC has made, and may continue to make, valid distinctions based on the differences in the purpose, support, and operation of the various classes of licensees under its jurisdiction.