

Market-Based Alternatives to Digital Must-Carry*

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Abstract

This paper addresses the current context of the digital must-carry debate, with the overarching purpose of establishing theoretical grounding for subsequent research that will further the DTV transition. To provide necessary background, this paper begins by examining the must-carry and retransmission consent provisions, including the Supreme Court's decision and rationale behind the upholding of the rules. Next, attention shifts to uncovering the ongoing policy debate over digital must-carry. Within this section, the FCC's formal rulemaking is discussed, including the Commission's recent proposal to meet the 85 percent rule and expedite the DTV transition. In response to the legal difficulties and policy stand-still associated with digital must-carry, this paper identifies several market-based alternatives that rely primarily on programming and service alternatives made possible through digital television. This study concludes by proposing further research that investigates and measures broadcasters' and cable operators' preferences for market-based remedies.

Introduction

Regulated ancillary to broadcasting, cable operators face significant rules to preserve over-the-air television, including providing access and channel capacity to carry the signals of local stations. The Cable Television Consumer Protection and Competition Act of 1992 (herein “’92 Cable Act”)¹ codified the “must-carry” rules.² In particular, the must-carry rules require broadcast television stations either to be carried on respective local cable systems or, in the case of commercial broadcasters to negotiate retransmission consent with the cable operator, whereby stations attempt to receive compensation for the carriage of their programming.³ The FCC has identified numerous concerns related to must-carry and retransmission consent in the digital context,⁴ most notably how to calculate cable channel capacity,⁵ and define and address “primary video,”⁶ “program-relatedness,”⁷ as well as the digital signal format or quality that a local station offers (e.g. material degradation).⁸

While the viewing public anticipates the eventual promise of high-definition (HD) and digital television (DTV), thus far the majority of broadcasters, cable operators and DBS providers have failed to reach any substantive agreements on the airing of digital broadcast channels.⁹ Even though more than 80 percent of the country watches local stations through a multichannel video program distributor (MVPD),¹⁰ the FCC initially ruled that cable operators only have to carry either an existing analog or digital-only television station.¹¹ Unless modified in the future, such a ruling means cable operators only have to carry only one of the multiple streams that may be multicast over a digital signal.¹²

Unfortunately, the current regulatory morass surrounding the uncertainty of the digital must-carry rules is slowing the digital television transition. Without effective carriage agreements between local stations and cable operators, the viewing public will not fully experience the potential programming options and aesthetic qualities of digital broadcast television. Not only will the public not be as likely to purchase DTV equipment, but the threshold for shutting down analog broadcasting will not be met until well beyond 2006.

In light of these concerns, this paper addresses the current context of the digital must-carry debate, with the overarching purpose of establishing theoretical grounding for subsequent research that will further the DTV transition. To provide necessary background, this paper begins by examining the must-carry and retransmission consent provisions, including the Supreme Court's decision and rationale behind the upholding of the rules. Next, attention shifts to uncovering the ongoing policy debate over digital must-carry. Within this section, the FCC's formal rulemaking is discussed, including the Commission's recent proposal to meet the 85 percent rule and expedite the DTV transition. In response to the legal difficulties and policy stand-still associated with digital must-carry, this paper identifies several market-based alternatives that rely primarily on programming and service alternatives made possible through digital television. This study concludes by proposing further research that investigates and measures broadcasters' and cable operators' preferences for market-based remedies.

Must-Carry Rules in the 1992 Cable Act

Part of the FCC's dilemma in applying the must-carry rules to digital television is that initial rules were written during a period of analog broadcasting, during which each station delivered programming in the same signal format (NTSC, 525 lines, 4x3 aspect ratio) that took up the same amount of channel capacity (6 MHz). With the possibility of 18 different scanning formats within the flexible standards for digital television broadcasting and the ability for a station's ability to multiplex and send as many as six simultaneous digital streams of programming, the application of the must-carry rules becomes nothing short of a policy quagmire.

The original rules delineating the requirements of cable operators to carry local broadcast television signals are found in the '92 Cable Act, which amends the Communications Act of 1934.¹³ In general, the '92 Cable Act prohibits cable operators and other multi-channel video programming distributors from retransmitting commercial television, low-power television, and radio broadcast signals without first obtaining the broadcaster's consent. This permission is commonly referred to as "retransmission consent" and may involve compensation from the cable company to the broadcaster for the use of the signal.¹⁴

Retransmission consent permits commercial broadcasters and cable operators to negotiate a carriage agreement based on business and market factors. When a broadcast station chooses to negotiate a retransmission consent agreement, the cable operator will compensate the station to place its programming on the cable system.¹⁵ Network-affiliated broadcasters are better positioned to negotiate retransmission agreements because of the popularity and ratings of their programs. Without these

stations on their cable line-up, the cable system is likely to lose many customers. A station would elect the must-carry option when its carriage does not financially benefit the cable system. Estimates show that about 80 percent of commercial television broadcasters chose retransmission consent over must-carry in the 1993-96 election cycle.¹⁶

Alternatively, if a local commercial television station doesn't believe it has enough clout to receive compensation, a station may require its signal carriage be made available for free through the election of the must-carry rules. The '92 Cable Act codified the "must-carry" rules, requiring local cable operators to carry local broadcast stations. Section 4 of the '92 Cable Act specifically states:

(a) CARRIAGE OBLIGATIONS.--Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b).¹⁷

Cable operators are required to carry only three local commercial stations if they have 12 or fewer usable activated channels on their cable system. Under these circumstances, the selection of local commercial stations may be left to the discretion of cable systems. Cable operators, however, may not select a low-power station over a local affiliate and, if the cable operator elects to carry a local affiliate of a network, it must carry the affiliate that is nearest to the area served by the cable system. Otherwise, if local cable systems have more than 12 usable activated stations, local commercial stations must be carried with the upward limit on local carriage equal to one-third of all channel capacity.

Once a local station is carried, the cable operator must "carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited."¹⁸ Thus, cable operators may not edit the content of local broadcasting stations available on their cable systems. Local commercial stations must also be placed on the same channel as they appear on the local broadcasting system.

Section 5 of the '92 Cable Act¹⁹ gave noncommercial (public) television stations authority to demand carriage. Cable systems consisting of 12 or fewer channels are required to carry one qualified local noncommercial station;²⁰ systems with 13-36 channels are required to carry at least one but not more than three stations;²¹ and cable systems with more than 36 channels are required to carry three stations.²² In order to be considered a "qualified" noncommercial educational television station, a station either must be licensed as such, and "owned and operated by a public agency, nonprofit foundation, corporation or association"²³ or be owned and operated by a municipality transmitting "predominantly noncommercial programs for educational purposes."²⁴ Noncommercial stations rely exclusively on must-carry and, unlike their commercial counterparts, are not able to seek compensation under the retransmission consent provisions.²⁵

In the "findings" section of the '92 Cable Act, Congress cited many justifications for the "must-carry" and retransmission rules. Congress found the cable industry to be highly concentrated and worried that this concentration could lead to barrier-of-entry problems for new programmers and a reduction of media outlets (i.e., diversity) available to consumers. Congress also contended the cable industry is increasingly

vertically integrated — common ownership among cable operators and cable programmers. As a result, operators naturally tend to favor their affiliated programmers.²⁶ This integration could make it "more difficult for noncable affiliated programmers to secure carriage on cable systems."²⁷

Congress also found there was both a "substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."²⁸ More importantly, Congress articulated an important governmental interest by having cable systems carry local stations. The carriage of these stations was necessary to provide a "fair, efficient, and equitable distribution of broadcast services,"²⁹ as laid out in Section 307(b) of the 1934 Communications Act. Local origination of programming was seen as a primary objective and benefit of must-carry regulation because local broadcast stations are an "important source of local news and public affairs programming," which are vital to having "an informed electorate."³⁰

Given all the praise for local broadcasting, Congress found it necessary to continue to promote the availability of free, over-the-air television to the public. Realizing the shift in audiences from broadcast to cable programming, Congress acknowledged that some advertising revenues would be reallocated to cable. In effect, cable systems carrying local broadcast stations were competing for advertising revenues on their own systems, and, theoretically, cable operators had an economic incentive to terminate the retransmission of broadcast signals or carry new channels. Given its rationale, Congress contended that absent "must-carry" requirements, a strong likelihood existed that "additional local broadcast signals will be deleted, repositioned, or not carried."³¹

In regards to digital television, the House Conference report interprets the '92 Act as implying that when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast of HD, it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards.³² This implies the must-carry laws were created in order to be flexible as technologies change and improve.

Provisions in the Telecommunications Act of 1996 codified advanced television, a new system of broadcast television in the U.S. commonly referred to as digital television.³³ In the legislative history of this provision, Congress stated that it did not intend to "confer must carry status on advanced television or other video services offered on designated frequencies" adding that the "issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act."³⁴

Analog Must-Carry Rules Constitutional

In 1997, by a five-to-four vote, the Supreme Court ruled the must-carry rules to be constitutionally valid under intermediate scrutiny as specified by the *O'Brien test*.³⁵ The Court examined the two inquiries left open during its prior review in *Turner I*: first, whether the factual record developed by the three-judge district court "supports Congress' predictive judgment that the must-carry provisions further important governmental interests,"³⁶ and second, whether the rules did "not burden substantially more speech than necessary to further those interests."³⁷

In answering its first question, the Court reasserted the rules furthered three important, interrelated governmental interests:

(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.³⁸

Combining these elements, the Court determined the preservation of a multiplicity of broadcast outlets was a substantial governmental objective that the must-carry rules addressed. Accordingly, after reviewing the record evidence in detail, the Court held the mandatory carriage requirements did further the aforementioned interests.³⁹

The Court exhaustively elaborated on the threats that existed absent any must-carry requirements. The increasing trends of vertical and horizontal integration in cable provided operators with the incentive and ability to give preferential treatment to their affiliated-programming services.⁴⁰ Moreover, when cable subscription percentages would level off, cable operators were expected to compete more aggressively with broadcasters for advertising revenue.⁴¹ The Court also demonstrated that a significant number of broadcasting stations had been dropped during periods without must-carry rules,⁴² placing some stations in financial disarray.⁴³ Although contrary evidence was presented,⁴⁴ the Court clarified its role, claiming it is in the position to determine whether the legislative conclusion was supported by the record before Congress and could not “re-weigh the evidence *de novo*,”⁴⁵ or “replace Congress’ factual predictions with our own.”⁴⁶ Thus, under intermediate scrutiny, the Court found the provisions to be consistent with the first prong of *O’Brien*.

Next, the Court examined the additional prong of *O'Brien* — namely whether the must-carry rules were broader than necessary to accomplish Congress' objective. Upon reviewing the evidence adduced on remand, the Court found “cable operators had not been affected in a significant manner by must-carry.”⁴⁷ The Court cited many statistics to support its finding: 87 percent of the time cable operators had been able to meet must-carry requirements through previously unused channel capacity; 94.5 percent of cable systems nationwide did not drop any programming to fulfill their obligations; and cable operators carry an average of 99.8 percent of the programming they carried before enactment of must-carry.⁴⁸ While cable operators contended these figures were overblown, the Court believed the results of must-carry spoke for themselves:

It is undisputed that broadcast stations gained carriage on 5,880 channels as a result of must-carry. While broadcast stations occupy another 30,006 cable channels nationwide, this carriage does not represent a significant First Amendment harm to either system operators or cable programmers.⁴⁹

The Court conceded that a majority of stations continue to be carried without must-carry. Nonetheless, the Court found the 5,880 added-channels, which appellants contend would be dropped absent any legal obligations, place a small burden on cable systems. In turn, “because the burden imposed by must-carry is congruent to the benefits it affords,”⁵⁰ the Court concluded the provisions are narrowly tailored to meet its objective of preserving “a multiplicity of broadcast stations for the 40 percent of households without cable.”⁵¹

Even though there may be alternatives to the must-carry rules that place less strain on cable operators, the Court articulated “content neutral regulations are not

invalid simply because there is some imaginable alternative that might be less burdensome on speech.”⁵² Nevertheless, the Court analyzed and rejected proposed alternatives to the current must-carry rules.⁵³ Such remedies included: the use of an A/B input selector switch; a leased access regime system; subsidy mechanisms to support financially weak stations; and anti-trust enforcement or anticompetitive administrative procedures.⁵⁴

FCC Proceedings on Digital Must-Carry

To clearly demonstrate its authority to interpret the must-carry rules to digital television, the Commission referred to the legislative history of the '92 Cable Act.⁵⁵ In its *First Report and Order and Further Notice of Proposed Rulemaking (here in “DTV Must-Carry Order”)*, the FCC established must-carry for digital-only television stations⁵⁶ and provided carriage for a digital station who returns its analog spectrum.⁵⁷ The Commission found that the '92 Cable Act “neither mandates nor precludes the mandatory simultaneous carriage of both a television station’s digital and analog signals (dual-carriage).”⁵⁸ The FCC also ruled that Congress intended the term “primary video” in the digital context to “mean a single programming stream and other program-related content”⁵⁹ and not the multicast streams that local broadcasters may offer.⁶⁰ As a result, digital-only stations (and those who’ve returned their analog spectrum) must elect which programming stream is its primary video, and the cable operator must provide mandatory carriage to the broadcaster’s primary video stream.⁶¹

Despite acknowledging the substantial governmental interests in preserving free television, multiplicity of information sources and fair competition in the programming

market,⁶² the FCC tentatively concluded that forcing cable operators to carry both the analog and digital signals of broadcast stations would place an undue burden on cable operators and therefore violate their First Amendment constitutional rights.⁶³ Cable operators are currently required to carry local television stations on a tier of service provided to every subscriber and on certain channel positions designated in the '92 Cable Act.⁶⁴ However, under the '92 Cable Act, cable operators are not required to carry duplicative signals or video that is not considered primary.⁶⁵ During the temporary transition period from analog to digital broadcasting, an increasing redundancy of basic content would occur between the analog and digital signals as the Commission's simulcasting requirements are phased in. If the Commission imposes a dual-carriage requirement, cable operators could be required to carry an additional quantity of television signals, carrying identical content, while having to drop other cable programming services because of lessened channel capacity. The broadcast industry generally urges the Commission to impose a dual-carriage requirement during the transition period to ensure viewers have continued access to all available local television programming. Cable operators hold that if they were required to carry digital-broadcast signals during the transition, an operator's channel line-up would consist of blank screens because most consumers will not have digital television receivers or converters allowing them to display digital signals on their analog sets.⁶⁶

Despite the conclusion that dual must-carry is unconstitutional, to make a final determination on dual-carriage, the Commission raised numerous questions around the seven DTV proposals⁶⁷ and requested further comment on other digital must-carry concerns, including: evaluating digital carriage agreements, retransmission consent and

market forces;⁶⁸ calculating cable system channel capacity;⁶⁹ and identifying and applying “program-relatedness”⁷⁰ in a multiple-signals environment. Once this information is analyzed, a more concrete decision can be reached.⁷¹

Initially, the FCC proposed seven DTV must-carry models in its *Notice of Proposed Rulemaking (herein “DTV Must-Carry NPRM”)*. Each model was designed to address specific problems arising from the digital broadcasting transition: however, based upon the factual record gathered to date, none achieve the balance necessary to accomplish the government’s objectives in DTV transition:

1. The Immediate Carriage Proposal — Requires all cable systems, regardless of channel capacity, to carry all digital signals of commercial broadcast must-carry stations up to the one-third statutory cap, in addition to the existing analog services.
2. The System Upgrade Proposal — Requires only cable systems with higher channel capacity to carry DTV signals of broadcast stations as they begin digital operation.
3. The Phase-In Proposal — Requires cable systems to carry some DTV broadcast signals. The number of DTV signals will increase by a few stations per year until it reaches its one-third capacity. This “phasing-in” is designed to alleviate sudden disruptions to cable systems.
4. The Either-Or Proposal — Requires eligible broadcasters to choose mandatory cable carriage for either their analog or digital signals, but not both, during the transition period. In 2005, when digital upgrades should be complete, all stations will switch to their digital broadcast.
5. The Equipment-Penetration Proposal — Requires cable carriage of digital signals only when a certain percentage of consumers have purchased DTV sets or analog-to-digital converters.
6. The Deferral Proposal — Defers the implementation of any mandatory DTV must-carry rule for a certain period of time and allows more time for broadcasters and cable operators to develop a successful business model for DTV carriage.

7. The No Must-Carry Proposal — Continues the analog must-carry rules but places no burden on cable operators to carry new digital signals until 2006 when all broadcast stations must convert to digital.⁷²

The FCC failed to adopt one of the seven digital must-carry proposals in its *DTV Must-Carry Order*, but did allow stations flexibility to negotiate for full or partial carriage of its digital TV signal.⁷³ The FCC also allowed a commercial station that negotiates retransmission consent of its analog signal to tie carriage of its digital signal to carriage of its analog signal.⁷⁴

Eighty-Five Percent Threshold Necessitates Action

To facilitate the timely recovery of analog spectrum, Congress and the FCC adopted an aggressive policy requiring broadcasters to convert to digital so it could reallocate and auction part of the existing spectrum utilized by analog broadcasting. The Balanced Budget Act of 1997 provides an exception for the termination of analog services. A station may extend its analog operation beyond 2006 if the television market in which it is operating has not received an 85% penetration in DTV viewership. Otherwise analog operation will end when 85% of households in a given market can receive a digital signal.⁷⁵

According to the General Accounting Office, several aspects of the “85% Rule” are still to be determined. For instance, the rule fails to specifically define what constitutes a television market. A cable-subscribing household counts as receiving DTV when its cable provider transmits at least one digital programming channel from each broadcaster in its market; however, no stipulation is made for households that do not own a DTV-ready television system. Furthermore, it is not yet clear how the number of

households receiving DTV in a market will be measured because markets consist of households using cable, satellite, and over-the-air broadcasts to view DTV.⁷⁶

To further complicate the transition to digital television, consumers have three options to receive a digital broadcast from local stations. Viewers may access digital broadcast signals using either an over-the-air antennae, through a digital-to-analog converter box that will allow them to watch digital signals on an analog television set or through a digital television set that includes a tuner capable of receiving and processing a digital signal.⁷⁷ However, most of the viewing public will be more likely to pursue digital broadcasts through their current MVPD providers. Once a cable subscriber owns a DTV monitor, lives in a market with stations that are broadcasting digitally, subscribes to a cable system that has chosen to carry those local digital signals, and obtains a set-top box and the necessary cable subscription package needed to view digital television, they can begin receiving local broadcast stations digitally.⁷⁸

In order to hasten the transition to DTV and respond to the 85 percent rule, the GAO provided three primary recommendations for executive action in its November 2002 report, paraphrased below:

1. One of the largest problems concerning DTV in the transition is consumer ignorance of the new technology. The GAO recommends exploring options to raise public awareness about the DTV transition and the implications it will have.
2. In order to speed up the transition, the GAO recommends the FCC bureaus and offices examine the costs and benefits of mandating that all new televisions be digital cable-ready in addition to the existing mandate for a digital over-the-air tuner. Two-thirds of the country receives television through a cable provider; therefore, it is important that the new televisions purchased are capable of transmitting a cable digital signal.

3. The GAO also recommends that an FCC Media Bureau examine the advantages and disadvantages of a policy that would set a date for cable carriage to switch from full carriage of analog signals to full carriage of digital signals. Such a policy would transfer broadcasters' must-carry rights from analog to digital on that date.⁷⁹

Not surprisingly, in addressing the second recommendation, the consumer electronic and cable industries reach a voluntary agreement on developing digital cable ready sets that will contain digital over-the-air and cable tuners that can receive the full panoply of digital signal formats a broadcaster or cable operator may offer.⁸⁰ Unfortunately, consumer purchases of digital television sets and tuners remain small,⁸¹ HDTV programming is still relatively sparse and, since January 2001, the FCC has failed to release any further rules concerning digital must-carry.

FCC floats new DTV must-carry proposal to meet 85 percent rule

As the Commission continues to ponder a vote on must-carry policy, in recent months, the FCC has responded to further define the 85 percent threshold and expedite the digital television transition. The head of the Media Bureau, Kenneth Ferree, along with FCC Chairman Michael Powell, are in favor of a plan — to begin in 2009 — that would require cable operators to carry broadcasters' digital signals (who elect must-carry) and down-convert such signals to analog for subscribers who don't have the ability to receive digital signals (herein "down-converting plan"). Based upon the DTV policy model employed in Germany,⁸² Ferree and Powell believe the down-converting plan would expedite the transition because existing cable and satellite subscribers who receive local stations may be included in the 85 percent-rule calculation. In addition,

such a policy would nullify any need for a dual-carriage requirement for analog and digital signals during the transition.⁸³

However, one looming question concerning the newly touted plan is whether broadcasters would have their digital multicast programming covered under digital must-carry status.⁸⁴ In its *DTV Must-Carry Order*, the FCC ruled that under digital must-carry, local broadcasters would have to elect one stream of their programming as their primary video. If such a ruling stands, broadcasters that wish to multicast would have to negotiate with cable operators to attain carriage for their program offerings that don't fall under their single stream of primary video.

In addition, if such a plan does take effect, the 15 percent of TV households that currently receive local broadcast signals on analog sets without the aid of a cable or DBS-subscription service could be disenfranchised and forced to buy a digital converter so they may still receive free, over-the-air television. In Germany, the government provided citizens with a subsidy to make such a purchase, but it doesn't appear the FCC is likely to follow suit.⁸⁵

Broadcasters are especially concerned the new plan doesn't effectively cover multicasting, as already nearly 200 DTV stations are engaged in transmitting multiple-broadcast streams. The plan represents a significant departure from the speculation that the FCC was going to vote in December 2003 to require cable operators to carry a station's 6 MHz of digital programming, whether in high-definition or multicast.⁸⁶

The broadcast industry also firmly believes the FCC's interpretation of the 85 percent rule would go against Congressional intent because many of the households

that would qualify would not be watching programming on DTV sets or have the ability to receive HDTV.

Alternatively, broadcasters have proposed a cable system may “terminate carriage of a station’s analog channel if the cable system (a) passes through the station’s digital signal to all digital receivers and (b) down-converts the digital signal for receipt at no extra charge on all analog-only receivers for carriage on the analog basic tier.”⁸⁷ Under such an initiative, stations that elect digital must-carry would have enough leverage to require the cable operator to carry both their analog and digital signals. Stations would also have the ability to negotiate retransmission consent for any multicast program offerings.⁸⁸ Such a policy would ensure that there would not be any material degradation of a station’s digital signal and the down-converting would occur at the TV set, not the cable headend. As a result, cable households receiving digital signals would still count toward the 85-percent threshold.⁸⁹

In refutation of broadcasters claims, cable operators argue there is no need for a multicast digital must-carry requirement because such a duty would only give stations unwarranted leverage for retransmission consent and retard innovative and competitive programming. Already more than 240 major network affiliates (ABC, CBS, NBC) have attained carriage for their digital signals without the aid of existing must-carry rules. If broadcasters offer multicast programming that is of high quality and in demand by consumers, then in all probability cable operators will want to carry such programming. Cable operators also claim that any digital multicast must-carry requirement would violate their First and Fifth Amendment Rights and contradict the FCC’s ruling that only primary video (one-program stream) falls under digital must-carry.⁹⁰

Market-Based Alternatives to Digital Must-Carry

Even if the FCC's new plan takes effect in 2009, it is highly likely it will be fraught with legal challenges and subsequent delays. Because of the legal complexities that have already faced the Commission's five-year pondering over digital must-carry, a more viable solution is to understand, propose and seriously consider market-based alternatives that might offer the flexibility and encourage the exploration of new digital services. This includes retransmission consent agreements that vary depending on local-station program offerings and scanning formats – multicasting of standard-definition and high-definition or multicasting of free video programming and pay services, whether in the form of pay movie channels or data casting. The market-based alternatives also need to take into account the strategic needs, available resources and industry agenda of both the broadcasters and the cable systems.

A number of policy remedies rely primarily on market-forces and retransmission-consent bargaining between cable operators and broadcasters. Under current law, broadcasters must elect whether to be carried free-of-charge by their local cable operators (must-carry) or negotiate with cable systems for some form of monetary or other compensation for carrying their signals (retransmission consent).

Because both dual and digital multicast must-carry regulations are likely to be constitutionally suspect through judicial review, the only viable regulatory alternative that exists for the industry is to work within the parameters set forth by the Commission's 2001 *DTV Must-Carry Order*. Until the 85 percent rule is met or a local station returns its analog spectrum voluntarily ahead of schedule, a local broadcaster may only elect must-carry for its analog signal. When a station returns its analog spectrum (whether

voluntarily ahead of the 85 percent rule or as a result of the 85 percent rule being fulfilled), then a local station may invoke must-carry, but only for the single, primary video program (whether in HDTV or standard-definition) that they elect. Even if the new down-converting plan is agreed upon and implemented by the FCC to speed up the 85 percent rule and DTV transition, such an effort doesn't guarantee any type of carriage for a local digital station that wishes to secure carriage for its multicast program offerings. Unless otherwise specified in the future, the newly proposed plan appears only to provide a mandatory right for a station's single, primary video signal.

As a result of such policy developments, retransmission consent bargaining and market forces combined are undoubtedly key variables to examining viable policy alternatives, both during and after the digital broadcast transition. Because more than two-thirds of all households receive their local television broadcast signals through cable systems, significant progress needs to take place in reaching additional retransmission consent agreements if the public at large is to reap the potential benefits of digital broadcasting. With such a goal in mind, the following paragraphs articulate market-based alternatives that may be pursued during and after the digital broadcast conversion in an effort to expedite the deployment and adoption of digital television.

During the period of transition from analog and digital broadcasting, retransmission consent is the primary bargaining tool a local station has to secure carriage for its digital television signal. Under the FCC's DTV Must-Carry order, a commercial station that negotiates retransmission consent of its analog signal may tie that consent to the carriage of its digital signal. This may potentially include multicasting of four (possibly six) standard-definition programming streams or a combination of a

HDTV program stream along one or two standard-definition streams. As cited earlier, more than 200 broadcast stations are already engaging in some form of multicasting. However, cable operators aren't likely to carry the full gambit of a station's multicast offerings, especially for programming streams that compete and potentially cannibalize an existing cable network that is already present in the system's line-up. Because many consumers who have purchased digital television sets are interested in receiving high-definition programming, it is advantageous for the cable operator and station to secure HDTV broadcasts, even if for just a portion of the day (i.e. primetime). Under this scenario one may imagine a local station may seek retransmission consent for its analog program offering and be compensated by having the cable system carry its HDTV counterpart. Whenever the program is not available in HDTV, then the cable operator could carry the program in standard-definition.

While this scenario would appear to be a promising strategy, many existing stations currently utilize retransmission consent as a leveraging tool. Specifically with regard to their analog signals, network-owned and-operated stations (herein "NO&Os") often seek carriage of their affiliated cable networks as the primary form of compensation in retransmission consent agreements, not only where their stations reside, but also in other markets where they have broadcast network affiliates.⁹¹ Cable MSOs claim it's rare for cash payments to be paid to NO&Os and, as a result, they are forced to carry less-desirable programming on their systems. Instead of stations leveraging analog retransmission consent for carriage of cable networks, it may be possible for local stations to seek digital carriage of their local broadcast programming, including desirable, high-definition broadcast network programming (i.e. popular

primetime sitcoms, dramas, sporting events, etc). Thus far, such a strategy has not been widely pursued because of current industry practice and broadcasters' requests for FCC reconsideration concerning dual carriage. Nevertheless, such a market-based strategy may help remedy broadcasters' desires and need for dual carriage. It will also provide additional time for stations in small-to medium-sized markets that don't possess a huge programming budget to figure out how to best use their digital spectrum for multicasting video and other services (i.e. data, paging).

If a local station is innovative enough in its program offering, it may create multicast options that a cable operator would agree to, especially once the digital broadcast transition is complete and analog spectrum has been returned. While digital-only stations (and stations that return their analog spectrum) may elect must-carry for their primary video, these stations may elect retransmission consent because a majority of their "primary" program offering will likely consist of affiliated broadcast-network content that is highly prized by the local cable systems. As a result, once a station is operating completely in a digital environment, retransmission consent may be leveraged for multicasting other program streams, whether devoted to local news or just syndicated shows that provide stations with more commercial avails. NBC has already announced plans to offer its affiliated stations weather programming and is proposing to repackage movies it has recently acquired from General Electric's merger with Vivendi Universal Entertainment. In a similar vein, a station that resides in a smaller market (one that possesses only a couple network affiliates) may elect to use its digital spectrum to attract multiple network affiliations and simultaneously multicast standard-definition programming to viewers. These stations may then decide which of these

network affiliates is most valuable and use it as a leveraging tool for its other network affiliated program streams.

Stations, weary of the potential possibilities of leveraging retransmission consent, may decide to pool their spectrum together to compete directly with cable television. Recently, Emmis Communications Chairman and CEO Jeff Smulyan announced a local-market based plan for stations to pool any excess DTV spectrum and utilize it to provide as many as 30 wireless cable channels that viewers would attain through a broadcast digital set-top box. While broadcasters are required to air at least one programming stream free to the public, policy provides them with the flexibility to offer pay, subscription-based services. In pooling spectrum together at the local level, it's conceivable that a collective of broadcasters could offer an alternative to cable television, with subscription prices starting around \$25 and initial set-up costs for the digital set-top box at around \$100. The only drawbacks to pooling spectrum in this regard is that it reduces the incentive and possibility for stations to offer high-definition programming as well as lessening the likelihood of reaching full multicast agreements with cable operators.⁹²

In addition to pooling spectrum to become a competitor to cable, a broadcaster may elect to use its spectrum to provide ancillary services to the public, such as paging and Internet services, as long as it continues to provide a free video programming stream to the public and pays the federal government a small portion of its ancillary service revenue. One possible scenario would be for a station to multiplex, using only a portion for video programming, whether standard or high-definition, and the reserve spectrum for paging and Internet access. Of course such ancillary services require

additional technological elements, such as interconnection and two-way connectivity. In addition, in providing such ancillary services, broadcasters would have to abide by existing FCC regulations. Furthermore, it's unlikely ancillary services would be construed to fall under the "program-relatedness" or "primary video" definitions of must-carry. Ultimately, stations that pursue the ancillary-services strategy may initially find it difficult to raise the necessary capital to launch these services successfully and would experience significant market and branding hurdles to overcome unless they found a strategic partner or alliance already established in the ancillary-service area. Stations embracing such a strategy during the digital-broadcast transition would still be better off pursuing a HD programming video stream for at least part of the day so they attain more leverage to negotiate carriage for the digital-video programming they are required to provide.

Direction for future research

Future research will continue to identify potential market-based alternatives through careful, independent review of FCC filings and scholarly articles as well as interviews with leaders of the respective trade associations to the broadcast and cable industries. The goal is to identify, under the permissible regulatory environment, what market drivers exist that enable mutually agreeable alternatives to digital must-carry. Although this paper has thus far presented various market-based scenarios, further research will aim at assessing both parties resources, strategic priorities, and other relevant concerns that might influence their must-carry preferences. To accomplish this, a nationwide survey of cable operators and television stations will be administered to attain their

preferences and factors affecting the preferences for market-based alternatives. The independent, third-party survey will specifically try to answer the following key questions:

1. What market-based preferences do local commercial stations have concerning non-regulatory alternatives to digital must-carry?
2. What market-based preferences do cable operators possess concerning non-regulatory alternatives to digital must-carry?
3. What factors influence these market-based preferences for local commercial stations and cable operators?

After careful data analysis, the market-based preferences of cable operators and local stations will be contrasted and discussed to make a neutral, unbiased contribution to the policy dialogue concerning digital must-carry and the transition from analog-to-digital television broadcasting.

The results of this research and future findings will make an important contribution to how cable carriage of digital broadcast stations will be resolved. The literature review in this area has thus far only raised legal and policy arguments that attempt to interpret the must-carry rules to digital television and weigh whether any affirmative obligations to carry digital stations (e.g. multicast, dual) would be constitutional. Thus far, a majority of local television stations airing digital signals have failed to reach carriage agreements with their respective cable operators. Upon a review of literature, a lack of scholarship and legal analysis exists that proposes market-based, non-regulatory approaches to remedying the carriage issues embedded in must-carry.

More importantly, the research undertaken in this study and future data will make an important contribution to finding a pragmatic solution to an ongoing regulatory issue concerning the wide spread adoption of digital television. Because more than two-thirds of Americans subscribe to cable, without carriage of local digital signals, stations and broadcast networks could lose a substantial part of their audience base and even limit the array of potential digital services they might offer. According to the General Accounting Office, absent carriage, a strong likelihood exists that the 85 percent threshold will not be met by 2006. If 85 percent of local viewers are not able to receive a local station's digital broadcast signal through the use of a DTV set with a digital tuner, digital set-top box or a converter attached to an existing analog set, then the government will be unable to take back the station's spectrum and reallocate the frequencies for other purposes.

The problem lies in trying to apply old rules to a new digital technology that offers so much more than just analog NTSC pictures and stereo sound. Digital television represents a multitude of programming, scanning formats and data services, not to mention a considerable upgrade in sound and picture quality — from Dolby 5.1 Channel Surround Sound to more than 2,000,000 million pixels in an HDTV picture. Instead of continuously flipping the channel around the public interest, scholars, policymakers and industry stakeholders alike should strive to employ innovative research that will further the intended goals of must-carry and help jumpstart the migration to digital television.

Endnotes

¹ Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.). The Cable Television Consumer Protection and Competition Act of 1992 amends various portions of the 1934 Communications Act.; For an overview of the must-carry provisions, including history, relevant litigation and First Amendment implications, see generally Gary Lutzker, *The 1992 Cable Act and the First Amendment: What Must, Must Not, and May Be Carried* 12 *CARDOZO ARTS & ENT L.J.* 467 (1994); Laurence Winer, *The Red Lion of Cable and Beyond — Turner Broadcasting v. FCC*, 15 *CARDOZO ARTS & ENT L.J.* 1 (1997)

²47 U.S.C. § 534

³47 U.S.C. § 325 (b)(4). For an overview of cable television and retransmission content regulation, see generally Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. § 325(b)) of the 1992 Cable Act*, 49 *FED. COMM. L.J.* 99 (1997).

⁴For an overview of the constitutional issues of applying the must-carry rules to digital television, see Albert Lung, *Must-Carry Rules in the Transition to Digital Television: A Delicate Constitutional Balance*, 22 *Cardozo L. Rev.* 151 (2000).

⁵ DTV Must-Carry R&O / FNPRM, 16 *FCC Rcd* 2653-55.

⁶ *Id.* at 2619-2622

⁷ *Id.* at 2651-2652.

⁸*Id.* at 2627-2628.

⁹See generally, Jenna Greene, *Digital TV a Remote Possibility: Cable, Broadcasters and FCC Mired in Policy-Making Battles*, *LEGAL TIMES*, July 30, 2001 at 1.; Failing to achieve dual-carriage, broadcasters have argued that the full 6 MHz signal should be available on cable systems. See Paige Albniak, *Cable: Get with the Program*, *BROADCASTING & CABLE*, Nov. 5, 2001 at 12.

¹⁰See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket 03-172, Tenth Annual Report, FCC 02-338 (rel. Jan. 28, 2004) (herein “Tenth MVPD Competition Report”) at ¶¶ 7, 69.

¹¹ *In the Matter of Carriage of Digital Television Broadcast Signals, Report & Order and Further Notice of Proposed Rulemaking*, 16 *FCC Rcd* 2598, 2599-2601 (2001) (herein “DTV Must-Carry R&O / FNPRM”)

¹² Aaron Heffron and Daniel Odenwald, *Multicasting Breaks Down 24-hour Limit on a Day*, *CURRENT*, March 26, 2001, <<http://www.current.org/dtv/dtv0106multicast.html>>

¹³ Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

¹⁴For an overview of cable television and retransmission content regulation, see generally Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. § 325(b)) of the 1992 Cable Act*, 49 *FED. COMM. L.J.* 99 (1997).

¹⁵ 47 U.S.C. § 325(b)

¹⁶ Stuart N. Brotman, National Cable Television Association, Priming the Pump: The Role of Retransmission Consent in the Transition to Digital Television, Comments to the FCC, CS Docket No. 98-1202, at 2 (Nov. 1, 1999.)

¹⁷ 47 U.S.C. § 534 (a).

¹⁸ 47 U.S.C. § 534 (b)(3)(B).

¹⁹ 47 U.S.C. § 535.; Some commentators suggest the must-carry provisions protecting PTV were singled out separately from commercial stations because more public stations had been dropped absent must-carry rules. Yet, the courts have failed to treat Section 4 or 5 of the 1992 Cable Act discriminately. See generally Monroe E. Price and Donald W. Hawthorne, Saving PTV: The Remand of Turner Broadcasting and the Future of Cable Regulation, 17 HASTINGS COMM/ENT L.J. 65 (1994).

²⁰ 47 U.S.C. § 535 (b)(1)(A).

²¹ 47 U.S.C. § 535 (b)(1)(A)(3)(i).

²² 47 U.S.C. § 535 (e).

²³ 47 U.S.C. § 535 (1)(1)(A)(i).

²⁴ 47 U.S.C. § 535 (l)(1)(B).

²⁵ 47 U.S.C. § 325 (b)(2)(A)

²⁶ 47 U.S.C. § 521 (2)(a)(2-5)

²⁷ 47 U.S.C. § 521 (2)(a)(5).

²⁸ 47 U.S.C. § 521 (2)(a)(6).

²⁹ 47 U.S.C. § 521 (2)(a)(8).

³⁰ 47 U.S.C. § 521 (2)(a)(11).

³¹ 47 U.S.C. § 521 (2)(a)(15).; Many researchers and commentators have been critical of the findings in the '92 Cable Act and their inclusion as justification for the Supreme Court's upholding of the rules, especially in light of vertical and horizontal integration and how frequently retransmission consent is invoked. See e.g., Nancy Whitmore, Congress, The U.S. Supreme Court and Must-Carry Policy: A Flawed Economic Analysis, 6 COMM. L. & POL'Y 175-225 (2001); Thomas Hazlett, Digitizing 'must-carry' under Turner Broadcasting v. FCC (1997), 8 S. CT. ECON. REV. 141 (2000)

³² H.R. Conf. Rep. No. 102-862 at 67.

³³ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 107-108 (codified in 47 U.S.C 336 §(a)(1)-(2)).

³⁴ Benton Foundation, Legislative Background: Digital Television and Cable TV, <<http://www.benton.org/Policy/TV/legislation.html>> (last viewed April 29, 2003).

³⁵ Turner Broadcasting System. Inc. v. FCC. 117 S.Ct. 1174 (1997).

³⁶ Id at 1184.

³⁷ Id.

³⁸ Id at 1186 (quoting Turner, 114 S.Ct. at 2469).

³⁹ Id at 1186-1197.

⁴⁰ Id at 1190. Horizontal concentration was growing as a small number of multiple system operators (MSOs) were acquiring significant numbers of cable systems nationwide. With regard to vertical integration, many operators owned or had affiliation agreements with cable programmers.

⁴¹ Id at 1191-93.

⁴² Id at 1192-94.

⁴³ Id. at 1195.

⁴⁴ Id at 1196-97.

⁴⁵ Id. at 1196.

⁴⁶ Id.

⁴⁷ Id at 1198.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id at 1199.

⁵¹ Id.

⁵² Id. (quoting United States v. Albertini, 472 U.S. at 689.)

⁵³ Id. at 1200-02.

⁵⁴ Id.

⁵⁵ See footnote 25, DTV Must-Carry R&O / FNPRM, 16 FCC Rcd 2603 (citing S. Rep. No. 102-92 at 85 (1991), H.R. Conf. Rep. No. 102-862 at 67 (1992), H.R. Rep. No. 102-628 at 94 (1992)). “The relevant language states that ‘when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this section.’” (quoting H.R. Rep. No. 102-862 at 67 (1992).

⁵⁶ DTV Must-Carry R&O / FNPRM, 16 FCC Rcd 2659-2600.

⁵⁷ Id.

⁵⁸ Id. at 2600.

⁵⁹ Id. at 2622.

⁶⁰ Id. at 2619-22

⁶¹ Id. at 2622. For further analysis on the meaning and importance of “primary video” within the digital must-carry debate, see Michael M. Epstein, “Primary Video” and Its Secondary Effects on Digital Broadcasting: Cable Carriage of Multiplexed Signals Under the 1992 Cable Act and the First Amendment” 87 MARQ. L. REV. 525 (2004).

⁶² Id. at 2600.

⁶³ Id. For further analysis of dual carriage of analog and digital signals, see Joel Timmer, Broadcast, Cable and Digital Must Carry: The Other Digital Divide, 9 COMM.L.&POL’Y 101 (2004)

⁶⁴ Id. at 2602 (citing 47 U.S.C. § 534(b)(6); 47 U.S.C. § 535(g)(5))

⁶⁵ Id. at 2602 (citing 47 U.S.C. § 534(b)(3)(A); 47 U.S.C. § 535(g))

⁶⁶ Id. at 2604-05.

⁶⁷ See Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rulemaking, 13 FCC Rcd. 15092, 15113-15116 (1998) (herein “DTV Must-Carry Notice”)

⁶⁸ Id. at 2600, 2655.

⁶⁹ Id. at 2652-54.

⁷⁰ Id. at 2651-52.

⁷¹ Id. at 2647-48.

⁷² DTV Must-Carry Notice, 13 FCC Rcd. 15113-15116

⁷³ DTV Must-Carry R&O / FNPRM, 16 FCC Rcd 2610.

⁷⁴ Id. at 2611.

⁷⁵ Balanced Budget Act of 1997, § 3003, Pub. L. No. 105-33(codified at 47 U.S.C. § 309(j)(14)(B))

⁷⁶ U. S. GENERAL ACCOUNTING OFFICE, TELECOMMUNICATIONS: ADDITIONAL FEDERAL EFFORTS COULD HELP ADVANCE DIGITAL TELEVISION TRANSITION (Report No. GAO-03-7, Nov. 2002) (herein GAO Digital Television Transition Report) at 11-12.

⁷⁷ Id. at 12.

⁷⁸ Id. at 13

⁷⁹ Id. at 39-40.

⁸⁰ George Leopold, Cable, CE Industry Shake on 'Plug-and-Play' Spec, ELECTRONIC ENGINEERING TIMES, Dec. 23, 2002 at 6.

⁸¹ GAO Digital Television Transition Report at 17-18. “Sales have grown from approximately 14,000 units in 1998 to 1.5 million units in 2001, according to the Consumer Electronics Association. However, despite this sales growth, in 2001 digital television units still represented less than

5 percent of the 28 million television sets sold in the United States. Moreover, the majority of these units were DTV monitors, which lacked a DTV tuner that can receive DTV signals.” *Id.* at 17.

⁸² For more specific details and analysis of the Berlin plan and its utility in the United States, see U. S. GENERAL ACCOUNTING OFFICE, TELECOMMUNICATIONS: GERMAN DTV TRANSITION DIFFERS FROM U.S. TRANSITION IN MANY RESPECTS BUT CERTAIN KEY CHALLENGES ARE SIMILAR (Report No. GAO-04-926T, Jul. 2004)

⁸³ Ted Hearn, Powell Pushes Back on DTV Plan, MULTICHANNEL NEWS, April 5, 2004 at 26; Ted Hearn, Powell Floats a Rigid DTV Switchover; Plan Would Make Berlin the Model For the Transition, MULTICHANNEL NEWS, March 15, 2004 at 50.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Bill McConnell, Billy Tauzin Sends His Own Signal, BROADCASTING & CABLE, October 27, 2003 at 2.

⁸⁷ National Association of Broadcasters (et al.), Ex Parte Submission to the Federal Communications Commission, Re: MB Docket No. 03-15 and CS Docket No. 98-120, filed April 15, 2004.

⁸⁸ Bill McConnell, Must-Carry, But Through the Back Door, BROADCASTING & CABLE, Dec. 8, 2003 at 31.

⁸⁹ See NAB, Ex Parte Submission.

⁹⁰ National Cable Telecommunications Association, Ex Parte Submission to the Federal Communications Commission, Re: MB Docket No. 03-15 and CS Docket No. 98-120, filed April 20, 2004.

⁹¹ Tenth MVPD Competition Report at ¶¶ 155

⁹² David Kaplan, The Multicasting Challenge; Just as Local Advertising Begins to Take Off, Stations Pose a New Threat, BROADCASTING AND CABLE, June 7, 2004 at 44.