ORAL ARGUMENT SCHEDULED SEPTEMBER 15, 2008

No. 08-1045

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

C-SPAN, DISCOVERY COMMUNICATIONS, LLC, THE WEATHER CHANNEL, INC., TV ONE, A&E TELEVISION NETWORKS, AND SCRIPPS NETWORKS, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF FOR INTERVENORS NATIONAL ASSOCIATION OF BROADCASTERS AND ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and Amici:

All parties, intervenors, and amici appearing before this Court are listed in the Brief of Petitioners.

B. Ruling Under Review:

The ruling under review is listed in the Brief of Petitioners.

C. Related Cases:

The case on review has not previously been before this Court or any other court. Intervenors are not aware of any related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenors National Association of Broadcasters (NAB) and the Association for Maximum Service Television, Inc. (MSTV) submit the following disclosure statement:

NAB is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry. NAB has not issued any shares or debt securities to the public, and NAB has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. Because NAB is a trade association as defined in Circuit Rule 26.1(b), it is not required to disclose the names of its members.

MSTV is a national association of local television stations dedicated to preserving and improving the technical quality of free, universal, community-based television service to the American public. MSTV has not issued any shares or debt securities to the public, and MSTV has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. Because MSTV is a trade association as defined in Circuit Rule 26.1(b), it is not required to disclose the names of its members.

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GLOSSARY

All-Digital Cable System	A cable system that transmits programming in digital format only. All-digital systems do not carry analog signals or provide analog service.
DTV Transition	Digital Television Transition. The transition from analog broadcasting to digital broadcasting, scheduled to be completed on February 17, 2009.
Headend	The location at which the cable system receives the signals transmitted by broadcasters and other programming, and processes them for transmission to subscribers.
Hybrid Cable System	A cable system that has both an analog and digital tier of service and transmits some programming in analog and other programming in digital.
MVPD	Multichannel Video Programming Distributor. A person who makes available for purchase multiple channels of video programming. 47 U.S.C. § 522(13).

STATUTES AND REGULATIONS

All pertinent materials are attached to Petitioners' brief.

INTRODUCTION

This case is about the national transition from analog to digital television broadcasting. On February 17, 2009, the date set by Congress, all full-power television broadcasters will transmit their free over-the-air programming using only a digital signal—no longer using the analog format that characterized television since its inception. The transition to digital broadcast television will allow viewers to enjoy the full benefits of next-generation television services—including programming in high-definition—over the air and for free.

The DTV transition, which began over twenty years ago, has required a massive, coordinated effort by Congress, the FCC, broadcasters, and other stakeholders. Congress has held hearings and passed legislation to ensure a smooth transition. The Commission has conducted rulemaking proceedings to establish a digital television standard, assign both interim and permanent digital channels to television stations, specify build-out schedules, and provide for transition mechanics. Broadcasters have invested billions of dollars in equipment to broadcast in digital and have undertaken a public affairs campaign to educate viewers about the transition.

The Order on review, *Carriage of Digital Television Broadcast Signals*, 22 F.C.C.R. 21064 (2007) (*Viewability Order* or *Order*) (JA), addresses a critical aspect of the DTV transition: How to ensure, as required by Section 614(b)(7) of the Communications Act, that local broadcasting signals carried on cable remain "viewable" for all cable subscribers after the transition. The *Order* takes steps to ensure that all cable subscribers—including an estimated forty million with older analog-only televisions—can still see their local television signals as they do now.

The Commission offers cable operators a choice for ensuring viewability, which mirrors the operators' voluntary plan presented to Congress. The Commission's decision falls well within its authority under the Communications Act and is consistent with the First Amendment. Although cable ***operators*** take no issue with the *Order*, cable ***programmers*** have filed this petition for review. The programmers lack standing to make these arguments; in any event, their arguments on the merits have no support. The petition should be denied in its entirety.

STATEMENT

A. The DTV Transition

Since the 1940s, television stations have broadcast using an analog signal. All television sets contained an analog tuner to receive the broadcasters' signals and convert them into pictures and sound. In the late 1980s, the Commission began to explore a nationwide transition to new television technology. By 1997,

Congress and the Commission committed the nation to abandoning analog broadcasting altogether and implementing the switch to digital. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 294 (D.C. Cir. 2003).

Congress and the FCC pursued this policy because of the strong national interest in a DTV transition. With the advent of digital technology, broadcasters can provide viewers with significantly enhanced picture and sound quality. Moreover, the DTV transition would help preserve free, over-the-air broadcasting by maintaining competition between the broadcasters and paid video services, such as cable and satellite, that increasingly utilize digital technology. In addition, because digital signals interfere less with each other than analog signals, the transition would permit the same number of television stations to broadcast using less spectrum, freeing up spectrum for public safety and other uses. To advance the transition, the Commission provided each station with a temporary second channel on which to broadcast in digital.

Congress initially set December 31, 2006 as the tentative end date for analog broadcasting, subject to a minimum percentage of consumers becoming able to view digital broadcasts. *Consumer Elecs.*, 347 F.3d at 294 (citing 47 U.S.C. § 309(j)(14)(A)); *see also* 47 U.S.C. § 309(j)(14)(B) (2004). By 2005, touting the advantages of a firm deadline and the need to free up spectrum for other uses, especially in light of the failures of public-safety communications following the

September 11 attacks and Hurricane Katrina, Congress established February 17, 2009 as the end date for analog broadcasting. Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 21 (2006).

By February 17 of next year, and from that day forward, television stations may transmit programming only in digital. *Id.* Congress determined that licensees would return the spectrum they used for analog broadcasting; a portion of the returned spectrum would be used for public-safety communications and a portion would be auctioned for commercial uses. *Id.* at 22; *see also* H.R. Rep. No. 109-276, at 367-368 (2005). The Commission recently concluded the auction of the largest part of the spectrum, generating over $19 billion in proceeds.[1]

Congress provided that a portion of those proceeds would be used to subsidize the digital transition for over-the-air viewers. H.R. Rep. No. 109-276, at 368. Congress recognized that there would be many households that had older analog-only television sets, which would not be capable of receiving digital signals. For the approximately 15% of households relying exclusively on free over-the-air broadcasting, Congress dedicated more than $1.5 billion to a digital-to-analog converter box assistance program. *Id.* Each household is now entitled to

[1] *See* http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73 (last visited June 17, 2008).

up to two $40 coupons towards the purchase of converter boxes. *Id.*; *see also* 120 Stat. at 23; 47 C.F.R. § 301.3 (program rules).

For the over 85% of households that subscribe to a multichannel video programming distributor (MVPD) service, such as cable or satellite, Congress concluded that "[a]llowing cable and satellite operators to offer digital broadcasts in both digital and analog-viewable formats will enable these households to continue using analog televisions if they wish to do so, without requiring television stations to continue to broadcast both digital and analog signals over the air." H.R. Rep. No. 109-276, at 368. The cable industry assured Congress that "[n]o one on day one of the transition will see any difference from the day before."[2]

The DTV transition is a monumental undertaking, commanding an enormous amount of attention and resources from Congress and the Commission. Broadcasters too have dedicated substantial resources to the transition. Specifically, they have invested substantially in equipment upgrades—spending approximately $2.3-3.1 million per station to convert to digital transmission. *Viewability Order* ¶ 55, n.192 (JA).

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[2] *DTV Staff Discussion Draft of the DTV Transition Act of 2005: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. 130-131 (2005) (statement of Kyle McSlarrow).

Broadcasters also have led the way in a billion-dollar effort to educate the public about the transition. "Every broadcast network and nearly 1,500 television stations nationwide are participating in a massive, multifaceted campaign that includes DTV action television spots, local speaking engagements, a road show that will visit 200 markets across the country and a variety of other grassroots initiatives."[3] In total, "it is estimated that broadcasters will spend between $10 billion and $16 billion on the digital transition." *Viewability Order* ¶ 55, n.192 (JA).

At the end of 2007, 1,635 of the Nation's 1,812 full-power television stations were broadcasting a digital signal. More than 800 stations were operating their final digital facilities; the rest will construct new facilities by next February.[4]

B. Ensuring Cable Subscribers Can View Local Broadcasting Stations After The Digital Transition

The DTV transition raised two important questions regarding the obligations of cable operators: (1) whether cable operators were required to carry the digital

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[3] *Status of the DTV Transition: 370 Days and Counting: Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce* (Feb. 13, 2008) (testimony of David K. Rehr at 2) *available at* http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.021308.Rehr-testimony.pdf.

[4] *Third Periodic Review of the Conversion to Digital Television*, 23 F.C.C.R. 2994, ¶¶ 16, 32, 36 (2007), *modified on other grounds*, 2008 WL 216991 (Jan. 23. 2008).

signals of local over-the-air television stations; and (2) the question addressed by the Commission in this case of how to ensure that all cable subscribers—including those with analog-only television sets—will continue to be able to view these local stations following the transition.

1. Carriage of local broadcasters' digital signals

The Commission commenced proceedings in 1998 to address, among other things, the responsibility of cable operators to carry local broadcasters' signals following the digital transition. As the Commission's Brief explains (at 4-7), under the "must-carry" rules in Sections 4 and 5 of the Cable Act, cable operators are required to carry the signals of "local commercial television stations" that operate within the same television market as the cable system, 47 U.S.C. § 534(a), as well as the signals of certain local public television stations, labeled under the Act as "qualified noncommercial educational television stations," *id.* § 535(b)(1). Every three years, commercial broadcasters have the option of electing must-carry or, instead, negotiating with the operators to grant retransmission consent (often for a carriage fee or other compensation). *Id.* § 325 (b)(3)(B). The "vast majority" of local television stations are now carried voluntarily by cable systems under retransmission consent agreements.[5]

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[5] Comments of Time Warner, Inc. 16 (JA).

The must-carry rules reflect Congress's concern about cable operators' ability to use their increased market power to harm local broadcast competition. Congress recognized that cable operators had the power to refuse carriage of broadcasters' signals, thereby reducing the number of households with access to broadcast programming, and ultimately threatening the survival of local broadcasters for lack of advertising revenue. Many must-carry stations provide foreign language and other niche programming, thus adding to the diversity of programming available to the public. Congress concluded that unless cable operators are ***required*** to carry local broadcast stations, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622, 634 (1994) (quoting Section 2(a)(16) of the Cable Act). The Supreme Court upheld the must-carry rules against First Amendment attack. *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 213 (1997).

In a 2001 Order, the Commission explained how must-carry rights would function after the DTV transition. The Commission made clear that cable operators were obligated to carry, in a digital format, the digital signals of local must-carry broadcasters. *See Carriage of Digital Television Broadcast Signals*, 16 F.C.C.R. 2598, ¶ 7 (2001) ("*2001 DTV Order*") (JA) ("cable systems are ultimately obligated to accord carriage rights to local broadcasters' digital signals

… analog stations that return their analog spectrum allocation and convert to digital are entitled to mandatory carriage for their digital signals"). No cable operator or programmer challenged this decision.

2. Viewability of local broadcasters' "must-carry" digital signals

Accepting the premise it established in 2001 that cable operators are required to carry the digital signals of must-carry stations following the transition, the Commission addressed how to ensure that all subscribers—particularly those with analog-only television sets—would be able to see such programming. Analog sets cannot display a digital signal (whether provided directly over the air by a broadcaster or provided in digital format by a cable operator). Subscribers with analog receivers therefore would not see local signals transmitted in digital format unless they had a converter.

Congress recognized in 1992 that if the signal is not viewable to the cable subscriber, then the entire purpose of must-carry would be defeated. To that end, Congress made clear that "signals carried in fulfillment of the [must-carry] requirements … shall be provided to every subscriber of a cable system" and "[s]uch signals shall be ***viewable*** via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection." 47 U.S.C. § 534(b)(7) (emphasis added);

see also id. § 535(h) (noncommercial broadcasting signals carried pursuant to the must-carry rules "shall be available to every subscriber").

In March 2007, the cable industry told Congress that it would ensure that digital signals would be viewable to subscribers with analog televisions: "each cable operators' [sic] first priority is to ensure that their customers suffer the least amount of disruption to their television service," and cable operators will "ensure that their customers can—on the first day of digital-only broadcasts—continue to watch their favorite stations on their existing televisions."[6] Cable asked for flexibility in ensuring "a seamless transition":

> For instance, a cable operator may decide to convert the digital broadcast signal to analog format at the headend. Under this option, cable customers who receive service on an analog television without the use of a set top box will receive the same high-quality service the day after the transition as they did the day before… In cable systems that have significant digital penetration, another option would be to deploy digital set top boxes to all consumers in that market, which would ensure continued access to local broadcast signals after the transition.[7]

Consistent with the commitment cable operators made to Congress, the Commission instituted these proceedings to ensure viewability following the

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[6] *The Digital Television Transition: Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, (Mar. 28, 2007) (testimony of Glenn Britt at 4-5) *available at* http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.032807.Britt-testimony.pdf.

[7] *Id.* at 5.

transition. The Order it adopted allows cable systems to either: (1) carry the signal of broadcasters electing must-carry in analog format (as well as in digital, as required by the *2001 DTV Order* and the statutory ban on material degradation, *see infra* p. 28); or (2) for "all-digital" systems, carry must-carry signals only in digital format as long as all subscribers are provided with the necessary equipment to view them. *Viewability Order* ¶¶ 17-18 & n.43 (JA). In other words, if a cable system chooses to operate a so-called "hybrid" system, which provides both analog and digital programming, it is required to ensure viewability by downconverting the broadcasters' digital signal at the headend and providing subscribers with an analog format of the must-carry broadcasts. If it chooses instead an "all-digital" system, which transmits video in digital format only, it is able to satisfy the *Order* by providing subscribers with equipment to view the digital signals (and indeed must do so or else subscribers would not receive service at all).

The Commission adopted the *Order* "to ensure that cable subscribers will continue to be able to view broadcast stations after the transition, and that they will be able to view those broadcast signals at the same level of quality in which they are delivered to the cable system." *Viewability Order* ¶ 2 (JA).[8]

[8] Although the cable industry pledged to Congress that they would ensure viewability for all customers, they submitted comments during the Commission's rulemaking proceeding that vigorously opposed a viewability requirement. The Commission thus had every reason to adopt a rule that ensured operators would in fact do what they assured Congress they would. Subsequently, the cable industry

SUMMARY OF ARGUMENT

I. Petitioners lack Article III standing to challenge the *Viewability Order*. The only injury they claim (at 17) is that the *Order* "imposes an unlawful burden on [their] speech under the First Amendment." Without offering any evidence, they vaguely allege that the *Order* prevents them from placing programming on some cable systems because hybrid cable systems will be required to transmit must-carry stations in both digital and analog formats. But they have failed to articulate how the *Order* actually—not just hypothetically—burdens their speech rights given the enormous growth in cable capacity and the fact that decisions about what programming to carry, and indeed the decision as to how much capacity to devote to video programming in the first place belongs to cable operators. Cable operators testified that the Commission's *Order* mirrors their plan for the transition, and Petitioners assert no basis for the Court to believe that, in the absence of the *Order*, cable systems would renege on their commitment to Congress. Because Petitioners have not alleged a redressable injury directly traceable to the *Order*, the Court should dismiss their petition.

II. On the merits, Petitioners' contention that the Commission exceeded its statutory authority fails. Congress made clear that must-carry signals "shall be

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announced that the *Viewability Order* "adopts cable's carriage plan." *See* http://www.ncta.com/ReleaseType/Statement/4364.aspx (last visited June 17, 2008).

viewable" on all subscribers' television sets that are connected to a cable system by a cable operator. 47 U.S.C. § 534(b)(7). Petitioners' assertion that the statute required the Commission to allow cable operators to meet the viewability requirement by merely ***offering*** subscribers the ability to purchase or rent a converter is precluded by the statute's plain language. Petitioners' reading conflates the exception—for those television sets that are ***not*** connected by the cable company—with the general rule of actual viewability where the cable company ***does*** provide the connection. Whereas "all-digital" systems can satisfy the viewability requirement by actually ***providing*** subscribers the necessary equipment to view the digital signal, a mere "offer" by cable operators to allow subscribers to rent or purchase a converter is insufficient.

Petitioners' remaining statutory arguments are equally baseless. In particular, their argument that cable operators should be able to provide must-carry stations in analog format only was rejected by the Commission seven years ago and thus comes too late. Moreover, their claim that the *Order* improperly requires "dual carriage" misapplies an unrelated provision of the statute.

III. The programmers' First Amendment argument was rejected by the Supreme Court more than ten years ago. In *Turner*, the Court concluded that requiring cable operators to dedicate up to one-third of their capacity to must-carry channels did not violate the First Amendment. The Court held that must-carry

advances important government interests in maintaining free over-the-air broadcasting and imposes only a modest speech burden on cable operators and programmers. Because must-carry is effective only if local broadcasters' signals are actually viewable by cable subscribers, the substantial interests advanced by must-carry are directly advanced by the *Viewability Order*.

Two additional points confirm that Petitioners' constitutional argument lacks merit. First, Petitioners presented no evidence to suggest that the operators' carriage choices would be any different in the absence of the Commission's *Order*. Second, any capacity concerns that may have in the past justified First Amendment concerns are no longer present, as all evidence shows that cable operators' carriage of must-carry signals—in digital format, analog format, or both—would demand only a small fraction of cable capacity and certainly nothing close to the one-third capacity previously upheld by the Supreme Court.

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE FCC'S ORDER

Petitioners lack standing under Article III to challenge the *Viewability Order*. To establish Article III standing, Petitioners must demonstrate (1) a personal injury-in-fact that is (2) fairly traceable to the Commission's *Order* and (3) redressable by the relief requested. *See Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1993) (citing *Allen v. Wright*, 468 U.S. 737 (1984)). With respect to

injury, Petitioners must show they have suffered "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 605 (D.C. Cir. 1996) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Petitioners meet none of these requirements.

Petitioners' injury claims are entirely speculative. They claim (at 18) that the Commission's *Order* "render[s] it more difficult for [them] to compete for carriage on the limited channels remaining." But they have offered no concrete allegations to support their contention that the *Order* affects their ability to compete for cable carriage or even affects the number of available channels.[9]

In fact, there is a tremendous amount of cable capacity available today. Relying on an independent study of cable infrastructure, NAB and MSTV showed that a typical cable system today, in addition to 83 analog channels, can transmit 300 digital channels, 12 high-definition channels, and 30 more video-on-demand channels. Expected future expansion will allow transmission by a typical system of 360 digital channels, 54 high-definition channels, and 60 channels of video-on-demand, all in addition to Internet and telephone service. Given this expanded

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[9] Notably, in the litigation over the constitutionality of the must-carry statute, the evidence produced in discovery showed that Petitioner C-SPAN, for example, ***increased*** the number of subscribers it reached after must-carry went into effect. *See* Letter from Edward O. Fritts to Brian P. Lamb, Ex. C to Reply Comments of NAB, CS Docket No. 98-120 (filed Dec. 22, 1998) (JA).

capacity, Petitioners failed to show how carriage of a handful of must-carry channels would have any impact at all on cable operators' programming choices. *See* NAB/MSTV Comments 14-15, 20-21 (JA).

With respect to all-digital cable systems, Petitioners can show no injury at all because the capacity available for new programming channels would ***increase*** following the DTV transition. Digital transmissions on cable use far less capacity than analog, and an all-digital system could reclaim the capacity now used to transmit analog broadcast signals and analog versions of cable programming. As to hybrid operators, while they will be required under the *Viewability Order* to transmit local signals in analog format (in addition to the requirement to transmit the signals in digital format imposed in the *2001 DTV Order*), many cable systems already carry many broadcast signals in both formats voluntarily—a point ignored by Petitioners—and thus the *Order* may not affect their capacity at all.

Even assuming a marginal reduction in capacity, any alleged injury to Petitioners depends on the choices made by cable operators in the future, such as whether or not they choose to carry Petitioners' programming. This Court has consistently rejected as "overly speculative" injury claims that "are predictions of future events (especially future actions to be taken by third parties) and those which predict a future injury that will result from present or ongoing actions—the

types of allegations that are not normally susceptible of labeling as 'true' or 'false.'" *United Transp. Union v. ICC*, 891 F.2d 908, 911-917 (D.C. Cir. 1989).

Petitioners also fail to show that any injury is fairly traceable to the Commission's *Order*. The Supreme Court has explained that "there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. Here, any potential injury will not be caused by the Commission, but would be the result of independent decisions of cable operators. The causal chain leads to the operators, not the Commission. *See, e.g.*, *Mideast Sys. & China Civil Constr. Saipan Joint Venture, Inc. v. Hodel*, 792 F.2d 1172, 1178 (D.C. Cir. 1986) ("the presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous that standing should be denied").

Nor can Petitioners show that their injury is redressable. Cable operators have confirmed that they will voluntarily undertake precisely what the *Order* requires. In recent testimony, the President and CEO of the National Cable & Telecommunications Association described the *Order* as a "mirror" of the "voluntary" commitment the cable operators had already made to ensure

viewability for their subscribers.[10] Thus, even if the *Order* were vacated, cable operators have indicated that they will not change their plans, and Petitioners would not benefit. Moreover, even assuming some marginal additional capacity, cable operators would have no obligation to devote it to carrying video programming; they might instead choose to use that capacity for additional Internet and telephone services. *See America West Airlines, Inc. v. Burnley*, 838 F.2d 1343, 1344 (D.C. Cir. 1988) (denying standing to contest an airline merger based on alleged difficulties in obtaining landing slots because the Order itself did not deny slots to the airline).

Citing *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), Petitioners claim (at 18) that they have standing "even if a cable operator, in the absence of the regulation, might still elect not to purchase programming from Petitioners." *Quincy Cable* is readily distinguished. In that case, the cable system had only 12 to 36 channels, *id.* at 1439, and the Court concluded that the must-carry rules would deprive programmers "of any opportunity *at all* to sell their services," *id.* at 1445. In confirming standing, the Court relied on the fact that the cable operator "expressly indicated that application of the rules would preclude

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[10] *E.g., Status of the DTV Transition: 370 Days and Counting: Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce* (Feb. 13, 2008) (testimony of Kyle McSlarrow at 3) *available at* http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.021308.McSlarrow-testimony.pdf.

carriage of TBS programming." *Id.* at 1445 n.24. Speaking to redressability, the Court "point[ed] to assertions by cable operators that, but for the must-carry rules, they would carry [the programmer's] programming." *Id.*

Petitioners here have made nothing close to the injury showing in *Quincy*. In contrast to *Quincy*, must-carry signals do not occupy a "significant number" of channels such that only a "limited number" remain available. 768 F.2d at 1445. In fact, the overwhelming bulk of cable channels remain available to cable programmers. The justifications in *Quincy* for finding the injury redressable also are not present here. Petitioners have presented no statements by cable operators or other evidence that operators would carry Petitioners' programming ***but for*** the Commission's *Order*. To the contrary, cable operators have stated that they voluntarily plan to take the same steps to ensure viewability.

For all of these reasons, the programmers have no standing to challenge the Commission's *Order*.

II. THE COMMISSION ACTED WELL WITHIN ITS STATUTORY AUTHORITY

On the merits, Petitioners' statutory arguments fare no better.

Petitioners' central argument is that the Commission acted contrary to the express will of Congress by requiring cable operators who run "hybrid" digital/analog systems to transmit must-carry signals in both analog and digital formats. Petitioners claim (at 19) that Congress "unambiguously" provided that

viewability under Section 614(b)(7) of the Act is satisfied so long as the cable operator offers subscribers the option to purchase or lease a converter box to see local signals that are not carried in analog. To prevail on this *Chevron* Step One argument, Petitioners must establish that "Congress has … addressed the precise question at issue," requiring this Court to "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Intervenors agree that Congress's intent was clear, but in fact it supports the Commission's decision. Under the plain terms of the statute, a mere ***offer*** to sell or lease a converter box is ***not*** sufficient to ensure viewability for all of the television sets for which the cable company provides a connection.

Petitioners' remaining statutory arguments are also without merit. In particular, the Commission could not have allowed hybrid cable systems to transmit broadcasters' digital signals only in analog. This option is precluded by Commission precedent and the statute itself. Also, Petitioners' suggestion that the Commission exceeded its authority by mandating "dual carriage" is based on a misreading of the statute and prior Commission decisions.[11]

[11] Intervenors adopt the arguments made by the Commission concerning Petitioners' claims that the Commission violated the Administrative Procedure Act. *See* Resp. Br. 45-54.

A. The *Viewability Order* Properly Ensures That Subscribers With Analog Receivers Are Able To View Must-Carry Stations Following The DTV Transition

Section 614(b)(7) of the Communications Act addresses the requirement that must-carry stations are viewable to all subscribers. The provision has three sentences:

> [1] Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. [2] Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. [3] If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 534(b)(3) of this title.

47 U.S.C. § 534(b)(7).[12]

Congress plainly addressed two different circumstances in the second and third sentences of this provision. The second sentence expressly deals with a cable operator's obligation to ensure viewability for all television receivers "which are connected to a cable system by a cable operator or for which a cable operator provides a connection." *Id*. The third sentence, by contrast, deals with a cable

[12] The Commission has previously confirmed that it has no authority "to exempt any class of subscribers from [the viewability] requirement." *Implementation of the Cable Act of 1992*, 8 F.C.C.R. 2965, ¶ 34 (1993).

operator's obligation with respect to connections it "does ***not*** provide." *Id.* (emphasis added). In this narrow circumstance, where the operator authorizes subscribers to install additional receiver connections but has nothing to do with the connection, the operator's sole obligation is to "notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and … offer to sell or lease such a converter box to such subscribers." *Id.* In other words, Congress determined that where the operator's involvement is limited because it does not provide the connection or equipment, its corresponding obligations also are more limited.[13]

That the two sentences deal with distinct situations is confirmed by the fact that the third sentence speaks only to "additional" connections: the use of that term shows that Congress expected the cable operator to be responsible for, and ensure viewability on, the connection to at least one receiver in a home, while it had a lesser responsibility for viewability on any "additional" connections it did not provide. In that way, subscribers would be assured the ability to view local signals over at least one connection to their home.

Consistent with the statute's straightforward mandate, the two options provided by the Commission guarantee that subscribers with analog televisions

[13] No party argued to the Commission, or supplied any evidence, that cable operators do not connect or provide connections for the bulk of subscribers' receivers.

will be able to view must-carry broadcasts following the transition. On hybrid cable systems, subscribers will be able to view the digital must-carry signal because the operator must provide it in an analog format.[14] For "all-digital" systems, subscribers will be able to view digital signals with the equipment the cable operators necessarily ***provide***—not just offer—as part of their service.

Under Petitioners' reading of the statute (at 20), however, the third sentence requires the Commission to allow hybrid cable operators to transmit must-carry signals only in digital format coupled with an ***offer*** to sell or lease a converter box. But Petitioners conflate the second and third sentences, ignoring the distinction between the circumstances covered by each. The statute is clear that only if the cable operator authorizes additional connections, but has no other role in providing them, can it meet its obligations by informing subscribers of the need for a converter ***for those additional receivers***. As the Commission's *Order* recognizes

[14] Petitioners suggest (at 15) that hybrid cable operators, as compared to other MVPDs, were unreasonably singled out to carry broadcasters' signals in both an analog and digital format. Leaving aside programmers' lack of standing to raise the alleged disparate treatment of operators, Petitioners ignore the fact that the other MVPDs it identifies are either all-digital or use proprietary technology and any subscriber to those systems therefore must have a converter for every receiver connected to the system.

(at ¶ 22 (JA)), all connections provided by a cable operator—whether a hybrid system or an "all-digital" system—require more than an offer of viewability.[15]

As this Court has reiterated on numerous occasions, "[w]e must strive to interpret a statute to give meaning to every clause and word[.]" *Donnelly v. FAA*, 411 F.3d 267, 271 (D.C. Cir. 2005). If, as Petitioners claim, an offer to sell or lease a converter box were sufficient to establish viewability in all cases, then the language in the third sentence making clear that the sale/lease option applies only "if" a cable operator "authorizes subscribers to install additional receiver connections" would be meaningless.

Moreover, where Congress has identified specific exceptions to a general rule—as it has done here with respect to additional connections for which the cable company is not responsible—"exceptions not explicitly made should not be implied." *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 615 (D.C. Cir. 1992) (internal quotation marks omitted). Petitioners' construction of Section 614(b)(7) would hijack the exception as the rule and therefore must be rejected.

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[15] The Commission's rejection of Petitioners' argument that hybrid cable operators should be allowed to transmit certain must-carry stations in both digital and analog formats and other stations in digital format only (coupled with the converter-box sale/lease offer) is consistent with its rejection under the satellite carriage rules of a similar scheme proposed by a satellite video provider. *See Broadcast Carriage Rules for Satellite Carriers*, 17 F.C.C.R. 6065, ¶ 23 (2002), *vacated in part by* 22 F.C.C.R. 16,074 (2007).

The legislative history of Section 614(b)(7) is entirely consistent with the Commission's reading.[16] At the time of the Cable Act, there were no standards for cable-ready televisions and, as cable capacity grew, converters were needed to access most cable systems. Congress recognized that, if a converter were needed to view local television signals on a cable system, it would be unfair to obligate cable operators to provide a converter for additional connections that subscribers might install without the cable operator's participation. As the Senate Committee Report explained:

> If the cable operator installs wires for connection to a television set or provides materials to connect a television set to the cable system, it must ensure that all must-carry signals can be viewed on that set. If, ***however***, the cable system authorizes subscribers to connect additional receivers, but neither provides the connections nor the equipment or material needed for such connections, its ***only*** obligation is to notify subscribers of any broadcast stations carried on the cable system which cannot be viewed via cable without a converter box, and to offer to sell or lease such a converter…

S. Rep. No. 102-92, at 86 (1991) (emphasis added); *see also* H.R. Rep. No. 102-628, at 94-95 (1992) (same). Where the cable system does not provide the

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[16] This Court must reject Petitioners' suggestion (at 18, 22-23) that the viewability requirement applies only to television technology in existence at the time the Communications Act was passed in 1992. Petitioners offer no support for this position; to the contrary, if Congress intended to limit the viewability requirement to certain technology, it would have said so. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) (Roberts, J.) (statute's broad language rebuts "conclusion that Congress intended to limit the statute to [one] specific application").

connection, its obligation is "only" to offer to sell or lease a converter box, but where the cable system ***does*** provide the connection, it is required to do more: ensure actual viewability. As the Supreme Court recognized, Congress's objective in enacting must-carry was to ensure that viewers who obtain their television service from cable operators would still be able to see all local stations, thus ensuring that the inability to reach cable subscribers would not weaken or eliminate those stations. *Turner II*, 520 U.S. at 213. As the Commission explained (at ¶ 22 (JA)), if the offer to rent or buy a converter is rejected and subscribers do not have the necessary equipment, "the broadcast signals in question are not 'viewable' on their receivers," thwarting Congress's intent.[17]

Given the mandate to ensure actual viewability, and the Commission's obligation to modify the must-carry rules in light of the transition to digital television, *see* 47 U.S.C. § 534(b)(4)(B), the Commission's *Order* is manifestly reasonable and indeed required.

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[17] In 2005, the cable industry recognized that optional viewability was insufficient, promising Congress it would provide actual viewability: "Cable operators will continue to make analog televisions … work long after the broadcasters shut off their analog transmissions by providing a digital-to-analog set-top box or by converting the digital TV signals at the head-end." *The Role of Technology in Achieving a Hard Deadline for the DTV Transition: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. 46-47 (2005) (statement of Michael Willner).

B. Petitioners' Other Statutory Arguments Are Meritless

Petitioners advance a number of other arguments in support of their position that the Commission exceeded its statutory authority. None has merit.

1. Operators cannot provide signals in analog format only

Petitioners' assertion that the Commission could have allowed cable operators to carry must-carry signals in analog format only was previously rejected by the Commission, lacks statutory support, and would deprive consumers with digital receivers the benefits of the DTV transition.

The Commission ruled in 2001 that, after the DTV transition, the must-carry obligation will shift from broadcasters' analog signals to their digital signals and the digital signals must be transmitted by cable operators in their native digital format. *2001 DTV Order* ¶¶ 7, 12 (JA). Neither Petitioners, nor anyone else, sought reconsideration or review of that decision, and it became final almost seven years ago. Any argument about whether or not cable systems should be required to carry broadcasters' digital signals in digital format is therefore not properly before this Court. *See Charter Commc'ns, Inc. v. FCC*, 460 F.3d 31, 38-39 (D.C. Cir. 2006) (refusing to consider arguments concerning a decision that the FCC made in an unchallenged earlier phase of a rulemaking proceeding in review of a later order).

In any event, permitting cable operators to transmit local signals, or just must-carry signals, only in analog format would itself have violated the Act. The Act requires that local signals be carried "without material degradation." 47 U.S.C. § 534(b)(4)(A). Downconverting high-quality digital signals to lower-quality analog would manifestly result in degradation.[18] Further, unless a cable system provided no digital signals at all—and the cable industry testified that most cable systems transmit at least some[19]—providing must-carry signals only in analog would violate the requirement that "the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations be no less than that provided by the system for carriage of any other type of signal." *Id*. § 534(b)(4)(A).[20]

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[18] The Commission's requirement that hybrid cable operators downconvert digital signals to analog so that they are viewable to customers with analog television sets does not violate the ban on material degradation because those operators still must carry the signal in a digital format. *See Viewability Order* ¶ 13 (JA). As a result, viewers with digital receivers will see the local signals in their digital format. Under Petitioners' analog-only alternative, they would not. Further, on analog receivers, the downconverted signal is the highest quality the set can display.

[19] Britt Testimony, *supra* n.6, at 4.

[20] Also, if hybrid systems were allowed to transmit programming in analog format only following the transition, subscribers who have digital televisions would not get the benefit of their purchase.

2. The *Viewability Order* is consistent with the Act and precedent related to "dual carriage"

Equally unavailing is Petitioners' claim (at 19) that the *Viewability Order* exceeds the Commission's authority because it "directly conflicts with Congress's express instruction to the Commission not to require duplicative carriage."

Petitioners misread the statutory language: the prohibition in Section 614(b)(5) they cite allows an operator to reject carriage of a signal of one station that "substantially duplicates the signal of ***another local commercial television station*** which is carried." 47 U.S.C. § 534(b)(5) (emphasis added). Section 614(b)(5) addressed the problem that would arise if there were two affiliates of the same network in one television market. Congress allowed a cable system to carry only one of those stations. *See* S. Rep. No. 102-92, at 85 (1991) ("Subsection (b)(5) exempts cable systems from the obligation to carry signals that substantially duplicate the signal of another local commercial television station or from having to carry the signal of more than one station affiliated with a particular broadcast network …"). The *Viewability Order* deals with the signal of one television station and, thus, Section 614(b)(5) has no application.[21]

[21] The Commission has agreed, concluding that the Act does not "preclude[] the mandatory simultaneous carriage of both a television stations' digital and analog signals." *Carriage of Digital Television Broadcast Signals*, 20 F.C.C.R. 4516, ¶ 13 (2005).

Petitioners are also wrong in arguing that the option to downconvert at the headend and transmit one local signal in two formats is inconsistent with the Commission's rejection of a "dual carriage" requirement in 2001 and 2005. The Commission in those decisions, while concluding that the Act does not preclude it, merely declined to ***require*** cable operators to carry two separate signals—one analog, one digital—from one broadcast station.

Those decisions are easily distinguishable. When the *Order* becomes effective, broadcasters will transmit only one signal. Moreover, the *Order* does not mandate carriage in two formats; cable operators can avoid doing so if they convert to all-digital operation. Finally, when the Commission determined that cable operators before the transition could meet their must-carry obligations by carrying only analog signals, all cable subscribers could still then view their local television signals. By contrast, if cable operators did not have to choose one of the options in the *Order*, subscribers with analog sets would not be able to see some local stations. *Viewability Order* ¶ 55 (JA).

3. Petitioners' argument that non-commercial broadcast stations should be treated differently is waived and has no merit in any event

For the first time in these proceedings—and contrary to what at least one of them argued below—Petitioners claim (at 21) that the Commission improperly applied the "viewable" language with respect to commercial broadcasting stations

in Section 614(b)(7) to non-commercial broadcasting stations covered by the "available" language in Section 615(h) (47 U.S.C. § 535(h)). The argument that commercial and non-commercial signals should be treated differently following the transition—an argument no party raised before the Commission—is not reviewable for the first time in this Court. *See* 47 U.S.C. § 405(a); *see also* Resp. Br. 43-45.

That the Commission (at n.36 (JA)) noted the different language in Sections 614(b)(7) and 615(h) does not mean that it had a "fair opportunity" to decide whether non-commercial stations warranted the same viewability requirements. The "mere fact that the Commission discusses an issue does not mean that it was provided a meaningful 'opportunity to pass' on the issue." *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 280 (D.C. Cir. 1997). Because no party argued that Sections 614(b)(7) and 615(h) impose different obligations, the Commission was not "provided a meaningful 'opportunity to pass' on the issue." *Bartholdi*, 114 F.3d at 280. In fact, cable programmers themselves argued before the Commission that the provisions meant the same thing.[22]

In any event, Congress's intent with respect to commercial and non-commercial must-carry stations was identical: for those connections for which the

[22] *See* Comments of Discovery Communications 4-5 (JA) (asserting that the import of the two provisions is equivalent).

cable company is responsible, the must-carry signals must be universally "viewable" or "available" to subscribers.

III. THE *VIEWABILITY ORDER* DOES NOT VIOLATE CABLE PROGRAMMERS' FIRST AMENDMENT RIGHTS

Petitioners' final argument (at 41-50)—that the *Viewability Order* violates their First Amendment rights—also lacks merit. Their constitutional argument is nothing more than a resurrected challenge to must-carry, which the Supreme Court upheld more than ten years ago.

A. The Supreme Court's *Turner* Decision Controls

In 1994, the Supreme Court first considered whether the must-carry rules violate the First Amendment. *Turner I*, 512 U.S. 622. The Court concluded that must-carry was content-neutral and would be sustained if "it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The Court recognized that must-carry was designed to serve "three interrelated 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." *Id.*

After allowing the parties to develop a more complete factual record, the Court upheld the constitutionality of must-carry. *Turner II*, 520 U.S. 180. The Court concluded that must-carry serves the Government's interests in a "direct and effective way." *Id.* at 213. The Court next found that "the actual effects" of must-carry "are modest." *Id.* at 214. The Court concluded that "the burden imposed by must-carry is congruent to the benefits it affords" and thus "must-carry is narrowly tailored to preserve a multiplicity of broadcast stations." *Id.* at 215-216. Justice Breyer agreed that "the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers is limited and will diminish as typical cable system capacity grows over time." *Id.* at 228.

For the same reasons, the *Viewability Order* is constitutional. The must-carry rules upheld in *Turner* include the requirement that must-carry signals "shall be viewable" on all television receivers of a subscriber for whom the cable operator provides a connection. 47 U.S.C. § 534(b)(7). Must-carry is meaningful only if all cable subscribers are able to view the signals of must-carry stations. If subscribers with analog receivers could not view some stations following the DTV transition, it would reduce those local broadcasters' potential audience and advertising revenues and significantly undermine the Government's interest in maintaining a vibrant system of free over-the-air broadcasting.

By ensuring that cable operators provide must-carry signals in a format actually viewable to subscribers, the Commission "directly" advances the important Government interests recognized in *Turner*. *Turner II*, 520 U.S. at 213. The programmers, moreover, concede that the *Viewability Order* does not burden more cable capacity than the one-third limit upheld by the Court. *Turner* thus controls and precludes Petitioners' constitutional argument.

Petitioners' arguments (at 43-48) that the *Order* is not "necessary" to further the Government's interests have no merit. The pivotal question is whether the *Order* furthers the Government's interests in a direct and effective way, *Turner II*, 520 U.S. at 213, and whether the incidental burden, if any, on the programmers' speech rights is more than is necessary to further those interests, *id.* at 213-214. The test is satisfied so long as the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner I*, 512 U.S. at 662 (internal quotation marks omitted). Plainly, the Government's interest in maintaining local broadcasting "would be achieved less effectively" absent requirements that ensure broadcasting signals remain viewable to all cable subscribers after the DTV transition. *Id.* Just as must-carry itself does not burden more speech than is necessary to advance the Government's interests, neither does the Commission's decision ensuring that must-carry signals are viewable by all cable subscribers.

Petitioners posit alternative viewability solutions that allegedly would require less cable capacity. They suggest, for example, that the Commission could have allowed cable operators to merely offer to sell or lease a converter box or to transmit must-carry signals in analog-only format. As described above, Petitioners' alternative solutions conflict with the statute. In any event, the *Order* is not unconstitutional simply because there may be alternative solutions that programmers might prefer. The *Turner* Court made clear that "[it] will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests." 520 U.S. at 217-218.

B. Increased Cable Capacity Confirms The *Viewability Order* Is Constitutional

A number of additional circumstances confirm the *Viewability Order* is constitutional.

First, the constitutional burden in *Turner* flowed from the fact that must-carry is mandatory, and there was evidence that cable operators would not carry certain broadcasting stations in the absence of the mandatory carriage requirements. The Court recognized that cable carriage that would continue in the absence of any legal obligation "does not represent a significant First Amendment harm to either system operators or cable programmers." 520 U.S. at 215. Here, Petitioners have not shown that operators' carriage of must-carry channels would

be different in the absence of the *Order*. Indeed, as discussed above, the operators have testified that the *Order* mirrors their voluntary plan. *See supra* pp. 17-18. Thus, there is no basis on which the Commission or this Court could conclude that, but for the *Viewability Order*, cable programmers would have any greater opportunity to place programming channels on cable systems.

Moreover, increased cable capacity underscores that there is no unconstitutional burden on cable programmers. Cable systems today have available a much larger number of channels for which the programmers can compete. *See supra* p. 15. Even further, the carriage of digital broadcast signals takes up significantly less capacity than carriage of the same signal in analog.[23] The effect on "all-digital" systems' cable capacity is therefore to ***increase*** the number of slots available to programmers.

Even where the operators choose to maintain a hybrid system and provide must-carry signals in both an analog and digital format, the burden on capacity remains much smaller than the one-third limit upheld in *Turner*. Since *Turner II*, the capacity of the average cable system has grown so large that even if cable systems were required to carry both digital and analog signals of local commercial television stations, such systems would have enough capacity to continue to carry

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[23] *See* Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. 13-14, CS Docket No. 98-120 (filed Apr. 21, 2005) ("NAB Recon. Pet.") (JA).

any other programming of their choice. NAB Recon. Pet. 12-13. A detailed study of cable capacity found that in 1993, when must-carry first went into effect, carriage of local commercial stations occupied 13.35% of the capacity of the average cable system (a little more than one-third of the statutory cap); but by 1999, local commercial stations filled only 6.25% of cable capacity (less than one-fifth of the statutory cap). *Id.* at 13. There is no evidence that cable operators' carriage of must-carry signals—in digital, analog, or both—would use anything close to the one-third capacity limit imposed by the Communications Act and upheld in *Turner*.[24]

These figures regarding cable capacity, moreover, include local commercial stations carried pursuant to retransmission consent agreements—which *Turner* instructs do not count for purposes of assessing the burden of must-carry on programmers' speech rights. *Turner II*, 520 U.S. at 215. As Time Warner admitted (Comments 16 (JA)), the "vast majority of broadcasters opt for retransmission consent," meaning that the effect of the *Viewability Order* (which relates only to must-carry signals) is minimal, and the corresponding potential intrusion on the programmers' First Amendment rights is far less than even the "modest" burden upheld in *Turner*. *Turner II*, 520 U.S. at 214; *see also Turner*

[24] Even at the time of *Turner II*, with far less channel capacity, evidence showed that "cable operators nationwide carry 99.8 percent of the programming they carried before enactment of must-carry." 520 U.S. at 215.

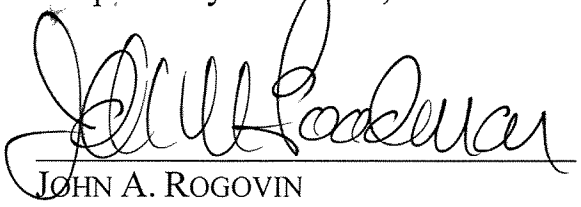
Broad. v. FCC, 910 F. Supp. 734, 743 n.22 (D.D.C. 1995) ("[I]f the burden to the cable industry [from must-carry] were much smaller, then the First Amendment would not even be implicated.").

Not only does the Supreme Court's decision in *Turner* preclude Petitioners' First Amendment arguments, but given the choice provided to cable operators and dramatically increased cable capacity, Petitioners' arguments have even less color today. The Court's prediction thirteen years ago—that "the rapid advances in fiber optics and digital compression technology [mean that] soon there may be no practical limitation on the number of speakers who may use the cable medium," *Turner I*, 512 U.S. at 639—is now reality. Thus, any cable capacity issues that may have given rise to First Amendment concerns for programmers ten years ago are no longer present.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a)(3)(C), I certify that this brief complies with the type-volume limitation of D.C. Circuit Rule 32(a)(3)(B)(i). This brief uses a 14-point proportionally spaced font and contains 8,716 words as calculated by the word processing software's word-count feature. The word count excludes sections of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2008, I caused two true and correct copies of the foregoing Brief of Intervenors National Association of Broadcasters and Association for Maximum Service Television, Inc. to be served by first-class U.S. mail upon the following parties:

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