

SHOULD DTV MUST-CARRY BE EXPANDED, SUNSET, OR PRESERVED AS-IS?

By J.H. Snider¹

Abstract

In an age of telecommunications convergence and Internet TV, DTV must-carry is a historical relic that nevertheless is likely to be preserved and expanded. Given that political reality, this paper makes two recommendations: 1) in the long-term, must-carry should be sunset and transformed into a blanket network neutrality rule for the Internet TV era, and 2) in the short-term, broadcasters should be held to quantifiable and enforceable public interest standards in exchange for any expansion of must-carry.

Introduction

House Commerce Committee Chairman Joe Barton (R-TX) has announced his intention to introduce a digital TV bill within the next few weeks. Senate legislation is expected soon after. The bill focuses on setting a hard deadline to end the DTV transition, but it may also grant broadcasters expanded digital must-carry rights. Broadcasters are lobbying for expanded must-carry rights as part of a deal to accept a hard deadline—and the reallocation of spectrum valued at \$30 billion from broadcast to wireless broadband and public safety.

This paper analyzes the policy arguments to preserve, expand, or sunset broadcast TV must-carry rights. I argue that on policy grounds, Congress should not require cable and satellite TV systems to carry all of the additional over-the-air programming streams enabled by DTV multicasting. Indeed, Chairman Barton opposes an expansion of this federal mandate. However, for compelling political reasons, Congress will likely do so anyway. Like social security benefits, must-carry rights are a third rail of politics. The conventional wisdom is they can never be reduced, only expanded, because the broadcast industry is too politically powerful and must-carry rights too important to the broadcast industry's bottom line. When President George H.W. Bush vetoed must-carry rights, his veto was overridden—the only veto override of his administration.²

¹ J.H. Snider is a Senior Research Fellow at the New America Foundation. This working paper is an update of an earlier issue brief on the same subject. See J.H. Snider, "Multicast Must-Carry for Broadcasters: Will It Mean No Public Interest Obligations for DTV?" (Washington, DC: New America Foundation, 2003).

² On October 5, 1992, Congress overrode President Bush's veto of the Cable Act of 1992 by a vote of 74-25 in the Senate and 308-114 in the House. Of Bush's 36 vetoes during his Administration, this was the only one to be overridden. The defeat was interpreted as a major political blow to the President. A month later he was defeated in his re-election attempt.

The most practical question, then, may involve an appropriate quid pro quo for expanded must-carry rights. Those rights are worth many billions of dollars now, but will probably drastically decline in value in coming years with the advent of the next generation Internet, which will include Internet TV (often called "IPTV" for TV-over-Internet-Protocol). As we shall see, expanding broadcasters' must-carry rights as the quid pro quo for returning the second channel of spectrum granted to licensees nearly a decade ago to make the digital transition would make a mockery of promises Congress made to the public in 1996 when it passed the Telecommunications Act of 1996. Therefore, a true quid pro quo must include something beyond broadcasters returning, more than 10 years later, spectrum they borrowed at zero cost.

I recommend two sets of quid pro quos: one for the long-term – when conventional must-carry becomes obsolete – and one for the short-term – while it is still valuable.

Long-term: There should be a fixed deadline for sunseting the old industry-specific must-carry rules and replacing them with a set of open access rules ("must-carry for all") befitting the coming age of Internet TV. This is similar to the actual Berlin DTV transition model, not the incomplete Berlin DTV model described by the GAO and discussed by Congress.³ In Berlin, the government not only limited commercial broadcasters to a one-year fixed schedule to complete their DTV transition; it combined that with a five-year sunset of commercial TV broadcasters' must-carry rights. Most European countries have in place procedures to periodically review the must-carry rules to determine whether they are still needed; the U.S. does not.⁴

Short-term: If Congress continues to insist on justifying must-carry as a way to enhance localism, free TV and civic education, it should demonstrate that this is more than "cheap talk" by backing such claims with quantifiable and enforceable requirements ("public interest obligations"). By cheap talk I mean words that serve a political purpose but do not lead to actions consistent with that talk. In Europe, must-carry rights are often restricted to public TV channels because of their demonstrated public interest programming.⁵ Commercial broadcasters in the EU may also get must-carry rights, but often only when combined with must-pay, the opposite of the retransmission consent right that typically accompanies must-carry in the U.S. (See Appendix A for a comparison of European Union and U.S. must-carry regulations).

If U.S. commercial broadcasters want expanded must-carry rights, including retransmission consent rights, they should compensate the public with expanded public interest obligations. These public interest obligations could usefully take the form of a quantifiable minimum amount of local civic and electoral programming each week – akin to the current three-hour weekly

³ "Telecommunications: German DTV Transition Differs from U.S. Transition in Many Respects, but Certain Key Challenges Are Similar," report #GAO-04-926T (Washington, DC: GAO, July 21, 2004).

⁴ Article 31 of the European Commission's "Universal Service" Directive states that member states' must-carry rules must be reviewed regularly. See "Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communication networks and services (Universal Service Directive)," March 7, 2002. This Directive is analyzed in "Must-carry obligations under the 2003 regulatory framework for electronic communications networks and services" (Brussels: European Commission, July 22, 2002).

⁵ See "An Inventory of EU 'Must-Carry' Regulations," A report to the European Commission, Information Society Directorate by Ovum, February 2001; Pascal Marlier et al., "Assessment of the Member States measures aimed at fulfilling certain general interest objectives linked to broadcasting, imposed on providers of electronic communication networks and services in the context of the new regulatory framework," by Eurostrategies, March 2003; "Must-carry obligations under the 2003 regulatory framework for electronic communications networks and services" (Brussels: European Commission, July 22, 2002).

obligation to air educational children's programming – or it could be the payment of a spectrum user fee into a trust fund to help support the digital future of public broadcasting and educational content more broadly.⁶

The Value of Must-Carry Rights

As Americans seek more TV programming choice and better TV reception, local TV broadcasting has gone into relative decline as a source of TV programming for the American public. From essentially 100% reliance on terrestrial, over-the-air delivery of local TV programming in the early 1960s, less than 15% of Americans rely on this delivery platform as their primary TV source today, with the balance relying on cable and satellite TV.

Left to market forces, this would give satellite and cable TV operators substantial negotiating leverage vis-à-vis local TV broadcasters. Broadcasters could not access 85% of the viewing public – the basis of their advertising income – without cable and satellite carriage. But broadcasters have won from Congress and the FCC a set of bargaining rights that allow them to retain the negotiating clout they had decades ago. This set of bargaining rights is commonly referred to as "must-carry."

The negotiating leverage that comes from being guaranteed must-carry rights at no cost on cable and satellite TV systems is extremely valuable for local TV broadcasters. In contrast, at least one new cable TV network had to pay as much as \$11/subscriber to secure cable carriage and a preferred channel location. The result of such incentives is that local TV broadcasting remains one of the most profitable businesses in the United States, with must-carry rights probably adding tens of billions of dollars to the cumulative market value of local TV stations' FCC licenses. Moreover, the monopoly power generated by these negotiating rights has resulted in virtually all programming available over cable networks being owned by either local TV broadcast stations or cable systems; among the top 25 cable TV networks, only one is owned by an independent.

Must-Carry Defined

Unfortunately, the term must-carry has often been used to refer to many different bundles of negotiation rights. This has often led to analytical confusion, where one person is using the phrase must-carry in one sense and another uses it in another sense, and they think they are referring to the same thing. For example, the GAO report on the digital transition spoke of must-carry rights but did not clearly state that must-carry rights in Berlin bear very little resemblance to must-carry rights in the U.S. For example, they don't include the highly valuable retransmission consent right, which is standard in the U.S. During the DTV transition, Berlin broadcasters could also only transmit a single standard definition TV channel on their conversion channel, so multicasting must-carry to speed up the DTV transition wasn't even a technological possibility.

Similarly, in Germany, must-carry rules are linked to must-pay rules, which specify that commercial broadcasters that exercise the must-carry option must pay a certain amount for that privilege. The result of such loose use of the term must-carry is that members of Congress and

⁶ See Henry Geller and Tim Watts, "The Five Percent Solution: A Spectrum Fee to Replace the 'Public Interest Obligations' of Broadcasters," (Washington DC: New America Foundation, May 2002). Also see the Digital Opportunity Investment Trust Act (S.1023), introduced in the Senate on May 12, 2005 by Senators Dodd (D-CT), Snowe (R-ME), Durbin (D-IL), and Burns (R-MT).

the public could have been left with a faulty impression of the role of must-carry in the Berlin DTV transition success story.

In the U.S., must-carry rights are more valuable than free carriage alone. Until 1992, must-carry rights referred to mandatory free carriage on cable systems. In the Cable Act of 1992, however, retransmission consent rights were added to must-carry rights. These allowed local TV stations to choose either free carriage on cable systems or the right to negotiate for the highest possible fee from the cable system. Ever since then, must-carry rights in the U.S. have always been bundled with retransmission consent rights. But the total bundle is still referred to as must-carry rights.

Another source of confusion is that in many foreign countries must-carry rights for commercial and non-commercial stations are very different.⁷ Usually, public TV stations have much stronger must-carry rights than private TV stations. In the U.S., private and public TV stations have essentially the same bundle of rights.

Whereas in the U.S. must-carry rights are always linked to retransmission consent rights, in other countries they are often linked to must-pay obligations.⁸ The economic rationale for this linkage is simple: if broadcasters get privileged distribution on a TV carrier (such as a cable or satellite company) because of the risk that the carrier will exercise monopoly power, then the carrier should still be given some compensation for the cost of building its delivery platform.

Must-carry rights may also differ by distribution medium. For example, with cable TV, each local TV station makes its own decision whether to elect must-carry or retransmission consent. With satellite TV, Satellite companies must negotiate with all local TV stations in a given market as a group. If they carry one, they must carry all. In Britain, must-carry rights may refer to carriage of an analog TV broadcaster's programming on a digital TV broadcaster's channel--a concept completely foreign to the U.S. That's because in Britain the digital channel wasn't given to the analog incumbent. A legally separate entity was given control of the digital channel, but the analog TV broadcaster was given must-carry rights to a part of the digital channel.

Must-carry rights also differ according to the number of bits or services carried. This gets at the distinction between single program and multicasting must-carry rights. But the debate over multicasting rights quickly turns out to be a lot more complicated than that simple dichotomy. Following closely to the different service levels conception of must-carry rights, we can hierarchically organize must-carry rights as follows:

1. **A single standard definition TV ad-supported programming stream with narrowly defined "program-related" data.** This corresponds to the level of must-carry rights broadcasters have on their analog TV channel today. They are entitled to carriage of their primary TV signal and any program-related data, such as closed captions, that can be fit in their vertical blanking intervals and other unused space. They are not entitled to carriage of non-program related data such as paging services.
2. **A single high definition TV ad-supported programming stream with narrowly defined "program-related" data.** There is no dispute that on their digital channel, broadcasters have

⁷ "An Inventory of EU 'Must-Carry' Regulations," A report to the European Commission, Information Society Directorate by Ovum, February 2001.

⁸ "Must-carry obligations under the 2003 regulatory framework for electronic communications networks and services" (Brussels, European Commission, July 22, 2002).

digital must-carry rights to a primary video signal including a high-definition TV programming stream. With 18 TV formats included in the ATSC specification, including multiple high-definition TV formats, the number of bits of required carriage under this right can vary greatly.

3. **One high definition TV ad-supported programming stream with broadly defined "program-related" data.** There is a lot of dispute over what constitutes program-related data, with the broadcast industry wanting a broad definition and the cable industry wanting a narrow definition. For example, broadcasters would like to see interactive advertising information included in the definition of program-related; the cable industry disputes that definition.
4. **Multiple ad-supported programming streams.** The broadcast industry has argued that all ad-supported free TV programming streams should be included in the definition of a primary video signal. The cable industry argues this is too loose a reading of the statute.
5. **All 19.4 mbps that can be sent on a 6 MHz channel.** This is clearly what the broadcasting industry wants, but current statutes don't allow it. There are significant policy concerns about whether giving must-carry rights to the full 19.4 mbps is a good idea. Every bit a broadcaster gets means one less bit for another information provider. Moreover, many of the broadcaster bits may be inappropriate for a conventional cable or satellite TV system. For example, much of the broadcasters' planned interactive advertising content could probably be better delivered over even a slow-speed Internet connection. Similarly, broadcasters in America have developed an enhanced ATSC standard that will allow them to broadcast to mobile handheld devices. This is something that is already being done in Europe (with its more flexible broadcast DTV system) and Qualcomm has proposed something similar in the U.S. with spectrum it recently purchased. But information transmitted to mobile devices may not be appropriate for cable or satellite systems. For example, local TV news reports on a handheld device with a small screen may be at 200kbps, but this would be totally unacceptable on a large screen TV connected to a satellite or cable TV system.

Ultimately, all this complexity should probably be discarded. It's based on the old-fashioned idea of thinking of channels as bundles of services rather than bit streams. If must-carry is to be preserved, broadcasters should simply be given rights to a certain number of bits. I suggest 5 mbps because that is the amount that will be necessary to provide an HDTV programming stream on the broadcast industry's next generation broadcast DTV standard.

Policy Rationales For Must-Carry

Historically, must-carry has been justified as a way to enhance the values of competition, free TV, and localism. Increasingly, however, broadcasters and federal policymakers have been justifying enhanced must-carry rights for broadcasters as a way to speed the DTV transition.

Speeding the DTV Transition

Currently, the most frequently cited rationale for multicasting must-carry is that it will speed the broadcasters' DTV transition and the return of the spectrum loaned to the broadcasters for their transition channel. According to this reasoning, broadcasters need not give back one of their two 6 MHz channels until at least 85% of Americans have access to broadcast DTV programming. Requiring cable and satellite distributors to carry all local broadcast DTV programming will give

broadcasters the market incentive they need to provide compelling DTV content, which in turn will spur consumers to purchase more broadcast DTV sets. The result will be that the 85% deadline will arrive faster than it otherwise would.

To the contrary, it is possible that the current must-carry regime actually slows down the return of spectrum. That is because the effect of must-carry rights is to strengthen broadcasters bargaining position in relation to both cable and satellite operators. The result could be higher prices and lower quality programming on these competing platforms. For example, consumers now have to pay approximately \$6/month to get a package of local broadcast TV signals via satellite, with most of that fee going to local broadcasters. A rational consumer response to such economic incentives would be to substitute terrestrial (probably analog) for satellite (DTV) reception of local TV programming. The same economic logic would apply to multicasting must-carry rights.

However, I want to focus my argument not on the question of whether it is more likely that granting broadcasters multicasting must-carry rights would spur their DTV transition, but on whether granting such rights is even remotely an efficient means to do so.

Let us remember that multicasting must-carry is only one of a long laundry list of subsidies the broadcasters have requested to speed their DTV transition. In the mid-1990s, broadcasters argued that to finance and thus speed the DTV transition they should be granted digital flexibility and only be required to provide one ad-supported ("free") DTV programming stream—thus allowing them to use more than 90% of their spectrum for other, more profitable uses. And in just the last few years, the FCC has used speeding the DTV transition as the rationale for mandating broadcast DTV tuners in all new TV sets, mandating plug & play (interoperable cable-ready TVs), mandating broadcast flag detecting equipment in all consumer electronics hardware that might store or retransmit broadcast DTV content, preventing unlicensed operation in the white space within the TV bands, and preventing the retransmission over the Internet of snippets of news and public affairs local broadcast TV programming. In addition to these back-door subsidies, broadcast licensees received sales tax exemptions on DTV equipment purchases for TV stations.

Interestingly, while we are told that the ultimate purpose of all these subsidies is to speed the return of spectrum at the end of the transition, the amount of spectrum to be returned keeps getting whittled down. In 1995, for example, broadcasters were expected to return 200 MHz of spectrum. That got whittled down by the FCC to 150 MHz, then 138 MHz, and then 108 MHz. Subsequently, broadcasters have also acquired approximately \$6 billion worth of guard band spectrum within the broadcast bands, with further acquisitions of guard band spectrum likely after the loaned conversion channel is returned.⁹

Britain provides perhaps the best evidence that boatloads of broadcast industry subsidies are not needed to spur the broadcast industry's DTV transition. There, incumbent broadcasters got only a small fraction of the subsidies heaped on American broadcasters. They even had the amount of spectrum allocated to each incumbent broadcaster reduced by 50%.¹⁰ A recent British government report on speeding the British broadcast DTV transition doesn't even mention must-carry, let alone multicasting must-carry.¹¹ But as Table 1 illustrates, the British DTV transition has progressed much more rapidly than the U.S. DTV transition. In Britain, 12% of households

⁹ NAF et al. Economic and Legal Reply Comments to the FCC in the Matter of Unlicensed Operation in the Broadcast Bands, Docket 04-186, January 31, 2005.

¹⁰ See Hernan Galperin, *New Television, Old Politics: The Transition to Digital TV in the United States and Britain, Communication, Society, and Politics* (New York: Cambridge, 2004).

¹¹ See Ofcom report, April 2004.

have DTV sets capable of broadcast DTV reception compared to 1% in the U.S. And overall, 50% of British citizens receive DTV compared to 41% in the U.S.

Table 1
Digital TV Transition Rates in the U.K. vs. U.S.

	Digital Terrestrial (% of all hh)	Digital Cable (% of all hh)	Digital Satellite (% of all hh)	Total Digital ¹²
U.K. ¹³	12%	9%	29%	50%
U.S. ¹⁴	1.1% ¹⁵	20.8% ¹⁶	19% ¹⁷	41%

Admittedly, there are many extenuating circumstances to explain why the British were more effective in speeding the broadcast DTV transition than the Americans. The British broadcast industry focused on services the British public actually wanted, and they helped design a broadcast DTV standard better suited to meet those wants.¹⁸

It is also relevant to note that in the decade from 1995 through 2004, a dozen other major consumer electronics categories made the transition from analog to digital technologies without the help of government subsidies. Figure 1 compares the growth of broadcast and non-broadcast DTV technologies in recent years.

¹² Some digital households may have more than one DTV tuner, thus the total here is an approximation and upper bound.

¹³ Based on data from, "Driving Digital Switchover: A Report to the Secretary of State," [report] OfCom, April 5, 2004. Available at http://www.ofcom.org.uk/research/dso_report/print/dso.pdf

¹⁴ See FCC, "Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming: Tenth Annual Report," January 28, 2004.

¹⁵ Based on Consumer Electronics Association estimates for the number of over-the-air DTV tuners shipped between 1998 and the end of 2003. Available at http://www.ce.org/press_room/press_release_detail.asp?id=10417

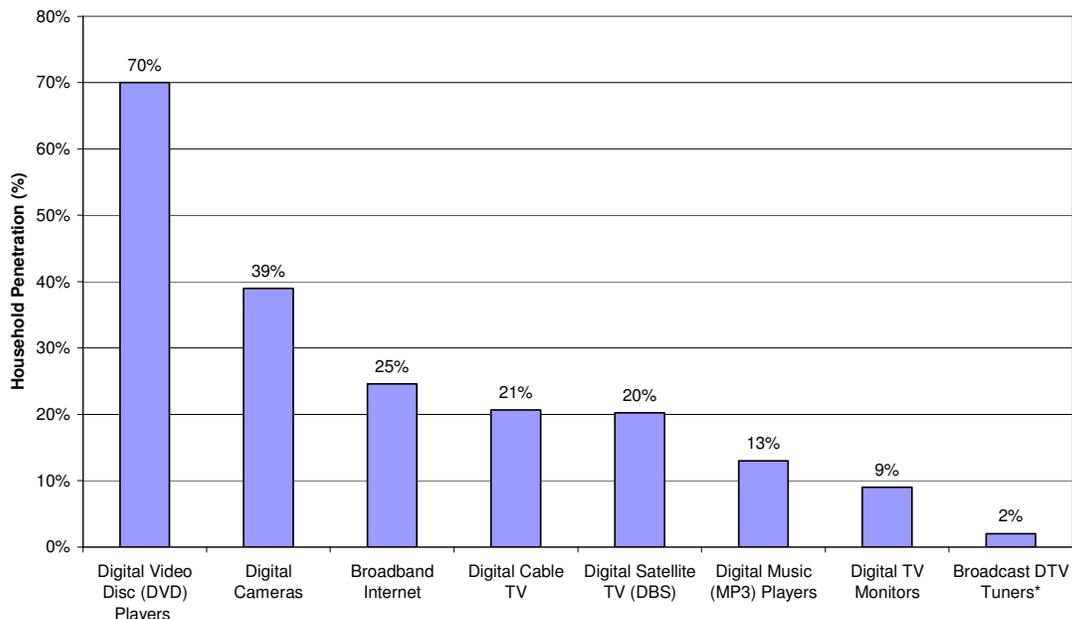
¹⁶ See National Cable and Telecommunications Association data from December 2003, available at <http://www.ncta.com/Docs/PageContent.cfm?pageID=86>

¹⁷ See FCC, "Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming: Tenth Annual Report," January 28, 2004.

¹⁸ Galperin, *New Television, Old Politics*.

Figure 1

Adoption of Major Consumer Digital Technologies:
Household Penetration (June 2004)



* As of January 2005
Sources: CEA, GAO, CTAM, Leichtman Research Group

Finally, it is extremely unlikely that even if multicasting must-carry and other broadcaster subsidies speed an 85% broadcast DTV penetration rate that Congress will then force broadcasters to give up their analog TV service. That is because of the widely acknowledged "granny rule," which is that members of Congress will not allow analog TV to be shut off in their districts as long as even a handful of constituents ("grannies") depend on over-the-air TV reception. A recent hearing of the House Commerce Committee, where almost all the questions focused on the potential harm to a small fraction of analog TV set owners if the analog TV channel were returned after the 85% threshold was met and even exceeded, shows that the granny rule is still an apt description of DTV politics.¹⁹

As Congress has now recognized, a much more direct, efficient, and politically realistic way to speed up the DTV transition is the direct consumer subsidy model employed in Berlin, Germany. House Commerce Committee Chair Barton has announced he will soon introduce a bill to implement such a model, as Senator John McCain (R-AZ) did at the end of the last Congress.

In Berlin, digital to analog set-top boxes were provided to low-income consumers dependent on analog TVs. The reason this consumer subsidy model is so efficient is that it directly addresses the problem why the analog spectrum cannot be returned. In contrast, the producer subsidy model, used in the U.S. and embodied by the multicasting must-carry proposal challenged here, requires an indirect and dubious cause-and-effect sequence to take place in order to achieve the same effect: spurring consumer adoption of broadcast DTV sets.

¹⁹ Hearing of the House Subcommittee on Telecommunications and the Internet on "The Role of Technology in Achieving a Hard Deadline for the DTV Transition," February 17, 2005.

A major policy implication of this argument is that if broadcasters are given multicasting must-carry as a quid pro quo for accepting a fixed date for returning their analog TV channel, the additional must-carry rights need not be given to the broadcasters before the broadcasters have returned their analog spectrum. This timing point is crucial because most of the claimed quid pro quos between the federal government and the broadcasting industry have involved giving the broadcasting industry benefits in the short-term (e.g., multicasting must-carry rights) and costs in the long-term (e.g., returning their analog channel). The twenty year history of the broadcasting industry's DTV transition demonstrates that the benefits are taken in the short-term but the costs invariably renegotiated and whittled down in the long-term.²⁰ That is why Congress should learn from its mistakes and insist, if it grants broadcasters additional must-carry rights, that the benefits and costs of the quid pro quo take place simultaneously.

Of course, speeding up the DTV transition is not the only argument broadcasters have put forth for winning multicasting must-carry rights. Must-carry rights long preceded the broadcasters' DTV transition. But it is remarkable how little emphasis the broadcasters have placed on extending the original arguments for must-carry to multicast must-carry. Broadcasters merely assume that if these must-carry arguments were valid in 1992, they remain equally valid in 2005. But it is worth revisiting those arguments in light of huge changes in telecommunications technology, the continued federal deregulation of the broadcasting industry, and the actual practices and proposed plans of the broadcasting industry. We shall now revisit the three original arguments used to justify must-carry: enhancing free TV, localism, and competition.

Free TV

Historically, preserving "free TV" has been a major justification for cable must-carry rules. To this day, congressional and FCC proceedings are full of references to the value of preserving free TV. But what is meant by this term is considerably less clear. Originally, "free TV" referred to ad-supported TV and was contrasted to subscription or pay TV such as that offered by cable TV. But increasingly, the term "free TV" has simply become a code word for expressing fealty to the local TV broadcasting industry. Otherwise, it is hard to explain the series of federal government actions designed to limit free TV.

In the Telecommunications Act of 1996, broadcasters won the right to use their DTV spectrum allocation for paid information services, providing they continue to broadcast one SDTV program free of charge. With today's off-the-shelf video compression software, this allows broadcasters to devote less than 10% and as little as 5% of their spectrum to free TV.

In the Cable Act of 1992 and the Satellite Home Viewer Improvement Act of 1999, broadcasters won the right to choose either 1) free cable carriage, or 2) negotiate a fee for cable carriage, depending on whatever would maximize its revenue. The result is that Americans pay a fee to broadcasters, albeit indirectly, when they subscribe to either satellite or cable TV and watch a local TV broadcast program. Senate Commerce Committee Chairman Ted Stevens (R-AK) recently announced he would hold hearings on retransmission consent. "None of the big-four networks are carried by cable through must-carry," he told the American Cable Association this month.²¹ Remarkably, thanks in part to such laws, America is one of the few countries in the

²⁰ See Appendix C of J.H. Snider, *Speak Softly and Carry a Big Stick: How Local TV Broadcasters Exert Political Power* (New York: iUniverse, 2005).

²¹ Drew Clark, "Stevens Pledges Hearings on Retransmission Consent," *National Journal's Tech Daily*, May 18, 2005.

world without a free TV (or radio) satellite service. In many countries, more people get free TV via satellite than terrestrially over-the-air.

More recently, the FCC issued a Report and Order creating a "broadcast flag."²² This technology drastically curtails the recording and later viewing of free TV without the broadcasters' permission. For the first time in history, this puts broadcasters in the position of being able to charge for their over-the-air "free TV" programming. As time-crunched Americans increasingly seek to store their over-the-air programming for later viewing, the realm of free TV is thus expected to shrink even further. On May 6, 2005, the District of Columbia Circuit Court of Appeals overturned the broadcast flag regulation on the grounds that the FCC overstepped its statutory mandate by requiring inclusion of a technology that affects the use of content *after* it is broadcast.²³ The broadcast and the motion picture industry lobbies, who fought for broadcast flag regulation, are now expected to take the battle to Congress.

How can broadcasters and Congress endorse such policies while claiming that they favor free TV? The most common argument is that to save free TV broadcasters must be allowed to kill it. That is, in order to subsidize free TV's continued existence, broadcasters need non-free TV revenues. But to date, no compelling evidence has been provided that broadcasters will use their non-free TV revenues to subsidize their free TV programming. Instead, their rational economic response is likely to be to invest resources in whatever programming will generate the greatest profits, whether or not the programming is ad-supported (i.e., "free").

Indeed, free TV has always been used more as a political slogan than a serious attempt to develop a policy promoting free TV.²⁴ The reason that free TV came into existence in the first place is that in the analog era it wasn't economical for broadcasters to charge for their signals. Cable could disconnect non-payers by disconnecting a wire. Broadcasters had no such cost-effective method to disconnect non-payers. Now that digital technology is making it much easier to disconnect non-payers, broadcasters will take advantage of that opportunity whenever it makes business sense.

It is striking that Congress has never seriously estimated the huge costs of subsidizing free TV or addressed why for more than forty years Americans have been abandoning it for pay TV services.²⁵ And it's been decades since broadcasters have even attempted to provide a serious study justifying why free TV is worthy of public subsidy. The principal author of one 1973 study they recently cited in an FCC filing to justify free TV, laughed when he heard how the broadcasters were using it more than thirty years later. The entire history of the free TV rationale for must-carry reminds me of the story about assumptions taught in entry level philosophy courses: A student asks his teacher what is holding up the earth. The teacher replies, "It's held up on the back of a turtle." The student asks, "What's holding up the turtle?" And the teacher replies, "It's turtles all the way down."

But assuming that free TV is indeed a worthy public policy goal, it is no longer clear that terrestrial, over-the-air broadcasting is the best way to deliver it. Satellite TV can now blanket the country with free local DTV signals at far less cost and with far greater coverage than

²² FCC Report and Order and Further Notice of Proposed Rulemaking in the Matter of Digital Broadcast Content Protection, November 4, 2003.

²³ Opinion of the U.S. Court of Appeals, District of Columbia Circuit, in *American Library Association v. FCC*, Docket No.04-1037, May 6, 2005.

²⁴ See J.H. Snider, "The Myth of Free TV," (Washington, DC: New America Foundation, June 2002).

²⁵ *Ibid.*

conventional, terrestrial TV. A fact little known to policymakers is that via unlicensed spectrum in the broadcast band, TV sets could pick up the satellite signals retransmitted from a satellite receiving dish several hundred feet away without the need for wires or any additional equipment in the receiver.

There is also the question of whether broadband Internet connections are a much better way to deliver free TV. Most content on the Internet is free (ad-supported). In addition, the Internet offers vastly greater choice than the current free TV system.

Localism

Localism has traditionally been employed as an argument for local broadcast TV industry privileges in the context of battles with TV networks, including media concentration. It has also crept into battles with the satellite industry. Localism is the claim that broadcasting is a local medium providing critical local information and thus needing special government protection.

Historically, localism has played less of a justification for must-carry rights. This may largely be attributed to the fact that cable TV was originally much more of a local TV medium than broadcast TV. In the early days of cable TV, there were only 210 TV markets (as there are today), but more than 10,000 cable systems. Cable systems, often through their local PEG channels, were far more likely to cover local sports events and small town races for city council, school board, and mayor.

However, claims that broadcasting is a local medium providing local information – and thus needing special government protections – have frequently shown up in the public record concerning both must-carry and multicasting must-carry.

There are several problems with this argument. The first is that since the early 1980s the broadcast industry has had virtually no legal obligation to provide local information and as a matter of fact provides very little such information. A recent study found that local election coverage on local TV stations is practically non-existent. Indeed, during the fall 2004 elections, 92% of special election coverage focused on just one race: the national race for U.S. president.²⁶

Another problem is that Congress has been allowing broadcasters to significantly expand their geographic areas as a result of the DTV transition.²⁷ Digital TV technology allows broadcasters to use many of the guard band channels (the empty spots on the over-the-air TV dial) previously unusable. If Congress really cared about local broadcast TV programming, it's unclear why it would be allowing broadcasters to expand their geographic coverage areas.

Lastly, it's not at all clear that broadcasting is either a "local" medium or the most efficient way to provide local information services. In the United States, there are 210 TV markets but more than 20,000 towns. From the beginning of TV, local TV stations have all but ignored the happenings in more 90% of those towns. Of the more than 500,000 elected officials in the United States, more than 95% are local, such as school board and city council members. Of those, fewer than 1% receive any local TV coverage, let alone thoughtful or in-depth coverage. The New York City TV market, called a "local market," covers more people than live in most countries and

²⁶ Matin Kaplan, Ken Goldstein, and Matthew Hale, "Local News Coverage of the 2004 Campaigns: An Analysis of Nightly Broadcasts in 11 Markets," (Los Angeles, California: USC Annenberg School for Communication, February 15, 2005).

²⁷ For a detailed discussion, see NAF et al. Economic and Legal Reply Comments, January 31, 2005.

includes three states, 33 members of Congress, and hundreds of towns. It is doubtful that, whether or not New York City broadcasters receive multicasting must-carry rights, they would ever find it in their interest to provide the truly local information that makes America's local democracy work.

For the type of localism provided by broadcasting, satellite spot beams would seem to be a much more efficient technology. Broadcasters have said as much in many FCC filings. And, indeed, DirectTV has announced that it will be providing local TV service to all 210 TV markets by the end of 2006.

However, for the future of truly local information—not the “regional” information which is the broadcasting industry's stock and trade—the Internet is clearly the way to go. The Internet can provide information affordably to any small, local audience. Thus, it may be no surprise that Americans already get far more information about their local communities and elections via the Internet than via local TV. The policy implication is that if Congress really cares about localism, it should be focusing subsidies on broadband Internet service, not so-called “local broadcast TV.”

Competition

“2004 is the last year when people consider video an exotic application for broadband.”

--Peter Barrett, Chief Technology Officer, Microsoft TV²⁸

Historically, cable has been seen as a bottleneck TV provider into the home. This gave the local cable TV company lots of bargaining clout with his local TV broadcaster and other information providers. But in recent years, the telecommunications market has become more competitive. Satellite TV has 100% coverage and grown from almost zero penetration in 1994 to more than 20% of households in 2004. Broadband Internet service is now provided by a multiplicity of wireline providers, including phone companies (via DSL), cable companies (via cable modem), and power companies (via broadband-over-power-lines); and wireless providers, including mobile telephone companies using licensed spectrum and wireless Internet service providers (“WISPS”) using unlicensed spectrum.

Another important development is that the DTV transition has made it possible for consumers to receive better over-the-air reception without an outdoor antenna. As part of the DTV transition, broadcasters on channels 52-69 were allowed to migrate to the lower channels where indoor TV reception is much better. In addition, the newest DTV receivers can pick up many signals that previously required an outdoor antenna. Lastly, in the Telecommunications Act of 1996, Congress passed rules making it illegal for landlords and community associations to ban broadcast TV antennas. The result is that even if a local cable system refuses over-the-air carriage of a local TV signal, it is easier than ever for a consumer to simply flick a switch on his remote control to pick it up over-the-air.

But by far the most important development is the rapid emergence of affordable Internet TV service. Current broadband Internet service is now fast enough for Internet radio. By the end of 2004, 19 million Americans listened to Internet radio each week.²⁹ But current broadband

²⁸ Jim Hu, “Video Gamble for the Bells,” *New York Times*, 22 November 2004.

²⁹ Sarah McBride, “Where the Listeners Are: What’s the biggest competitor to regular radio? No, guess again,” *Wall Street Journal*, December 13, 2004, p. R4.

Internet service is still too slow for most useful types of broadcast TV. Speeds, however, are rapidly increasing. In Japan and South Korea, tens of millions of consumers already have access to broadband Internet service that can provide good quality streaming TV. In the U.S., Internet TV has pretty much been restricted to elite college campuses, such as Dartmouth and Northwestern, which are connected to the Internet2 backbone. At such schools, a two hour DVD-quality movie can now be downloaded in as little as a minute. Using Microsoft technology, both SBC and Verizon have recently announced the rollout of Internet TV service to tens of millions of U.S. customers over the next five years. (See Sidebar on "The Coming IPTV Boom") Comcast is providing an Internet TV service that provides thousands of hours of "free" on-demand TV programs as an exclusive service for its subscribers.

The Coming IPTV Boom*

After more than a decade of trying to crack the TV software business, Microsoft's persistence is starting to pay off. The first sign came last November, when cable-TV industry leader Comcast Corp. rolled out set-top boxes running Microsoft's TV software to its Seattle customers. Since then, Microsoft has landed deals with two Bells - BellSouth and SBC Communications -- as they charge into competition with cable operators. And BusinessWeek has learned that Verizon Communications Inc., the Bell that's making the most aggressive foray into television, plans to use Microsoft's technology for its TV service, beginning with its initial rollout in the second quarter. "We have a shared vision of how the world is evolving," says Shawn Strickland, director of Verizon's new service, FiOS TV.

Microsoft's burst of progress comes just as the TV business is on the verge of massive change. Deep-pocketed telecom companies are starting to move into the market, challenging cable players that are offering telephone service over their networks. The resulting battle has both sides racing to roll out new, sophisticated TV services, including vast libraries of movies on demand and personal video recording.

ENORMOUS POTENTIAL

The key technology for delivering these services is something called Internet protocol television, or IPTV. The technology can be used to offer a dizzying array of options: Desperate Housewives anytime you want it, the Super Bowl from a dozen different camera angles, and a nearly limitless number of channels. Telecom companies are embracing IPTV since they're building their TV systems from scratch. Cable companies, which use older technology, are likely to begin migrating to IPTV over the next five years. Analyst Herve Uteza with the Diffusion Group Inc. estimates that 15.3 million homes will subscribe to IPTV services worldwide by 2008, compared with 184 million using traditional cable technology...

JUST-IN-TIME CHANNELS

While the scope of Microsoft's opportunity is still in question, there's little doubt that IPTV will change the way couch potatoes get their programming. Today's cable systems were designed to have every channel they offer flow to each set-top box at the same time -- ready for the viewer to select one. But with all of that programming clogging the cable into a home, cable operators can offer only a limited number of channels.

IPTV does away with that design. Only one program shoots into a set-top box at a time. When a viewer clicks to a new channel, the set-top box notifies a computer server at the IPTV operator's facilities to instantly send a new stream of programming. This superefficient design gives viewers no end of choices. Down the road, IPTV providers expect to be able to let customers roam the Internet in search of interesting video too -- whether it's news clips, blockbuster films, or a blogger's home movies.

Gates is confident that consumers will want IPTV. "People care about the TV viewing experience. If you can really make it better, it has a really profound impact," he says. If Microsoft can pull this off, it might be able to turn its decade-long slog in TV technology into a sprint. This show is about to get interesting.

**Excerpted from Jay Green et al., "Microsoft May Be A TV Star Yet," Business Week, February 7, 2005, p. 78.*

Of course, widespread adoption of Internet TV is still years away. But with the costs of deploying such networks rapidly declining, it is entirely possible that within a few years, more people will be getting their TV via the Internet than over terrestrial, over-the-air TV.

The policy significance of Internet TV is that it will allow consumers to choose among a limitless numbers of TV providers as opposed to the seven local TV stations provided in the average local broadcast TV market in the United States. Given a choice between fostering infinite choice by consumers rather than choice among a handful of providers, Congress should recognize that the interest of the public lies with greater choice, not less. David Poltrack, CBS Executive Vice President for Research and Planning, acknowledges, "In our research with consumers, content-on-demand is the killer app."³⁰

Proposed Quid Pro Quos for Multicasting Must-Carry

I have argued that multicasting must-carry should not be justified on policy grounds because it is not an efficient way to speed up the return of the broadcasters' analog TV channel, or even as a means to enhance free TV, localism, or competition. However, because broadcasters are renowned for their political power and want multicasting must-carry very much, they are likely to get it in some form or another.³¹ The question then becomes: what type of quid pro quo can the public get in return?

The most common quid pro quo put on the table is that broadcasters will accede to a fixed deadline to give back their analog channel in return for multicasting must-carry rights on their digital channel. Essentially, the fixed deadline merely returns us to 1996, when Congress originally established a fixed deadline for the DTV transition in the Telecommunications Act of 1996. What it reverses is a rider attached to a budget bill passed 18 months later, with no public vote or hearing, creating the 85% escape clause that has indefinitely postponed the return of the broadcasters' second channel.³²

The reason that no members of Congress took public credit for creating this loophole was that it embarrassed them. Members of Congress remembered that when they "loaned" the broadcasters the second channel, they responded to widespread criticism that the loan was really a giveaway with the claim that the loan was for a short and fixed period of time. Consistent with this interpretation, CTIA president Tom Wheeler condemned the rider as "the lobbying loophole of the century." Granting multicasting must-carry rights to reverse this rider and merely reinstate the promise Congress made to the American public in 1996 should be an embarrassment to every member of Congress.

Long-Term

For this reason, it is entirely appropriate to ask for something in addition. Specifically, I recommend that 1) Congress sunset must-carry rights five years after the completion of the broadcasters' DTV transition, and 2) After sunseting broadcasters' must-carry rights, replace them with a regime of must-carry-for-all, commonly called "open access" or "network neutrality."

The reason for the open access requirement is that for the foreseeable future last-mile information providers such as the cable and phone company will continue to have significant monopoly power

³⁰ Clive Thompson, "The BitTorrent Effect," *Wired*, January 2005, p. 179.

³¹ For an account of the passion, sophistication, and effectiveness with which broadcasters have historically lobbied for must-carry rights, see Chapter 14 of J.H. Snider, *Speak Softly and Carry a Big Stick: How Local TV Broadcasters Exert Political Power*, New York: iUniverse, 2005.

³² See Balanced Budget Act of 1997, passed June 1997.

over the physical layer of their broadband connections into the home. What is revolutionary about Internet TV from a policy standpoint is that it makes it possible to separate control of the physical and content layers of the network. In other words, whereas must-carry offered only local TV broadcasters non-discriminatory carriage on a local broadband network, it's now possible to offer all content providers such non-discriminatory access. What is needed therefore is a policy to expand must-carry rights from local TV broadcasters to all information providers.

Unfortunately, non-discriminatory bit access is not currently in the interests of either broadcasters or the cable industry. Broadcasters have no interest because as long as they have non-discriminatory access to cable bits for themselves, they have no interest in opening up that right to others. And cable companies have no interest because their business model is based on having gateway power over access into the American home. If TV providers can get into the home via the Internet, there is no reason for them to pay cable providers simply for the right of channel access.

If broadcasters lose their industry-specific non-discriminatory bit rights, they will have a strong incentive to champion non-discriminatory bit rights for everyone. Cable companies, in turn, may be willing to strike some type of deal in return for getting back control over close to a third of the physical capacity of their networks that have been allocated via must-carry to local TV broadcasters.

Short-Term

After the hard spectrum return deadline, the second most frequently cited quid pro quo on the table is some type of expanded public interest obligation. Here I distinguish between commercial and non-commercial broadcasters.

Public TV stations should be asked to provide a compelling business plan for how they plan to use multicasting must-carry rights to address market failures in commercial TV programming. Preschool education and civic information are two programming areas where such market failure is still rampant. If public TV provides such a plan, I recommend it be granted multicasting must-carry rights as an explicit subsidy for its public interest programming. In many European countries, public TV is granted such privileged must-carry rights not possessed by their commercial counterparts.

Senator Stevens, Chair of the Senate Commerce Committee, has come out in favor multicasting must-carry for commercial broadcasters as long as any additional programming above and beyond a single channel is used for "public service"—but without clearly defining what public service is.³³ The key here will be defining what public service is. In the past, Congress and the FCC have meant it to mean: "whatever the broadcasters choose to provide." Clearly, that approach to defining public service is totally inadequate.

The Public Interest, Public Airwaves Coalition (PIPAC), of which the New America Foundation is a member, has proposed to the FCC a quantifiable and verifiable public interest test. (See Appendix B for a summary of PIPAC's proposal.) That test was designed as a basis to revoke an FCC TV license. But, as Echostar has observed in its own comments to the FCC, such a test could just as easily be used to revoke must-carry rights.

³³ Ted Hearn, "Stevens Supports Indecency Bill," *Multichannel News*, March 1, 2005.

Alternatively, a more market-based and strictly content-neutral approach is to monetize the broadcasters' public interest programming obligations. Since broadcast licensees have never paid for access to the airwaves – while cell phone companies have paid the public tens of billions at competitive spectrum auctions – broadcasters should pay an annual user fee into a fund to finance the digital future of public broadcasting and other non-commercial media, education and information services. Former FCC General Counsel Henry Geller proposed this in his paper entitled "The Five Percent Solution: A Spectrum Fee to Replace the 'Public Interest Obligations' of Broadcasters," published by the New America Foundation in May 2002. A more detailed trust fund proposal funded from earmarked spectrum revenue – the Digital Opportunity Investment Trust Act (S.1023) – was introduced in the Senate on May 12, 2005, by Senators Dodd (D-CT), Snowe (R-ME), Durbin (D-IL), and Burns (R-MT).

Conclusion

The world of TV technology is rapidly changing, making technological convergence with the Internet a reality for the first time in history. It would thus be a tragedy to expand such an old-fashioned industry-specific policy as must-carry when this new world beckons for thoughtful, new policy proposals. However, Congress has not been known for its telecommunications foresight. The Telecommunications Act of 1996 was written with all sorts of brave talk about the future, and then was totally blind sighted by the emergence of the Internet, even though by 1996 the Internet was a ubiquitous presence on college campuses. The broadcast DTV policies in the Telecommunications Act were also a disaster, and the FCC and hundreds of lobbyists have spent ten years sorting out the mess. Multicasting must-carry promises to be another broadcast industry windfall and telecommunications policy disaster. But assuming it is inevitable, Congress should, for the short-term, impose meaningful public interest obligations as a quid pro quo. For the long-term, Congress should try to limit the damage by beginning the process of thinking through what must-carry should look like in the Age of Internet TV and what steps should be taken now to make that happen.

Appendix A: A Comparison of European Union and U.S. Must-Carry Regulationsⁱ

Country	Does must-carry apply to satellite as well as cable networks?	Do all private broadcasters get must-carry rights?	Are carriers required to pay broadcasters for programming (i.e. retransmission consent)?	Are must-carry regulations regional? ⁱⁱ
Austria	NO	NO ⁱⁱⁱ	NO	NO
Belgium	NO	NO ^{iv}	NO ^v	YES
Denmark	NO	NO ^{vi}	NO	NO
Finland	YES ^{vii}	NO ^{viii}	NO	NO
France	YES	NO ^{ix}	NO ^x	YES ^{xi}
Germany	NO	NO ^{xii}	NO ^{xiii}	YES
Greece	(No must-carry in Greece)			
Ireland	NO	NO ^{xiv}	NO	NO
Italy	(No must-carry in Italy)			
Luxembourg	(No must-carry in Luxembourg)			
The Netherlands	YES	NO ^{xv}	NO ^{xvi}	NO
Portugal	NO	NO ^{xvii}	NO	NO
Spain	NO	NO ^{xviii}	NO	NO
Sweden	NO	NO ^{xix}	NO	NO
UK	NO	NO ^{xx}	NO	NO
USA	YES^{xxi}	YES	YES	NO

Compiled by Naveen Lakshmipathy

ⁱ Source unless otherwise noted: "An inventory of EU 'must-carry' regulations: A report to the European Commission, Information Society Directorate," Ovum, February 2001.

ⁱⁱ In the case of regional must-carry regulations, the dominant regulatory practice in the country is marked in the table, with regional exceptions noted in footnotes.

ⁱⁱⁱ Two channels of the public broadcaster ORF, plus the tourism and weather channel (partially owned by ORF), and local program services broadcasting less than 2hrs a day are given must-carry rights.

^{iv} Flemish Community: Flemish public broadcast programming (must be partly in Dutch); 2 radio, 2 TV programs of French public broadcaster; 2 radio, 3 TV programs of Dutch public broadcaster; radio program of German Community public broadcaster get must-carry. Only authorized private broadcasters destined for entire Flemish Community get must-carry, and must be partly in Dutch language. French community: French community public broadcaster, authorized local and regional broadcasters, 2 TV programs of Flemish community public broadcaster; 1 TV program of German community public broadcaster if reciprocity; programs of broadcasters created to promote French audio-visual productions get must-carry. Only authorized private broadcasters destined for entire French Community get must-carry. Brussels: Flemish and French community public broadcasters; other broadcasters falling in French of Flemish community jurisdictions; FM radio programs by French and Flemish public broadcasters. No private broadcasters get must-carry.

^v Broadcasters compensate cable operators, except in the case of regional public-interest programs in the Flemish community, which must be carried free of charge. In some cases cable operators make net payments to broadcasters because they must pay more in copyright royalties and authors' and performers' rights than the broadcaster must pay them for carriage.

^{vi} Only public broadcasters and regional program services get must-carry rights in Denmark. A local channel must be carried if the capacity of the cable network allows.

^{vii} Must-carry is imposed on "telecommunications operators" in general, so it is technology neutral.

- ^{viii} Finland's public broadcaster gets full must-carry rights. Private broadcasters get must-carry only if their license covers the entire country of Finland (currently only 2 broadcasters).
- ^{ix} Only cable operators are required to retransmit certain private channels. All national public channels get must-carry, as well as 2 commercial national channels.
- ^x Historically, carriers have paid broadcasters for content, although there is no rule requiring this. Carriers are currently seeking to reverse this payment flow in order to receive payment for the distribution service they provide to broadcasters.
- ^{xi} National regulators give power to local authorities to make agreements with cable operators which may include must-carry provisions; satellite obligations are imposed on the national level.
- ^{xii} In the state of Northrhine-Westphalia, for example, public broadcasters are assured carriage, but private broadcasters are not. Other states have similar rules.
- ^{xiii} Broadcasters (both those with must-carry and commercial broadcasters) pay cable operators for carrying their programs. Exceptions are made for local community events channels, which must be carried free of charge.
- ^{xiv} All national public broadcaster (RTE) channels get must-carry, and one independent broadcaster, Channel 3.
- ^{xv} Three channels of national public service broadcaster, local public service broadcasters, and the Flemish public broadcaster get statutory must-carry rights (7 channels total). Beyond this, cable operators must carry 8 other channels besides public broadcasters (not specified which ones, so local councils decide this).
- ^{xvi} In the Netherlands, must-carry channels are carried free, while other channels must negotiate carriage agreements with cable operators. In some cases, private broadcasters receive payment from cable operators, and in others, broadcasters pay for carriage.
- ^{xvii} Only public broadcasters get must-carry rights in Portugal (for 2 channels).
- ^{xviii} The national public broadcaster gets must carry (for 2 channels), as well as regional public broadcasters. The three private channels get must-carry rights as well, and local television channels, if they request.
- ^{xix} A maximum of three public channels (financed by TV license fees) get statutory must-carry, plus a maximum of one other channel.
- ^{xx} Two channels of the public broadcaster get must-carry (BBC1 and BBC2), as well as private broadcasters ITV and Channel 4 (SC4 in Wales). The public teletext service and Ceefax (teletext) on BBC1 and BBC2 get must-carry as well.
- ^{xxi} Satellite carriers in the U.S. are subject to the "carry one, carry all" rule, in which if they carry one local broadcast channel from a given market area, they must carry all.

Appendix B:
Statement of the Public Interest, Public Airwaves Coalition (PIPAC)

The *Public Interest, Public Airwaves Coalition* (PIPA) is an alliance of public policy groups, media activists and grassroots organizers that have united to call on the Federal Communications Commission to clarify and enforce the public interest obligations of broadcasters.

Broadcasters have been granted free and exclusive use of our publicly-owned airwaves in return for a pledge to "serve the public interest." Unfortunately, the FCC (with the complicity of Congress) has failed to define the public interest obligations of broadcasters. In this vacuum, broadcasters have been free to do what they want and define for themselves what constitutes fulfillment of this critical obligation.

Therefore, the PIPA Coalition is asking the FCC to set standards that would ensure that broadcasters:

- Air a minimum of three hours per week (at least half of which would air in or near prime time) of local civic or electoral affairs programming. In the six weeks prior to a general election, at least two hours of the three-hour minimum would have to be local electoral affairs programming.
- Air independently produced programming for at least 25 percent of their primary channel's primetime schedule.
- Report to the public how they have fulfilled the above obligations.

For more information, visit the Campaign Legal Center's PIPA Coalition website at: <http://www.ourairwaves.org/fcc/>.