



January 7, 2004

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CS Docket No. 98-120

Dear Ms. Dortch:

We are writing in response to recent ex parte submissions made by the National Broadcasting Company (“NBC”) and the ABC Owned Television Stations (“ABC”) in the above-captioned proceeding, describing potential multicast digital programming services to be broadcast by them. These presentations address various issues relating to the digital TV transition, but both ask the government to mandate cable carriage of these yet-to-be developed multicast services. Moreover, ABC suggests that this requirement should apply whenever a cable operator carries a digital signal – “whether pursuant to must-carry or retransmission consent arrangements.”

As NCTA has explained in this proceeding, we strongly believe that the Commission was correct when it ruled that cable operators’ must-carry obligations with respect to multicast digital signals are limited to carriage of a single video programming stream. This interpretation is not only most consistent with the language of the statute, which limits carriage obligations to the “primary video.” It is also necessary to avoid a result that would raise serious constitutional problems under both the First and Fifth Amendments.¹ Nothing in the ABC or NBC filing refutes these arguments.

In addition to the statutory and constitutional problems that NBC and ABC largely ignore, the plea by NBC and ABC that they need and should be entitled to further governmental assistance to guarantee carriage of their multicast signals on cable systems does not withstand scrutiny. Congress has already given broadcast stations the advantage of choosing between requiring cable operators to carry their signal (“must-carry”) or requiring that operators obtain their consent to carry their signal (“retransmission consent”). The stations owned by NBC and

¹ See L. Tribe, “Why the Federal Communications Commission Should Not Adopt a Broad View of the ‘Primary Video’ Carriage Obligation” (submitted by NCTA, July 9, 2002); L. Tribe, “Why the Federal Communications Commission Should Not Adopt a Broad View of the ‘Primary Video’ Carriage Obligation: A Reply to the Broadcast Organizations” (submitted by NCTA, Nov. 24, 2003).

ABC, as well as, in most cases, the stations affiliated with those companies' broadcast networks, have almost always chosen retransmission consent. And they have used retransmission consent to ensure that, in addition to carrying their broadcast stations, cable operators also carry the multiple cable program networks that they also own.²

The ability of broadcast networks to gain carriage of signals beyond their primary video is well established, the General Accounting Office recently found.³ Of the 90 cable networks that are carried most frequently on cable operators' basic or expanded-basic tier, approximately 43 percent were majority-owned by a broadcaster. NBC and ABC, in particular, have been successful in obtaining carriage of their non-broadcast cable program networks. Of the 14 non-broadcast networks in which NBC has an ownership interest, seven have over 70 million subscribers; and two of the three Vivendi networks soon to be added to the NBC roster have over 80 million subscribers each. Of ABC's satellite networks, eight of 15 have over 80 million subscribers.

Just as NBC and ABC have had success gaining cable carriage of their non-broadcast program networks, they have already successfully negotiated for widespread cable carriage of their existing digital broadcast programming – which mainly consists of high-definition programming during prime time. As of December 1, 2003, cable operators carried the high-definition digital signal of 74 ABC affiliated stations and 58 NBC affiliated stations. Some of these agreements provide for carriage of multicast programming as well. Indeed, ABC apparently has already secured multicast carriage for its owned and operated stations. As ABC conceded in its ex parte submission, it “has enjoyed success in negotiating marketplace arrangements for cable carriage of ABC HDTV and multicast services.” (Emphasis added.)

To the extent that NBC's Telemundo stations have voluntarily elected must carry instead of retransmission consent, carriage of their primary video is assured after the end of the digital transition. If it so chose, NBC could also include Telemundo's non-primary multicast digital video streams in its retransmission consent negotiations, just as it does for the cable networks that it owns.

In any event, the Commission's proceeding, in which these ex parte submissions have been filed, is dealing on reconsideration with the scope of cable operators' must-carry obligations with respect to multicast signals. For stations like ABC's and NBC's, which almost always elect retransmission consent rather than must carry, the relevance of this issue is unclear – unless ABC and NBC want the government to mandate carriage of their multicast digital signals while still opting for retransmission consent.

² See, e.g., Comments of Cox Enterprises, Inc., MB Docket No. 02-277, at 41-47 (Jan. 2, 2003); Reply Comments of American Cable Association, MB Docket No. 02-277 (Feb. 3, 2003); Reply Comments of Mediacom Communications Corporation at 64-67 (Feb. 3, 2003).

³ See GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry* (October 2003).

Such a result would ensure that broadcasters could continue to exert the full power of retransmission consent to gain carriage of cable program networks they own and/or other monetary compensation rather than use it to obtain carriage of additional digital broadcast channels. Mandated carriage of broadcasters' non-primary, multicast signals would be a new government-conferred benefit, while independent cable program networks would have to compete in the market for carriage.

The ability of broadcasters to negotiate retransmission consent agreements for carriage of multicast digital signals should depend on market factors such as the attractiveness of their program offerings. Unlike HDTV, the attractiveness to consumers of commercial multicast digital broadcast programming has yet to be demonstrated. Of the dozens of stations owned by ABC and NBC, for example, only one station actually offers a multicast service today. The evidence in this proceeding reveals a paucity of commercial multicast offerings nationwide.

The Fresno, California example cited by ABC may explain why. One of the channels features "repurposed" local news along with some local public affairs programming. Given a cable environment with several live national news services (two alone offered by NBC-owned networks), national and state networks dedicated entirely to public affairs programming, and myriad newscasts offered by local cable news channels and local broadcasters throughout the day, it remains to be seen how compelling a newscast-rerun model will be for viewers.

The other Fresno channel cited by ABC purports to provide "local weather information," which apparently consists of a stationary camera mounted outdoors for some portion of the broadcast day. While an additional local meteorological option may appeal to some viewers, one would be hard pressed not to find local current weather conditions on existing channels, especially when the weather is actually in the news. Local weather information is already widely available on cable and broadcast channels, as well as on radio and the Internet.

The fact that nearly five years into the transition, only one network-owned station has even gotten this far implementing multicast suggests that an economic model for advertiser-supported multicasting – beyond self-sustaining services like infomercials or other paid programming – may not exist. Still, if there are some new ways for local broadcasters to present appealing programming in multicast streams, there is every reason to believe that cable operators will want to carry it, just as they have demonstrated their desire and willingness to carry broadcast HDTV programming.

For instance, cable operators have voluntarily entered into agreements to carry the digital TV signals of 66 public television stations, many of which provide for the carriage of multicast non-commercial digital content. The competitive risk of ceding attractive programming services – and the customers who might find them attractive – to DBS providers is a powerful market incentive. To date, however, commercial broadcasters have shown no signs of developing any attractive multicast programming or business models to sustain such programming.

If commercial broadcasters are unlikely to develop any compelling multicast content, what are cable's concerns? There are two major concerns, and both are very troubling from the

standpoint of wanting to offer cable consumers new and diverse services that would be of value to them. First, as mentioned above, cable operators are rightfully concerned that broadcasters would utilize the multicast channels for infomercials, paid programs and other low-budget fare. Alternatively, broadcasters could simply “warehouse” the additional cable bandwidth so that competing non-broadcast networks and programming have less chance of obtaining carriage. Either way consumers would be the losers.

In sum, there is every reason to believe that if NBC, ABC, Telemundo, or any other broadcaster provides compelling multicast programming that viewers want, cable operators will want to carry them. With competition coming from DBS’s growing carriage of local stations’ primary video signal, quality services – whether local or national – will provide a competitive edge to distributors, cable or DBS. Such compelling programming needs no government granted advantage. It would be especially inappropriate to give such an additional advantage exclusively to programming provided by broadcasters, who already enjoy an artificial advantage over non-broadcast programmers in gaining cable carriage through government grants of must carry and retransmission consent for their primary video signal.

To contort the law to require cable carriage of any additional new video channel a broadcast station might develop would do a tremendous disservice to consumers and non-broadcast programmers while violating the First and Fifth Amendment rights of cable operators. Nothing that NBC and ABC have argued or submitted to the Commission alters these realities.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Michael S. Schooler
Diane B. Burstein