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The Honorable Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120

Dear Mr. Chairman and Commissioners:

This letter responds to a June 8, 2006 filing from the National Association of Broadcasters (NAB), reporting on a Decisionmark multicast carriage study and a NAB survey asking full power TV stations about multicast plans. The NAB submission purports to argue why the FCC should reverse its 2001 and 2005 legal determinations that “primary video” in the Communications Act means one programming stream. It claims that obtaining carriage of multicast has proved difficult and that NAB’s members are “offering locally-oriented multicast programming that clearly serves the public interest.”

If the assertions in these documents were true, they might be of some relevance to Congress, were it considering changes to the must carry statute. They are, however, of no conceivable relevance to the broadcasters’ current request that the Commission overturn its 2001 and 2005 legal determinations that “primary video” means one stream.

Even in the legislative context, the Decisionmark study and NAB survey would be useless. Properly viewed, these flawed data and self-serving surveys do not support NAB’s claims, for several reasons.

1. NAB’s main claim that only nine percent of local commercial broadcasters’ multicast channels receive cable carriage is based on a meaningless and useless jumble of carriage data.

The underlying Decisionmark study (filed on June 9, after the June 8 letter citing it) is a print-out of broadcast digital stations which purports to indicate whether the primary video and/or the

multicast video of stations are being carried by at least one cable operator. The study does not indicate when the carriage data was recorded and by what methodology.

There is reason to doubt its reliability. The NAB claims that only 9% (or 56 instances) of commercial stations' multicast streams are being carried by a cable operator. This claim is ludicrous. A cursory comparison of the Decisionmark materials with results of a multicast carriage survey of the top cable system operators conducted by NCTA in Fall 2005, produced several discrepancies. Specifically, the carriage data of commercial broadcasters' multicast streams is at least double that cited by Decisionmark. Approximately 170 of the multicast streams (including 92 streams from commercial broadcast stations) tagged as not being carried by Decisionmark were in fact carried. See Attachment A. And the Decisionmark study fails to even list seventeen stations (including twelve commercial stations) which have both their primary and multicast signals being carried. One of the "missing" stations: KNBC, Los Angeles, the NBC affiliate in the second largest TV market. See Attachment B. Another example: NAB relies on Decisionmark's report that cable does not carry KTVB, Boise's multicast stream. But the NAB's own June/July 2004 *Destination Digital TV* newsletter touted KTVB's news/weather channel multistream launch in October 2003 with carriage on Cable One, carriage which continues today.¹

At least as significant as these data errors, the Decisionmark study does not indicate whether any of the programming comprises the "locally-oriented multicast services" touted in the NAB's letter – their core argument. Still worse, the study does not differentiate between *must carry* stations and *retransmission consent* stations in reporting multicast carriage. The "nine percent" figure misleadingly commingles retransmission consent carriage data with data about noncarriage of commercial multicast must carry streams when the law says those streams are not part of the carriage obligation; it is of no use in this proceeding.

Retransmission Consent Stations

As to retransmission consent stations, the cable industry has long argued that valuable programming will be, and is being, carried. The Decisionmark study, to the extent it is accurate and up-to-date, does not show otherwise. NCTA reviewed multicast carriage in the top 10 TV markets (which cover roughly 30% of all viewers) and found that cable systems are carrying 87.5% of the multicast streams of the top six commercial broadcast networks (ABC, NBC, CBS, Fox, UPN, WB).² That's a far cry from the nine percent carriage the NAB's letter cites based on the erroneous Decisionmark data. Because these streams are offered by retransmission consent stations, they are by definition coming from broadcasters whose primary video is more in demand. While the multicast streams may or may not be compelling, there is likely a stronger underlying station to support them. Even then, some of these stations may remind viewers of Commissioner Capps' apt observation: "Do I believe that cable ought to carry every camera dangling out of every window, doppler radar? ... No."³

¹ NAB Destination Digital, Vol. 4, No. 5 (2004).

² See Attachment C.

³ Communications Daily, June 8, 2006. In fact, the only three multicast streams from the top six commercial broadcasters not carried in the top 10 DMAs are live doppler radar (and another broadcaster's multicast weather

These examples of cable carriage of multicast signals are nonetheless the result of an agreement between a cable operator and a broadcaster – the sine qua non to obtain carriage of the broadcaster’s primary video. Thus, it is hard to take at face value that “[b]roadcasters have reported a number of other examples of cable operators seeking unreasonable restrictions on multicast carriage.”⁴ Broadcasters have the power to withhold the primary video signal in these negotiations. And where a retransmission consent station’s multicast signals aren’t being carried, it may be that the broadcaster has ranked carriage of those secondary programming streams below other demands in the retransmission consent give-and-take. This could explain the relative differences in carriage patterns for digital multicast streams in smaller markets. It may be that smaller market stations chose to bargain for compensation rather than multicast carriage in the latest retransmission consent round. It may also be the case that stations and systems reached accommodations that take into account system size and the lack of capacity, or that the multicast stream identified by Decisionmark was just recently created. There are a variety of legitimate reasons why a given programming stream might not have carriage rights; the Decisionmark data, even assuming its accuracy, is useless because it fails to account for these reasons.

To give this NAB “heads we win, tails you lose” argument credence, one would be left with a regime of “primary video retransmission/multicast must carry” – an utter corruption of the retransmission /must carry election that broadcasters asked for and received in the 1992 Cable Act.

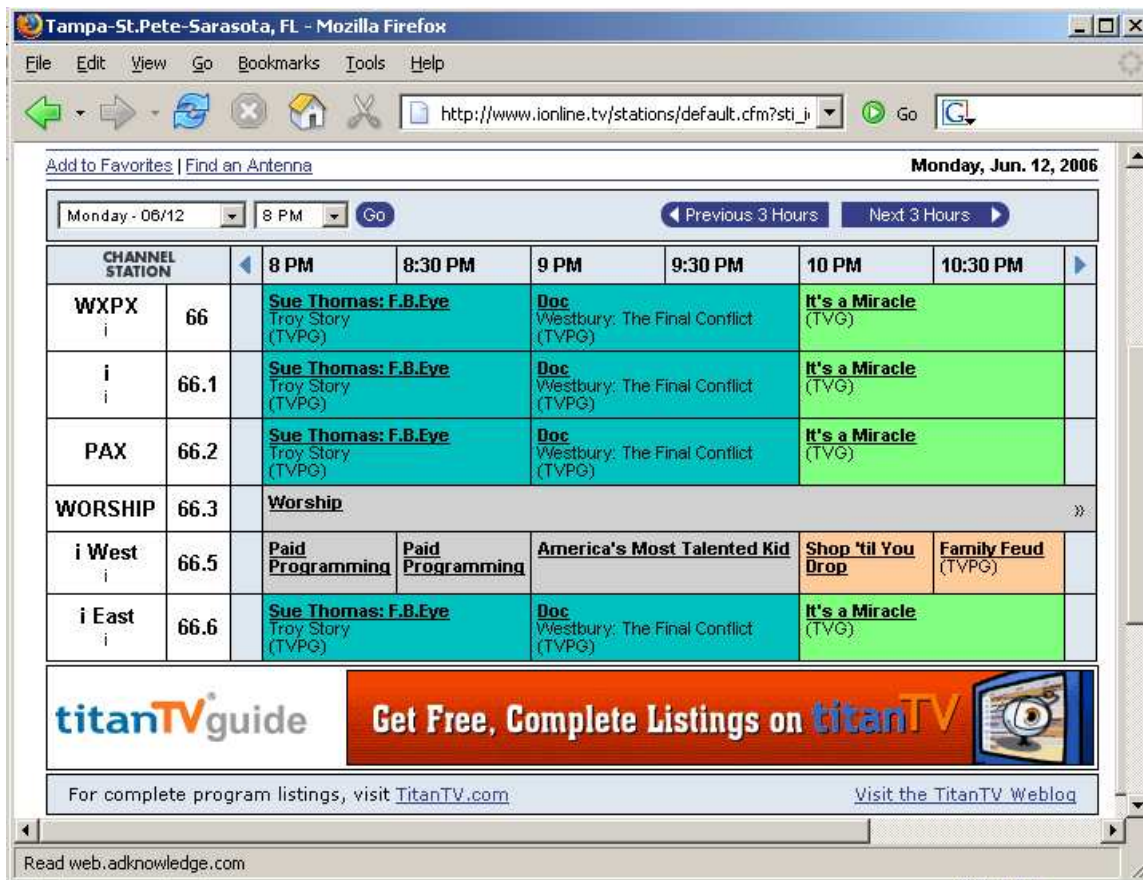
Must Carry Stations

Commercial stations that elect must carry have concluded that their primary video programming, absent a government-enforced carriage obligation, might not be carried at all. Realizing that market forces might not assure carriage of that signal, it should come as little surprise that the multicast streams of such stations would be unlikely to be carried, when competing with the hundreds of nonbroadcast programming networks also seeking carriage.

Indeed a brief examination of the multicast must carry streams of “i” affiliates (formerly Paxson) shows how little there is to carry. Consider WXPX-DT, Tampa, included in NAB’s filing: it is shown having six multicast streams, none of which are carried. According to the station’s website, there are five multicast streams. Of these five, three simply simulcast the analog feed. Of the remaining two, one simply time shifts programming from the West Coast feed (ch. 66.5). Only one stream offers differentiated programming, “Worship,” and there is no indication that this service comprises the “locally-oriented multicast services” touted in the letter. (See programming grid below for WXPX DT for 6/12/06 8PM-11PM captured from WXPX website)

service is already being carried in those markets, in addition to other cable-only all weather services like The Weather Channel and Weather Channel Local Edition.)

⁴ NAB letter, June 8, 2006.



The Decisionmark list includes 211 digital streams for “i”-affiliated stations. To the extent the Tampa schedule is repeated elsewhere, most of these streams are simply placeholders duplicating analog coverage. None of the streams appear to have locally-oriented programming – or compelling programming at all.

Or consider Decisionmark’s citation of 17 instances of multicasting by WB affiliates, which sometimes elect must carry. Fifteen of these stations use the multicast stream to simulcast the analog service, according to TVGuide.com. It appears that only two (WNUV- Baltimore and WKCF - Orlando) offer nonsimulcast programming – one a nonlocal music channel (The Tube Music Network) on WNUV; and the other a looped replay of a 3-hour morning TV show (WKCF).

Stripped to its core, NAB is arguing that cable operators’ failure to carry multicast streams of commercial must carry stations – which the FCC twice concluded are not part of a cable operator’s must carry obligation – thereby justifies carriage. While a new line of argument is, in some sense, welcome in a matter as reargued and reargued by the broadcasters as this one, this claim is particularly bizarre. It’s a bit like saying that there are hundreds of drivers under 16 who can’t drive because of licensing laws prohibiting drivers under 16; so because the law sets 16 as the age for licensing, the DMV should change its rules to license them. No; the law says no drivers under 16 may drive – get the legislature to change the law if you will, but don’t condemn the DMV for doing what the law says.

The analog must carry rules were upheld in *Turner* precisely because, even in the absence of must carry rules, the vast majority of broadcast stations were being carried by local cable systems. In that environment, the Court found the burden of must carry rules to be fairly minimal, and it found this fact to be relevant to its “intermediate scrutiny” test. So, what would be the relevance of a study that purports to show that cable operators today are choosing to carry hardly any of the multicast streams of must carry broadcast stations? It would show that the burden of a multicast must carry requirement would be substantial – and much greater than the burden imposed by the rules upheld in *Turner*.

To sum up, it is fallacious to commingle must carry and retransmission consent multicast signals in the same study. The evidence indicates that a significant number of commercial retransmission consent multicast signals are being carried – in addition to the hundreds of PBS multicast streams and hundreds of high definition streams also being carried. **NAB’s “nine percent” statistic is meaningless and incorrect.**

One additional point: Broadcasters have argued that if there were a guarantee of multicast carriage, then they’d have the incentive to invest in quality programming for multicast channels. It’s a purely speculative – and dubious – proposition in any event. But the broadcasters’ studies showing that a low percentage of streams are being carried today do nothing to bolster their argument. It may be that must carry broadcasters have no interest in investing in quality programming without a guarantee in advance that their programming will be carried on cable systems (even though new non-broadcast cable networks, which have no must carry rights, take such risks all the time). But the fact that cable systems are choosing not to carry their low-quality multicast streams today proves nothing about whether must carry broadcasters would suddenly begin investing in high-quality local-interest programming if they were guaranteed cable carriage.

2. The NAB survey offers stale, largely self-serving data.

NAB also tries to rely on an unscientific survey answered by a self-selecting group of commercial stations. This data is from July 2005 – nearly a year ago. Since that time, in October 2005, broadcast stations had their pick between carriage pursuant to retransmission consent or must carry. As described above, if broadcasters opted for retransmission consent and obtained a bargain that did not lead to carriage of a digital multicast stream, it may be that stations more highly valued a different form of compensation for carriage of their primary broadcast signal than carriage of a digital multicast stream.

Moreover, the NAB survey contains little more than reports of the well-worn musings about “plans” for programming that broadcasters are “considering” that might be of a local nature. The broadcasters similarly paid “if-only” lip-service to local programming plans more than two years ago. As NCTA pointed out at that time, the broadcasters “describe[] several other inchoate ideas that some affiliates ‘might provide’ or are ‘considering’ – for example, local news, local government affairs, local amateur sports. But none of these seem to be beyond the drawing boards even in concept, much less economically viable business ventures, given the not

June 14, 2006

Page 6

insignificant cost of producing high quality, audience-attracting local programming.”⁵ Given that these ideas seem to have advanced little in the two years since, it is no wonder that cable operators have been unwilling to devote more valuable channel capacity to these half-hearted “concepts.”

* * *

NAB’s June 8-9 filings in support of its second petition for reconsideration – offered up more than 13 months from when it filed this petition – prove nothing. They demonstrate no significant local programming character to multicast offered under retransmission consent – where the broadcaster has all the cable-carriage guarantee it needs (and claims it needs in the must carry context) to prove its claims about innovative local programming. The Decisionmark study, itself not a Gibraltar of reliability, advances NAB’s argument not a single inch. As the FCC has twice concluded, primary video means one stream. And even this late-date showing demonstrates, when it comes to multicast service, there is little the FCC can rely on to reach any other result.

Respectfully,

/s/ Daniel L. Brenner

Daniel L. Brenner

⁵NCTA Ex Parte dated April 19, 2004.

Attachment A

Commercial Multicast Streams carried by Cable Systems that were Misidentified as Non Carriage

Station Call Sign	Station Affiliation	DMA Name	Digital Streams	Cable Carriage
KASA	FOX	Albuquerque-Santa Fe	The Tube	Comcast (207)
KELO	CBS	Sioux Falls	WeatherNow	Midcontinent (160)
KFOR	NBC	Oklahoma City	Weather Plus	Cox (247)
KGBT	CBS	Harlingen-Wslco-Brnsvl-MCA	Action 4 News 24/7 Weather	Time Warner (366)
KGWN	NBC	Portland, OR	Weather Plus	Comcast (128)
KHOU	CBS	Houston	11 Now Weather	Time Warner (310)
KHQ	NBC	Spokane	Weather Plus	Comcast (114)
KING	NBC	Seattle-Tacoma	Weather Plus	Comcast (115)
KMIZ	ABC	Columbia-Jefferson City	Show Me Weather	Mediacom (23)
KNDO	NBC	Yakima	Local News Channel	Charter (286)
KNDO	NBC	Yakima	WeatherPlus	Charter (287)
KNDU	NBC	Kennewick-Pasco-Richland	Local News Channel	Charter (286)
KNDU	NBC	Kennewick-Pasco-Richland	WeatherPlus	Charter (287)
KOLD	CBS	Tuscon (Nogales)	The Tube	Comcast (207), Cox (764)
KOLN	CBS	Lincoln-Hstings	UPN	Time Warner (110)
KRNV	NBC	Reno	Weather Plus	Charter (224)
KSDK	NBC	St. Louis	Weather Plus	Charter (127)
KSL	NBC	Salt Lake City	Weather Plus	Comcast (153)
KTRK	ABC	Houston	ABC News Now	Time Warner (315)
KTSM	NBC	El Paso	Weather Plus	Time Warner (1302)
KTUL	ABC	Tulsa	First Alert 24/7 Weather	Cox (247)
KUSA	NBC	Denver	Weather Plus	Comcast (249)
KVUE	ABC	Austin	KVUE Weather	Time Warner (1512)
KWCH	CBS	Wichita-Hutchinson	KWCH WX	Cox (675)
KWWL	NBC	Cedar Rapids-Waterloo	The Tube	Mediacom (106)
WAFF	NBC	Huntsville-Decatur	Weather Plus	Comcast (194), Mediacom (99)
WAKA	CBS	Montgomery-Prattville	CBS Weather	Charter (182)
WAVE	NBC	Louisville	WeatherPlus	Insight (128)
WBAL	NBC	Baltimore	Weather Plus	Comcast (208)
WBAY	ABC	Green Bay-Appleton	Weather 24/7	Time Warner (702)
WBFF	FOX	Baltimore	Weather	Comcast (206)
WBIR	NBC	Knoxville	Weather Plus	Comcast (196), Charter (196)
WBNS	CBS	Columbus	Ohio News Network	Time Warner (100)
WBOC	CBS	Salisbury	UPN	Comcast (21)
WBTW	CBS	Charlotte	WBTW Weather	Time Warner (226)
WBTW	CBS	Charlotte	WBTW XL	Time Warner (227)
WCAU	NBC	Philadelphia	Weather Plus	Comcast (248)
WCCB	FOX	Charlotte	FOXSCAN Radar	Time Warner (242)

Attachment A

Commercial Multicast Streams carried by Cable Systems that were Misidentified as Non Carriage

Station Call Sign	Station Affiliation	DMA Name	Digital Streams	Cable Carriage
WCIA	CBS	Champaign-Sprngfld	UPN	Insight (19)
WCMH	NBC	Columbus, OH	Weather Plus	Time Warner (80), Insight (100)
WCNC	NBC	Charlotte	Weather Plus	Time Warner (221)
WCPO	ABC	Cincinnati	Radar	Insight (71)
WDBJ	CBS	Roanoke-Lynchburg	WDBJ Too	Adelphia (180)
WDBJ	CBS	Roanoke-Lynchburg	Local Weather	Adelphia (181)
WDJT	CBS	Milwaukee	Telemundo	Time Warner (66)
WECT	NBC	Wilmington	Weather Plus	Time Warner (939)
WESH	NBC	Orlando-Daytona Bch	Weather Plus	Brighthouse (1021)
WFLA	NBC	Tampa-St. Petersburg	WeatherPlus	Brighthouse (607), Comcast (243)
WFLX	FOX	West Palm Beach	The Tube	Adelphia (183), Comcast (184)
WFMY	CBS	Greensboro-High Point-W Salem	WFMY News 2 24/7 Weather	Time Warner (521)
WFTV	ABC	Orlando-Daytona Bch	Local Weather	Brighthouse (1091)
WGAL	NBC	Harrisburg-Lncstr	Weather Plus	Comcast (248)
WHTM	ABC	Harrisburg-Lncstr	Weather	Comcast (247)
WIS	NBC	Columbia, SC	WeatherPlus	Time Warner (806)
WITN	NBC	Greenville-N.Bern	Weather Plus	Charter (244)
WJAC	NBC	Johnstown	Weather Plus	Atlantic Broadband (110)
WJAR	NBC	Providence	Weather Plus	Cox (800), Comcast (750)
WJRT	ABC	Flint-Saginaw	Local News, 24hr Weather	Comcast (246,247)
WKMG	CBS	Orlando-Daytona Bch	Local Weather	Brighthouse (1061)
WLBT	NBC	Jackson, MS	Weather Plus	Time Warner (102)
WLOX	ABC	Biloxi-Gulfport	WLOX 24/7 Weather	CableOne (60)
WLTX	CBS	Columbia, SC	Radar	Time Warner (811)
WLWT	NBC	Cincinnati	Weather Plus	Insight (137)
WMAQ	NBC	Chicago	Weather Plus	Comcast (194)
WMC	NBC	Memphis	Weather Plus	Time Warner (4)
WMC	NBC	Memphis	The Tube	Time Warner (755)
WNCN	NBC	Raleigh-Durham	Weather Plus	Time Warner (219)
WNWO	NBC	Toledo	Weather Plus	Time Warner (80), Buckeye (626)
WOLO	ABC	Columbia, SC	Radar	Brighthouse (816)
WOWT	NBC	Omaha	UPN	Time Warner (11)
WPGH	FOX	Pittsburgh	24 Hour News	Comcast (96)
WPMI	NBC	Mobile-Pensacola	Weather Plus	Cox (716), Comcast (194)
WPVI	ABC	Philadelphia	Local News	Comcast (245)
WPXI	NBC	Pittsburgh	Weather Plus	Comcast (208)
WRC	NBC	Washington, DC	Weather Plus	Comcast (208)
WREG	CBS	Memphis	Local News	Time Warner (2)

Attachment A
Commercial Multicast Streams carried by Cable Systems that were Misidentified as Non Carriage

Station Call Sign	Station Affiliation	DMA Name	Digital Streams	Cable Carriage
WRGB	CBS	Albany-Schenectady-Troy	WRGB2	Time Warner (1896)
WRTV	ABC	Indianapolis	Local News	Insight (64)
WSBT	CBS	South Bend-Elkhart	UPN	Comcast (16)
WSFA	NBC	Montgomery	Weather Plus	Brighthouse (213/228), Charter (183)
WTLV	NBC	Jacksonville	Weather Plus	Comcast (247)
WTOC	CBS	Savannah	WTOC Weather	Comcast (242)
WTVD	ABC	Raleigh-Durham	24 Hour Radar	Time Warner (212)
WTVJ	NBC	Miami-Ft.Lauderdale	Weather Plus	Comcast (250)
WTVR	CBS	Richmond-Petersburg	The Tube	Comcast (207)
WTVR	CBS	Richmond-Petersburg	CBS 6 Xtra	Comcast (206)
WVLT	CBS	Knoxville	UPN	Comcast (8)
WVTM	NBC	Chattanooga	Weather Plus	Comcast (244), Charter (196)
WWAY	ABC	Wilmington	Local Weather	Time Warner (903)
WWBT	NBC	Richmond-Petersburg	WeatherPlus	Comcast (208)
WXIA	NBC	Atlanta	Weather Plus	Comcast (211)
WZZM	ABC	Grand Rapids-Kalamzoo	Target Weather	Comcast (247)

Source: NCTA Survey of Top Cable System operators, data as of Sept. 30, 2005; Cable system websites.

Attachment B
Multicast Commercial Stations Missing from Decisionmark Data

Station Call Sign	Station Affiliation	DMA Name	Digital Streams	Cable Carriage
KTBS	ABC	Shreveport, LA	Mega 3 Live Radar	Time Warner Channel 1104
WPRI	CBS	Providence, RI	Pinpoint Weather	Cox Cable (Providence)
KARE	NBC	Minn-St. Paul, MN	Local Weather	Comcast (St Paul) Channel 249
KCRA	NBC	Sacramento	Local Weather	Comcast Channel 193
KNBC	NBC	Los Angeles, CA	Weather Plus	Charter (304), Comcast (193), Cox (804), Time Warner (1194)
KNSD	NBC	San Diego, CA	Weather Plus	Cox Channel 107
WGRZ	NBC	Buffalo, NY	Weather Plus	Adelphia Channel 114
WVIT	NBC	Hartford-New Haven	Weather Plus	Comcast (Danbury) (248), Cox (Manchester) (800)
WVTM	NBC	Birmingham, AL	Weather Plus	Brighthouse (183), Charter (653)
WRCB	NBC	Chattanooga, TN	Weather Plus	Comcast (244) and Charter (196)
WYFF	NBC	Greenville-Spartanburg	Weather Plus	Charter Channel 244
WUAB	UPN	Cleveland (Akron)	The Tube	Time Warner Channel 545

Attachment C
Cable Carriage of Top Six
Commercial Broadcasters' Multicast Signals in Top 10 DMAs

DMA	DMA Rank	Broadcasters' Multicast Signals (Affiliation) Subchannel	Cable Carriage of Multicast Signals by at Least One Cable Operator
New York	1	WABC TV Plus WNBC Weather PLUS NBC 4.4 (not Listed on WNBC website)	WABC TV Plus on Time Warner Channel 730 WNBC Weather Plus on Time Warner Channel 731 NBC 4.4 on Time Warner Channel 732
Los Angeles	2	KNBC Weather Plus KABC Live Doppler Radar KABC Digital Multicast	KNBC Weather Plus Carried on Multiple Systems including Comcast (193), Cox(804), Time Warner (1194) and Charter (304) - KABC Digital Multicast carried on Multiple Cable Systems including Charter Channel 307
Chicago	3	WMAQ (NBC) Weather Plus WLS DT2 (ABC) ABC Now WLS (ABC) DT3 Live Doppler Radar	WMAQ (NBC) Weather Plus carried on Comcast Channel 194 ABC Now carried on Comcast Channel 217 -
Philadelphia	4	WCAU (NBC) Weather Plus 6ABCNews (ABC) WPVINW (ABC)	WCAU (NBC) Weather Plus carried on Comcast Channel 248 6ABCNews carried on Comcast Channel 246 WPVINW carried on Comcast Channel 245
Boston	5	WCVB (ABC) 5.2 Live Doppler Radar WHDH (NBC) Weather Plus	- WHDH Weather Plus Carried on Comcast Channel 297
San Francisco-Oakland-San Jose	6	KNTV (NBC) Weather Plus KGO (ABC) Plus Note: KTVU (Fox) simulcasts analog feed on both Digital subchannels	KNTV (NBC) Weather Plus carried on Comcast Channel #186 KGO (ABC) Plus carried on Comcast Channel 194

Attachment C
Cable Carriage of Top Six
Commercial Broadcasters' Multicast Signals in Top 10 DMAs

DMA	DMA Rank	Broadcasters' Multicast Signals (Affiliation) Subchannel	Cable Carriage of Multicast Signals by at Least One Cable Operator
Dallas- Ft. Worth	7	KXAS Weather Plus WFAA (ABC) 8.2	KXAS Weather Plus carried on Charter Channel 105 ABC Digital Multicast carried on Charter Channel 175
Washington, DC	8	WRC (NBC) Weather Plus WJLA (ABC) Doug Hill's Weather Now	WRC (NBC) Weather Plus carried on Comcast 208 Doug Hill's Weather Now carried on Comcast 204
Atlanta	9	WXIA Weather Plus	WXIA Weather Plus carried on Comcast Channel 211
Houston	10	KPRC (NBC) Radar KPRC (NBC) News KTRK 13.2 (ABC) Local Produced Program	KPRC (NBC) Radar carried on Time Warner channel 321 KPRC (NBC) News carried on Time Warner Channel 320 13NOW (ABC) Carried on Time Warner Channel 315; 13TV2 (ABC) carried on Time Warner Channel 314
Totals		24	21 The three instances of non carriage involve ABC Doppler Radar in markets with NBC Weather Plus

- indicates Non-cable Carriage

Source: NCTA survey of Top Cable operators, data as of September 30, 2005; Cable System and TV Stations websites.