

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast	)	CS Docket No. 98-120
Signals: Amendments to Part 76	)	
of the Commission's Rules	)	

**RESPONSE OF  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION  
TO SUPPLEMENTAL SUBMISSION**

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INTRODUCTION AND SUMMARY .....	1
I. CABLE SYSTEMS ARE CARRYING INCREASING NUMBERS OF BROADCASTERS’ MULTICAST STREAMS. ....	3
II. THERE IS NO EVIDENCE OR REASON TO SUSPECT THAT CABLE OPERATORS ARE REFUSING TO CARRY MULTICAST SIGNALS FOR ANY REASON OTHER THAN THEIR LACK OF MARKETPLACE APPEAL. ....	5
III. THE “RECENT DEVELOPMENTS” CITED BY THE AFFILIATES PROVIDE NO JUSTIFICATION FOR MULTICAST MUST CARRY. ....	8
A. The “Hard Date” Legislation. ....	8
B. The “70/70” Test.....	9
C. The “Burden” of Must Carry Rules. ....	10
CONCLUSION.....	12

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The National Cable & Telecommunications Association hereby responds to the Supplemental Submission of the CBS and NBC Affiliate Associations in the above-captioned proceeding.

**INTRODUCTION AND SUMMARY**

The CBS and NBC Affiliate Associations (“Affiliates”) have once again weighed in with a “Supplemental Submission” urging the Commission to force cable operators to carry all the multicast streams of broadcasters’ digital signals. As usual, the Affiliates characterize their proposal not as a “must-carry” imposition on the editorial discretion of cable operators – indeed, the words “must carry” and “First Amendment” do not appear in their filing – but as an “anti-stripping” requirement. Cable operators, they suggest, should not be allowed to “degrade” broadcasters signals by refusing to carry every multicast program service that might be included in such signals.

The Affiliates argue that cable operators are refusing to carry multicast broadcast signals for anticompetitive reasons – in order to promote their own vertically integrated programming and to prevent the siphoning off of local advertising revenues. But the Affiliates present no credible evidence to support these assertions. To the contrary, all evidence indicates that the

marketplace is working in a *pro-competitive* way: Cable operators *are* carrying multicast streams of broadcasters in increasing numbers, where there is reason to believe that such carriage will enhance the value of service to consumers.

The Affiliates identify a handful of new multicast services that they suggest will “advance the public interest.”<sup>1</sup> But they fail to note that many of their examples are already being carried by cable systems. Others are still just plans on the drawing board, or one-time special events that hardly would justify full time carriage.

The Affiliates argue that the Commission has authority to require carriage of multicast signals under the “70/70” test in Section 612(g) of the Communications Act – a frivolous legal argument. And, finally, they repeat the broadcasters’ shibboleth that mandatory multicast carriage imposes no significant burden on cable systems because it requires less capacity than has been required for mandatory carriage of analog signals – as if cable operators, who have recently invested more than \$100 billion to increase the capacity and capabilities of their systems, had no plans to fill that capacity with services other than broadcasters’ multicast programming.

The overwhelming majority of network affiliates represented by the Affiliates are, in any event, not subject to the must carry rules at issue in this proceeding. They have generally opted to be carried pursuant to *retransmission consent* agreements. These agreements enable them to negotiate for the carriage of their multicast digital signals. Indeed, cable operators are *already* carrying a large number of multicast streams offered over-the-air by retransmission consent broadcasters.

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<sup>1</sup> Supplemental Submission at 8.

It's not clear, therefore, why the Affiliates would be participating in this proceeding – unless they want guaranteed carriage of every multicast stream of *retransmission consent* stations without having to negotiate for such carriage. That may be why they use the upside-down rhetoric of “anti-stripping,” and why they try to find statutory authority in Section 612(g), *outside* the must carry provisions of the Act. Such a requirement would be a stretch beyond anything contemplated by Congress in Title VI – not to mention the First and Fifth Amendments. But it's hard to see what other interest network affiliates, who generally opt for retransmission consent, would have in a proceeding about multicast *must carry*.

**I. CABLE SYSTEMS ARE CARRYING INCREASING NUMBERS OF BROADCASTERS' MULTICAST STREAMS.**

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The Affiliates start from a shaky statistical premise – namely, data that supposedly show that only 9% of the multicast streams being transmitted today by commercial broadcast stations are being carried by cable systems. Not surprisingly, neither the data nor the Affiliates' submission analyzes the specific content being provided on those channels. How many, for example, are using their digital channels during the digital transition simply to simulcast the programming on their analog channels? How many are transmitting multicast programming only on a part-time basis, or only to cover occasional special events? How many are providing nothing more than the 21<sup>st</sup> century equivalent of test patterns and clocks, thermometers and barometers, which would attract minimal viewership?

Without that information, the statistics on percentage of streams being carried would prove little about the benefits and burdens of mandatory carriage, even if those statistics were valid. But all indications are that the statistics are not valid. NCTA's own survey of cable systems shows that the data relied upon by the Affiliates does not count a substantial number of multicast streams that are, in fact, being carried by cable systems. First, a significant number of

the multicast signals that the study identifies as *not* being carried *are*, in fact, being carried. Second, there are a number of multicast streams being carried by cable systems that are *not identified at all* in the Affiliates' data. In fact, the number of multicast streams not counted for one or the other of these reasons exceeds the number that were counted. In other words, the number of streams identified in the broadcasters' study as being carried by cable systems is fewer than half – approximately 35% – of the number actually being carried.<sup>2</sup>

The Affiliates identify 13 examples of the sort of broadcast multicast programming that will, in their view, “advance the public interest.”<sup>3</sup> In some of these cases, a multicast must carry requirement would have no effect because the multicast programming is already being carried by cable systems.<sup>4</sup> In four other cases, the multicast services are not yet launched, so there is no way to know whether they will actually be provided – or whether, if so, they will be carried.

Other examples identify particular events and one-time programs offered on multicast channels, such as coverage of the NCAA basketball tournament, national political conventions, and hurricane coverage. Many cable operators carried the network feeds of the basketball tournament and the conventions on digital channels. But it is hardly reasonable to require operators to allocate such channels to broadcasters on a full-time basis just because they may occasionally carry special events on an otherwise unused multicast stream.

Even at a time when broadcasters are still deciding whether and to what extent they will provide multicast streams in addition to or instead of HDTV – or use the spectrum for other

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<sup>2</sup> See Ex Parte Letter of Daniel L. Brenner, NCTA Senior Vice President, Law and Regulatory Policy, June 14, 2006, Attachments A and B.

<sup>3</sup> *Id.* at 8.

<sup>4</sup> For example, cable systems are already carrying WREG-TV's 24-hour local news and weather channel in Memphis, WPEC's weather stream in West Palm Beach, and KTVB's news channel in Boise.

purposes<sup>5</sup> – cable operators are increasingly agreeing to carry a significant number of such streams. Whether any of those multicast streams will be economically viable, even with cable carriage, in today’s competitive programming marketplace is uncertain. The Affiliates provide no evidence that they will be. Nor do they support the even more speculative assertion that multicast streams of failing broadcast stations that cannot attract sufficient viewership on their primary channels to ensure their survival will bail themselves out with the advertising revenues generated by their multicast programming.

All that we know for now is that in more and more instances, where broadcasters are using their digital channels to provide unique programming of interest to viewers, cable operators are carrying those channels – whether they are HDTV *or* multicasting.

**II. THERE IS NO EVIDENCE OR REASON TO SUSPECT THAT CABLE OPERATORS ARE REFUSING TO CARRY MULTICAST SIGNALS FOR ANY REASON OTHER THAN THEIR LACK OF MARKETPLACE APPEAL.**

The Affiliates seek to create the impression that cable operators have an anticompetitive incentive and ability to refuse to carry broadcasters’ multicast streams that would appeal to cable customers. They provide a handful of examples where cable systems allegedly have refused or resisted carriage of multicast streams – as if that proves that something anticompetitive is going on.

But cable systems, which are already carrying hundreds of channels of programming (including the analog signals of virtually every local broadcast station, many broadcast and non-broadcast *high-definition* signals, and multiple channels of local origination, local news and public, educational and governmental access programming), receive requests for carriage by new

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<sup>5</sup> “Nextar [Broadcasting] is exploring other uses for its spectrum, such as gaming and broadband,” Communications Daily, June 14, 2006.

*non-broadcast* program services and networks almost every day. All these services and networks believe that they are offering content that will appeal to viewers. Cable operators have to choose from among these offerings – not for any sinister or anticompetitive reason but simply because there are better uses for the scarce available capacity.

The Affiliates’ short list of 13 anecdotes include several instances in which operators ultimately agreed to carry multicast streams but initially resisted, or agreed to carry the digital signals only on digital tiers, or conditioned carriage on the particular content to be provided. In the Affiliates’ view, merely *negotiating* the terms of carriage pursuant to retransmission consent rather than unconditionally agreeing to carry every multicast stream is a sign of anticompetitive conduct. But it is hardly a sign of market failure or anticompetitive conduct that cable operators want to exercise editorial discretion over the services they carry and want to negotiate the terms and conditions of such carriage.

To the contrary, the highly competitive marketplace in which cable operators now offer their services makes it all the more essential that their limited capacity is used in a manner that enhances the value of their service to consumers. The Affiliates suggest that cable’s market power has somehow increased since the 1992 Act “by virtue of its increased penetration.”<sup>6</sup> But, as the Commission’s annual reports on the status of video competition have documented, cable’s share of multichannel video households has sharply and steadily declined, from 95% in 1992 to less than 70% today.

More than 25% of MVPD households now get their service from one of the two national DBS services – which had not even launched in 1992. Meanwhile, telephone companies are mounting a major effort to enter the video marketplace in order to compete with cable in the

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<sup>6</sup> Supplemental Submission at 6.

bundled offering of voice, video and telephone service. To meet this competition, cable operators rebuilt their systems in order to offer the most attractive array of video and non-video services, including not only new digital tiers of program networks but also multiple channels of video on demand, Internet service with greater and greater speeds (using more and more bandwidth), and telephone service.

The notion that cable operators have “bottleneck power” in this environment is ludicrous – as is the notion that they can afford to carry every multicast broadcast stream without regard to their value. In today’s competitive environment, operators pay a price for refusing to carry attractive services that might be carried by their competitors. And they pay a price for wasting channels on the carriage of unattractive services that do little to enhance the value of cable service to consumers.

It’s also wrong to suggest that vertical integration is somehow responsible for cable operators’ reluctance to carry all multicast signals, sight unseen. First of all, a majority of the Supreme Court in the *Turner Broadcasting* case, *rejected* the notion that cable operators’ supposed incentive to favor vertically integrated program networks constituted a sufficiently real threat to justify must carry requirements. Second, as the Commission’s annual video competition reports have shown, vertical integration has substantially *decreased* – not increased, as the Affiliates contend – since the *Turner* case. With the proliferation of DBS and telco competition in the video marketplace and the decline in vertical integration, the vertical integration canard raised by the Affiliates is less credible than ever.

If a cable operator resists carrying a broadcaster’s multicast stream, it won’t be because the broadcast station isn’t owned by the cable operator. And it won’t be because the digital multicast stream of a must carry station is likely to siphon off significant advertising revenues. It

will be because the broadcasters' digital streams are not likely to enhance the value of cable service to consumers as much as other uses of the operator's scarce capacity.

**III. THE "RECENT DEVELOPMENTS" CITED BY THE AFFILIATES PROVIDE NO JUSTIFICATION FOR MULTICAST MUST CARRY.**

Grasping at straws, the Affiliates cite three "recent developments," which supposedly provide support and justification for a multicast carriage requirement. None of these developments provide any basis in law or policy for reversing the Commission's previous decision.

**A. The "Hard Date" Legislation.**

First, the Affiliates contend that enactment of the Digital Television Transition and Public Safety Act of 2005, which established a "hard date" of February 19, 2009, for completion of the digital transition bolsters the need for a multicast must carry requirement. Previously, broadcasters had argued that the *absence* of such a hard date justified such a requirement by expediting the completion of the digital transition. Under the Balanced Budget Act of 1997, the transition had not been scheduled to end until at least 85% of television households subscribed to cable or DBS services or were otherwise equipped to receive digital broadcast stations. The broadcasters claimed that widespread availability of multicast broadcast streams would provide over-the-air households with incentives to purchase digital television sets or set-top converters so that this test could be met.

Now, they argue that *because* there is a hard date, there should be a multicasting requirement. The new legislation established a program of subsidies for households that need converter boxes to receive digital signals after the hard date. The Affiliates contend that "[t]he

wide availability of attractive multicast services will encourage viewers to buy digital sets prior to the cut-off date, thereby reducing the need for recourse to these subsidy funds.”<sup>7</sup>

The notion that a significant number of over-the-air viewers will rush out, *prior to the hard date*, to purchase converter boxes just so that they can receive the multicast standard definition signals of must carry broadcast stations is no more likely than that they would have rushed out to buy converters before there was hard date legislation. And the must carry obligation would only kick in after the transition, so a pre-transition purchase would result in no new programming. It’s especially unlikely that over-the-air households would jump the gun now, if subsidies will be available in 2009.

Even if the chain of events suggested by the Affiliates had the slightest chance of occurring, the government could hardly justify the intrusion of multicast must carry on the First and Fifth Amendment rights of cable operators and cable program networks on the grounds that such a subsidy to broadcasters reduced the magnitude of the converter-box subsidy from the federal Treasury. First, this is hardly the sort of “important government interest” sufficient to justify must carry rules under the test set forth in the *Turner* case. Second, any reduction in converter-box subsidies would pale in comparison to the liability that multicast must carry would impose on the Treasury as the result of the Fifth Amendment taking that would occur.<sup>8</sup>

**B. The “70/70” Test.**

Second, the Affiliates cite Section 612(g) of the Communications Act – the so-called “70/70” test – as a recent development that justifies a multicast must carry rule. Section 612 is

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<sup>7</sup> Supplemental Submission at 14.

<sup>8</sup> See Cooper & Kirk, *A Mandatory Multicast Carriage Requirement Would Violate Both the First and Fifth Amendments*, <http://www.ncta.com/DocumentBinary.aspx?id=128> (2005).

the “leased access” provision of Title VI of the Act. Section 612(g) provides, in relevant part, that:

Notwithstanding sections 621(c) and 623(a), at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources.<sup>9</sup>

It’s not exactly clear what’s “recent” about this provision. It was enacted in 1984, long before the Commission’s two decisions on multicast must carry in 2001 and 2005. Moreover, as NCTA has discussed at length in the Commission’s pending proceeding examining whether the test has been met, not only has the 70/70 test never been met but, because cable’s share of multichannel customers has been steadily declining, it is unlikely that the test will *ever* be met.

We’ve also shown repeatedly that this provision was meant only to authorize additional *leased access* rules that exceed the scope of what was otherwise authorized by Section 612.<sup>10</sup> Congress did not intend that, if the 70/70 test was met, the Commission had authority to rewrite or ignore virtually the entire Act – including the subsequently enacted must carry provisions of Section 614. The 70/70 test has nothing to do with the must carry rules and provides no conceivable basis for a multicast carriage requirement.

### **C. The “Burden” of Must Carry Rules.**

Finally, the Affiliates briefly argue that the burden that multicast carriage imposes on cable operators is a non-issue because multicast digital carriage uses no more capacity than the 6MHz required for carriage of analog must carry signals today. This is another groundless

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<sup>9</sup> 47 U.S.C. § 532(g).

<sup>10</sup> See NCTA Comments, MB Docket 05-255 (April 3, 2006).

argument, which we've repeatedly addressed.<sup>11</sup> First of all, under the First Amendment test set forth by the Supreme Court in the *Turner* case,

[b]roadcasters have no constitutional entitlement to six MHz of capacity on cable systems just because analog carriage required that amount. The First Amendment test is not about protecting squatter's rights – it's about protecting speech. It is about achieving the purposes identified by Congress and the courts without unnecessarily or excessively burdening *speech*. If, as a result of digital technology, the purposes of the statutory must carry provisions can be achieved using *less* capacity than was formerly the case, then the must carry rules must be narrowly tailored to occupy only as much capacity as is necessary.<sup>12</sup>

The Affiliates' argument compares to a claim that: if a speaker using a sound truck in the 1940s was justified in taking up private property under a First Amendment claim, then the speaker would be entitled to the same square footage even if the same First Amendment objective could be fulfilled by a boom box today, *i.e.*, the speaker would be entitled to however many boom boxes fit in the same space. The spuriousness of such an entitlement is obvious, but in reality the Affiliates are making the same claim.

Moreover, as we've shown, a multicast must carry requirement would impose a much greater burden on the speech rights of cable operators and program networks than the analog requirements upheld in *Turner*:

[M]ulticast obligations multiply the editorial choices of cable operators that would be overridden. Moreover, the Supreme Court noted in *Turner* that cable operators were already carrying most over-the-air channels, so that the interference with cable operators' free speech rights was relatively minor. Multicast must carry, on the other hand, means *every single* multicast stream is a new forced burden.<sup>13</sup>

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<sup>11</sup> Ex Parte Letter from NCTA President and CEO Kyle McSlarrow to Chairman Martin and Commissioners, June 8, 2006.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

As the Commission prepares to deal – and hopefully dismiss – the broadcasters’ second, repetitive petition for reconsideration of its multicast must carry decision, it should once and for all put to rest the notion any must carry rule that requires no more than 6MHz of capacity somehow imposes no significant Constitutional “burden,” Constitutional or otherwise, on cable operators and program networks.

**CONCLUSION**

The Affiliates provide no basis for reconsidering the Commission’s decision not to impose a multicast must carry requirement. The petitions for reconsideration should be dismissed.

Respectfully submitted,

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