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The Honorable Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Chairman Martin:

The Commission may be about to vote – for the third time – on whether, after the completion of the transition to digital broadcasting, cable operators will be required to carry multiple streams of programming transmitted by a single broadcast station. Five years ago, the Commission decided that the “must carry” provisions of the Communications Act imposed no such multicast carriage obligation. Broadcasters petitioned for reconsideration, and last year the Commission, by a 4-1 vote, reaffirmed its decision. Refusing to take no for an answer or seek judicial review, the broadcasters have petitioned for reconsideration again,¹ making the same arguments that the Commission has twice rejected.

Two bites of the apple are enough. Even if the issue of multicast must carry were a close call, the need for regulatory certainty and administrative finality should foreclose parties from repeatedly asking for reconsideration until they get the answer they desire. In fact, the Commission’s rules specifically authorize dismissal of a second petition for reconsideration, where, as in this case, the Commission rejects the *first* petition and makes no changes to the initial decision. If the Commission’s decision is at odds with the law or has no reasoned basis, judicial relief is available. And if the decision does not reflect the will of Congress, the legislative process can correct it.

But the issue of multicast must carry is *not* a close call. As a statutory matter, the plain language of the Act does not authorize such carriage. As a constitutional matter, even if the language of the Act were ambiguous, construing it to require multicast carriage would run afoul of the First and Fifth Amendments.

¹ Broadcasters’ most recent policy restatement, a self-styled “White Paper” filed June 2, 2006, prepared by three outside legal counsel [hereinafter “June 2 filing”], fails to include any economic or predictive studies that would form a factual basis to support a policy change. And it includes several misstatements of the position of the cable industry in the proceeding as well as a litany of irrelevant or inaccurate statements of the law governing must carry. Some of these are detailed below.

The Commission was correct to conclude that mandatory multicast carriage serves no government interest sufficient to justify its intrusion on constitutional rights. The enactment of recent legislation establishing a “hard date” for completing the digital transition only confirms and bolsters this conclusion. Multicast must carry would multiply the burden on protected speech. It would force cable operators to carry many more distinct channels of broadcast programming, thereby overriding many more editorial choices, and use up capacity that could otherwise be used for a wide range of services of value to cable customers. These services include non-broadcast cable program networks, which have neither the free spectrum nor guaranteed cable carriage to reach prospective viewers that broadcasters already have and will continue to have. They also include a rapidly evolving array of new digital broadband services and enhancements – the very services that the President and Congress have sought to promote and make available throughout the nation.

The Statute: “Primary Video” Means a *Single Stream of Programming*

Cable operators’ must carry obligations are statutory, and Congress provided, in Section 614(b)(3) of the Act, that operators are required to carry the “primary video” of broadcast stations that opt for must carry status. As the Commission has twice concluded, when a broadcaster transmits multiple digital streams of programming, only *one* of those streams can be the “primary” stream. This is the most common meaning of the term “primary.” As one court has noted, “there can only be one ‘primary’ anything.” *Hakala v. Atxam Corp.*, 753 P.2d 1144 (S.Ct. Alaska 1988).

As the Commission recognized, while other meanings might be possible, this is the only reading of the term that makes sense in the context of the must carry provisions. The broadcasters have argued that the term “primary video” somehow means *all* the video streams – or, at least, all the *free* video streams – offered by broadcasters. But that can’t be right. If *all* the video streams in the signal were “primary,” then the requirement to carry the “primary video” would be redundant, and the term “primary” would be superfluous. And if Congress meant to require carriage of all the “free” video streams offered by a broadcaster, it’s reasonable to assume that it would have used the term “all free video signals” instead of the term “primary.”

The Constitution: Construing “Primary Video” To Include Multicast Signals Would Raise Serious Constitutional Problems

Even if the intended meaning of “primary video” were ambiguous, the Commission would be compelled by the well-established doctrine of “constitutional avoidance” to construe the term in a way that steers clear of raising serious constitutional problems. NCTA has submitted several comprehensive analyses in this proceeding by constitutional law experts showing that a multicast must carry requirement would not only raise serious constitutional issues but would, in fact, violate both the First and Fifth Amendments. Here’s what those analyses showed:

First Amendment. The Supreme Court made clear, in narrowly (5-4) upholding the must carry provisions of the Act in the *Turner Broadcasting* cases, that must carry requirements

burden the First Amendment rights of cable *operators* (who are forced to use their channels to carry programming that they might otherwise choose not to carry) and non-broadcast cable program *networks* (who must compete for access to cable households with no such government guarantee of carriage). The Court held that such requirements are subject to heightened constitutional scrutiny and are permissible only if they advance important and legitimate government interests and do not “burden substantially more speech than is necessary to further” those purposes.

Broadcasters insist that the constitutional question is whether carrying multiple digital streams uses more capacity on a cable system than carrying a single analog channel. They say that because the digital streams may use the same or even less space than the analog channels, the issue is easy to decide. Broadcasters are entirely wrong in this regard.

Broadcasters 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.² And if the legislative purposes are not meaningfully advanced by multicast, then the additional burden of multicast on the protected speech rights of operators and networks cannot survive First Amendment scrutiny under the *Turner* standard.

The governmental interests that justified the analog must carry rules in *Turner* would *not* be meaningfully advanced by mandatory multicast carriage. All parties agree that, as the Supreme Court said, the statutory purpose of the must carry provisions was “to prevent any significant *reduction* in the multiplicity of broadcast programming *sources* available to non-cable households.”

In other words, the *Turner* standard requires a showing that there would otherwise be: 1) a reduction in the number of services currently available to over-the-air viewers; and 2) a reduction in the multiplicity of program sources. The Court found, after remanding the matter to develop a voluminous evidentiary record, that this standard had been met. It found that Congress had before it substantial evidence to sustain its predictive judgment that absent must carry of a broadcaster’s *single* analog channel, the availability of broadcast stations to non-cable households could be threatened; and that must carry was narrowly tailored to fulfill Congress’s objectives.

² NAB also asserts that “[c]able will be better off in terms of available capacity, even under a multicast carriage obligation, than ever before in its history.” June 2 filing at 1. That claim is similarly erroneous. It is obvious that cable operators will supply analog customers with a number of analog streams for some period of time. Significant demand on cable capacity will likely remain for the foreseeable future.

But there is no evidence or reason to believe that failure to carry *multiple* program streams – in addition to carriage of the primary signal – transmitted by a single broadcaster would have these effects. After the transition, cable operators will continue to carry a single programming stream from each broadcaster. This carriage ensures, to the same extent as the analog must carry rules, that there would be no reduction in the availability of over-the-air programming. In contrast to the FCC record in the *Turner* litigation, the broadcasters have not provided a *shred* of evidence indicating that failure to carry multicast programming would threaten their viability or the continued availability of the amount of programming currently provided on their analog channels.

And it's obvious that carriage of additional streams of programming from the *same* broadcasters would do nothing to promote diversity of over-the-air programming sources. It would only serve to *diminish* diversity of programming available to cable customers by putting those additional streams of broadcast programming ahead of the long line of diverse cable networks competing for scarce cable channels. In short, the two *Turner* justifications for must carry requirements disappear when looking at *multicast* must carry.

Moreover, the burden of multicast must carry on cable operator speech rights – the relevant criteria under the First Amendment – as opposed to MHz – would be much greater than that sustained by the Supreme Court in the *Turner* cases. As set out above, multicast 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.

While it's clear, for the foregoing reasons, that a multicast requirement would not survive the "intermediate scrutiny" standard set forth in *Turner*, any future challenges of must carry requirements would likely be assessed under the even less forgiving "strict scrutiny" standard. This is because the reasons relied upon by the Court in *Turner* for rejecting strict scrutiny no longer apply. Based on the technology available at the time, the Court found that cable was practically the sole alternative to over-the-air viewing and that cable customers would not watch off-air channels through means other than their cable systems. Neither of these findings is true today, and there is certainly no factual record developed by the Commission (let alone the Congress) to support the additional burdens on free speech rights that multicast must carry would entail.

First, as to competition, the Commission itself has recognized that cable operators face vigorous and growing competition from other multichannel providers. Direct Broadcast Satellite (DBS) companies alone now accounts for upwards of 30% of multichannel viewers, and new entry by well-funded telephone companies is now under way. There is no record evidence, and none could be developed, that could demonstrate that cable operators have any incentive or ability to disfavor broadcasters for impermissible reasons. Any such decisions would meet with severe discipline in the marketplace, as cable customers could readily switch to DBS or other providers (including the Internet) to obtain programming that was wrongfully denied to them.

Second, as to the ability of broadcasters to reach viewers through other means, the facts are also markedly different than they were in 1994. Among other things, broadcasters have now been the recipients without charge of enormously valuable digital spectrum. Part of the reason they were given this spectrum was Congress's belief that digital transmission was superior to analog for off air transmission. Indeed, broadcasters themselves have recognized these benefits and are now offering pay services such as Moviebeam that are explicitly designed to work solely through over-the-air transmission. In addition, broadcasters are making increasing use of delivery over the Internet for versions of free broadcast programming, which did not exist as a medium for video delivery at the time must carry was enacted.

Third, technology now makes it much easier for cable customers to receive broadcast signals via over-the-air reception than was the case at the time of the *Turner* decision. It is no longer necessary to obtain and install a separate "A/B" switch to receive both over-the-air and cable service. Television sets are now commonly equipped with multiple inputs, and cable customers can – and routinely do – switch between inputs, including cable service, DVRs, and VCRs with just a click of their remote controls. There's no reason to think these remotes will not also be used to obtain free over-the-air programming if customers truly want it.

In the competitive environment that exists today, and with today's technology, it's likely that the Supreme Court would apply to must carry rules the same strict scrutiny that would apply if newspapers were forced to carry material against their will, even on a content-neutral basis. But, *in any event, our argument that multicast must carry would be unconstitutional has never depended, as the broadcasters now suggest, on strict scrutiny.* Even under intermediate scrutiny, multicast must carry would not survive.³

Finally, broadcasters have recently insisted that because they possess First Amendment rights, their interests should somehow be added to the FCC's analysis of the multicast requirement.⁴ This claim is absurd. What is at issue is must carry. Must carry burdens the speech interests of cable operators. It forces a First Amendment speaker, the cable operator, to distribute content because the government orders it to do so, whether it wishes to do so or its customers wish to view it. Must carry imposes no burden on broadcasters' speech interests. Broadcasters are free as ever to reach over-the-air viewers, regardless of must carry. It is wrong to suggest that their interests be figured into the First Amendment analysis here.

Fifth Amendment. Giving the broadcasters the right to physically occupy channels on a cable system on an ongoing basis is a *per se* "taking" of cable operators' property. This taking violates the Fifth Amendment unless just compensation is paid. Since the must carry rules forbid a broadcaster from making payments, it falls on the government to do so under the Tucker Act.

³ 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).

⁴ "[C]able advocates tout their supposed First Amendment interests as if those interests were the only ones that hang in the balance. But ... broadcasters also possess a constitutional interest in maintaining their ability to reach those who wish to view their programming." June 2 filing at iv.

To make a claim under the Tucker Act, however there must be a clear, explicit Congressional authorization for a taking.

Such authorization was clear for analog must carry – the Cable Act is explicit. But as the FCC found twice, and is clear from the use of “primary video,” when it comes to multicast, there is no explicit authorization for a taking. This means that there would be a “taking without just compensation” – a flat violation of the Fifth Amendment.⁵

The magnitude of this taking, by the way, would be enormous. One study estimated the “opportunity cost” to cable operators could be as high as \$115 billion. This reflects the fact that cable operators have, in just the past decade, radically transformed their systems into broadband facilities, capable of carrying not just more video programming channels but also all sorts of new video and non-video broadband services.

Cable capacity can now be used to provide a multitude of video-on-demand services, as well as other two-way interactive services. It can also be used to provide high-speed Internet services, and IP telephony services, which are constantly evolving and making demands for more and more bandwidth. For example, in its initial stages, cable modem service has used only a single 6 MHz channel. But the services on the horizon, using DOCSIS 3.0, will be much more robust. Demand for capacity will rapidly increase to at least *four to eight channels* in order to deploy broadband speeds of around 160 megabits/second downstream (compared to an average of around 5 megabits/second today) and will continue to expand. This is the broadband future that Congress envisioned when it urged and encouraged cable operators to upgrade and rebuild their facilities; and when it instructed the FCC under Sec. 706(b) of the 1996 Act to “take immediate action” to accelerate broadband capability. Multicast must carry would not only be a taking of valuable property from cable operators, it would also be a giant step backward, expropriating and setting aside valuable and newly rebuilt capacity for multiple streams of standard definition programming from the least viewed broadcast stations in the community.

Recent Legislation Confirms and Bolsters the Commission’s Decision

No new circumstances have arisen since the Commission’s two decisions rejecting multicast must carry that warrant further reconsideration and reversal of those decisions. This year, Congress enacted legislation establishing a “hard date” of February 17, 2009 for the completion of the digital transition. But that legislation only confirms and bolsters the Commission’s decisions.

⁵ The broadcasters are flatly wrong in contending that the cable industry has conceded that the analog must carry rules “are not a taking under the Fifth Amendment.” June 2 filing at 30. The compelled permanent physical occupation of cable operators’ facilities by must carry broadcasters’ signals is a Fifth Amendment taking, whether the signals are today’s analog must carry signals or digital multicast signals. The difference between the analog requirements and an FCC-imposed multicast requirement, as we’ve made clear, involves the question of whether the taking provides an opportunity for “just compensation.” Because Tucker Act compensation is not available for an FCC-ordered multicast taking, the taking would clearly violate the Fifth Amendment.

Broadcasters had argued that a multicast carriage requirement would somehow expedite 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.

While the 85% test was the law of the land, the broadcasters tried to justify a multicast requirement on the far-fetched theory 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. But now the 85% test – which some thought might never be met – has been replaced by a hard deadline. When that deadline arrives, over-the-air viewers will need to obtain digital sets or set-top boxes to receive *any* broadcast signals – whether or not there is any multicasting. Multicasting – much less a multicast must carry requirement – provides no *additional* incentive to acquire such equipment.

Relieving broadcasters of the need to compete for carriage on cable systems would diminish *their* incentive to develop quality programming. And it would diminish their incentive to develop programming that is uniquely targeted at over-the-air viewers. It doesn't promote or expedite the digital transition. And it doesn't promote the interests of over-the-air viewers. It simply clutters cable's valuable broadband facilities with services least likely to promote and expedite the availability of high-quality digital broadband services.⁶

The marketplace is working, even before completion of the digital transition, to ensure voluntary carriage of multicast broadcast streams that offer programming likely to meet the needs and interests of cable customers. Broadcasters' claim – that Congress created a perpetual right to 6 MHz of bandwidth and not simply to primary video – is not what the statute says and not what the *Turner* Court approved. Guaranteed cable carriage of *every* multicast stream of *every* broadcast station – without regard to whether it serves any viewer's needs or interests –

⁶ NAB claims that broadcasters "intend" to provide "some or all" locally-oriented content on their multicast services, if only cable were forced to carry those streams. June 2 filing at 6, 7. There is nothing new to these recycled claims that a multicast must carry requirement will, just maybe, lead to diverse, locally oriented programming. The broadcasters have been mouthing these same promises for years. They are no more credible today than they were more than two years ago, when NCTA explained that even a cursory examination of the broadcaster's Special Factual Submissions (now cited in the June 2 filing at 6) shows they are "long on promises but short on performance with respect to multicasting." Ex Parte Comments of NCTA, CS Docket No. 98-120 (Apr. 20, 2004). These network affiliated stations' submissions were "full of intentions that have not yet been implemented." That has not changed. Other than some weather services that have been rolled out in some communities (and that are voluntarily carried by cable systems in some markets without government compulsion), NAB's programming cornucopia is no more than a recycled Thanksgiving table prop.

NAB also repeats its claim that without guaranteed cable carriage, many broadcasters "have indicated that they will not invest in developing digital programming..." June 2 filing at 13. But NCTA has explained previously that "beyond their guaranteed carriage rights [for their main stream of programming], it makes no sense to add more guarantees to coax these reluctant programmers: there are dozens of non-broadcast entities ready to compete for limited available channel space." Ex Parte Comments at 7. Innovative non-broadcast HD programming channels, now numbering 23, demonstrate this.

The Honorable Kevin J. Martin

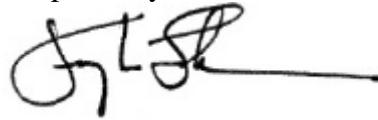
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serves no public policy purpose. It unfairly thwarts the development and availability of non-broadcast cable program networks, which have no such guarantee of carriage for even a single stream of programming. And it forces cable operators, who spent \$100 billion upgrading their facilities in the last decade to provide their customers with the most desirable array of video, voice and data services, to set aside valuable channels for services that may have no appeal at all.

The Commission has twice decided the issue of multicast must carry, and it has decided it correctly. One last time, reconsideration should again be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. McSlarrow', with a long horizontal line extending to the right.

Kyle McSlarrow

cc: Heather Dixon
Marlene H. Dortch