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1201 PENNSYLVANIA AVENUE NW  
WASHINGTON, DC 20004-2401  
TEL 202.662.6000  
FAX 202.662.6091  
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January 17, 2001

**BY HAND DELIVERY**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**RECEIVED**

**JAN 17 2001**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: **Carriage of the Transmissions of Digital Television  
Broadcast Stations (CS Docket No. 98-120),  
Notice of Ex Parte Presentation**

Dear Ms. Salas:

This letter is further to meetings the undersigned, on behalf of the Association of Maximum Service Television, Inc. ("MSTV"), had yesterday with all the Commissioners' offices (a separate *ex parte* letter on those meetings is being filed today).

We understand that the Commission is about to act on the issue of what constitutes "primary video" for purposes of any cable must-carry obligation of DTV signals. We understand that the Commissioners may be feeling that they should make this determination (prior to determining the contours of a DTV carriage obligation either during or after the transition period) because of one or more of the following factors: (i) the need to dispose of the Stuart, Florida, digital-only carriage request, (ii) the Paxson must-carry complaint to be resolved this week, (iii) the desire to take some action in the long-pending CS Docket No. 98-120 proceeding, and (iv) the need to facilitate broadcaster migration out of Channels 60-69 in order to make the most out of the auction of that spectrum now scheduled for March. Of these four reasons for resolving this issue, only one (reason no. (ii)) may require action now, and that is the case only if the Commission is going to grant Paxson's complaint. It is unclear whether Paxson is, at this time, carrying multicast digital programming (although it plans to do so in the future). Regardless, we believe that the Commission could promptly issue a decision in that matter, and could address the other three matters listed above, subject to resolving what constitutes "primary video" for must-carry purposes (in this or in the interactive video proceeding or both) shortly.

This issue is extraordinarily important and will have wide-ranging and long-lasting implications. Digital broadcast stations can carry during part or all of their schedule one full HDTV channel and one all-news SDTV channel; they could also multicast five local news SDTV programs at the same time. They could also provide an interstitial data service and a program-related non-subscription service. It is clear that must-carry would apply at least to the one channel of the main programming stream and to the program-related service (related to the main channel) but not to the subscription data service. The question at issue is whether must-carry should apply to the all-news second channel in the first example

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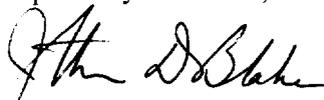
and to all the multicast news programs in the second example. The use of a program-related definition to ensure carriage of more than one stream of programming is both cumbersome and extremely limited. We do not think the Commission or the cable industry should be in the position of parsing what will become increasingly complex uses of the DTV bitstream to make program-related decisions. Rather, a much simpler rule that is more faithful to the goal of ensuring that viewers have access over cable to what they can access through free, over-the-air television, is to include in the concepts of "primary video" and "program-related material" everything that is not ancillary and supplementary to the signal (that is, everything but subscription services).

We believe that Congress intended that must-carry should apply to all but subscription services. The term "primary video," to which the must-carry requirement applies, was not intended to imply "single" channel programming. The word "primary" does not connote "only one." The phrase "primary colors" is illustrative. *Webster's New Collegiate Dictionary* uses the example, "the primary causes of the war." "Primary" is singular if the noun it modifies is singular; plural if the noun it modifies is plural. Thus, the dictionary also uses the example, "the primary meaning of a word." Here the phrase, "primary video," is a collective, and therefore, linguistic analysis is non-determinative.

If the Commission were to apply must-carry only to a single channel of programming, multicasting as a programming option would be deterred, crippled and possibly thwarted altogether. Congress did not intend for the FCC to pick winners and losers among program choices and strategies. Under a narrow definition of "primary video," broadcasters would be influenced to use the magic of digital not to create new services for all Americans but to use excess capacity for pay services. This is clearly not what Congress intended.

The Commission should rule now that "primary video" means all free services provided to the public (or at least those that can be received without special reception capabilities). But if it cannot reach that decision immediately (given the ardors associated with the just-resolved AOL/Time Warner case), the Commission should take the extra time necessary to further consider this seminal issue, perhaps in conjunction with its about-to-be released notice of proposed rule-making on interactive television.

Respectfully submitted,



Jonathan D. Blake  
Ellen P. Goodman  
*Attorneys for MSTV*

cc.  
Chairman Kennard  
Kathy Brown  
Commissioner Ness  
David Goodfriend  
Commissioner Powell  
Peter Tenhula  
Susan Eid

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