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

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999:	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Sinydicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	)	CS Docket No. 00-2

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To: The Commission

PETITION FOR RECONSIDERATION OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation
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West Palm Beach, FL 33401

Dated: April 25, 2001

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SUMMARY

In the 1992 Cable Act, Congress provided the Commission with a clear mandate regarding digital must carry – insure the full cable carriage of qualified local broadcasters. In the *Report and Order*, the Commission disregarded this Congressional mandate.[1] The Commission's actions exceeded the Commission's statutory authority under the 1992 Cable Act, were contrary to the text and meaning of the 1992 Cable Act, as well as the holdings of the United States Supreme Court, and, ultimately, will threaten the future of free over-the-air broadcasting and deprive the public of new and innovative programming services.

The carriage requirements contained in the 1992 Cable Act make no distinction between analog and digital signals. Under the plain language of the 1992 Cable Act, subject to the limits set forth in the Cable Act and the Commission's rules, any full power commercial television station operating in the same market as a particular cable system is entitled to carriage, regardless of whether the station is broadcasting an analog or digital signal. Thus, the 1992 Cable Act requires immediate cable carriage of qualified digital signals. Congress clearly presumed the mandatory carriage of digital signals and intended the Commission to take whatever steps were necessary, from a strictly technical standpoint, to insure that television broadcasters' digital signals were carried by local cable systems. **Thus, all of the Commission's actions beyond the resolution of technical issues were beyond the Commission's authority and must be eliminated.**

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[1] *Carriage of Digital Television Broadcast Signals Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, CS Docket No. 00-96, CS Docket No. 00-2, *First Report and Order and Further Notice of Proposed Rule Making*, FCC 01-22 (rel. Jan 23, 2001) ("*Report and Order*").

In particular, the Commission's decision to exclude multicast signals from the "primary video" entitled to carriage must be reversed. The ability of digital broadcasters to deliver several multicast programming streams will create a wealth of new programming services, improve the competitive position of local broadcasters and increase the diversity of programming sources. Without the guarantee of access provided by the must carry statute, however, these benefits may never be realized. **Moreover, the Commission's action limiting "primary video" to a single programming stream and "program-related" content is contrary to the plain language of the 1992 Cable Act, disregards the value placed on a multiplicity of program/information sources by the United States Supreme Court, and represents an impermissible content-based regulation.**

Paxson urges the Commission to reconsider its actions in the *Report and Order* and uphold the plain language of the 1992 Cable Act which permits broadcasters to elect immediate and full carriage of digital broadcast signals, whether HDTV or multicast. To this end, Paxson resubmits for adoption by the Commission the Paxson DTV Must Carry Proposal (the "Paxson Proposal"), pursuant to which broadcasters may elect to have either their analog or digital signals carried on cable systems. For broadcasters electing their digital signals, the main programming would be down-converted by the cable operator to analog and carried on the analog portion of the cable system and HDTV or digital multicast signals would be carried on the digital portion of the cable system. **The *Paxson Proposal* is workable, reasonable, consistent with the 1992 Cable Act, and will speed the ultimate transition to full digital operations for all stations and the return of broadcasters' analog spectrum.**

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PETITION FOR RECONSIDERATION OF PAXSON COMMUNICATIONS CORPORATION

Pursuant to Section 1.429 of the Commission's rules,[1] Paxson Communications Corporation ("Paxson") hereby submits its Petition for Reconsideration of the First Report and Order in the above-captioned proceeding.[2] The digital must carry decisions contained in the *Report and Order* are the acutely flawed products of a deeply divided Commission which ignored the Congressional mandate to the Commission to do one and only one thing with digital must carry – insure full cable carriage of stations' signals! Of the Commissioners issuing separate statements, three dissented, at least in part, to various

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[1] 47 C.F.R. § 1.429 (2000).

[2] *Carriage of Digital Television Broadcast Signals Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, CS Docket No. 00-96, CS Docket No. 00-2, *First*

aspects of the must carry portions of the *Report and Order,* and the fourth openly contemplated "recourse to Congress" by those harmed by any negative impact on the development of digital television.[3] The *Report and Order* reflects this division. Ambiguous and uncertain, the *Report and Order* provides little guidance for either commercial or non-commercial broadcast stations attempting to assert their digital carriage rights as provided for in the 1992 Cable Act. Significantly, insofar as the Commission's actions addressed cable carriage matters beyond the technical issues required to effectuate digital must carry, such as the Commission's foray into primary video interpretation, the Commission exceeded its statutory authority under the 1992 Cable Act. Moreover, the Commission's decisions, particularly with regard to the content of broadcast signals subject to mandatory cable carriage, were contrary to the text and meaning of the 1992 Cable Act. In improperly addressing primary video, the Commission forgot to focus on the language of the 1992 Cable Act and entered into programming content regulation which is far beyond its legal authority. Finally, in rejecting multicast must carry, the Commission ignored the value placed on a multiplicity of program/information sources by the United States Supreme Court. Upon reconsideration of the *Report and Order*, the Commission accordingly must uphold the plain language of the 1992 Cable Act which permits broadcasters to elect immediate and full carriage of digital broadcast signals, whether HDTV or multicast, pursuant to the proposals set forth herein.

Report and Order and Further Notice of Proposed Rule Making, FCC 01-22 (rel. Jan 23, 2001) ("*Report and Order*").

[3] *See id.* Separate Statements of Commissioners Ness, Furchtgott-Roth, Powell and Tristani.

I. THE 1992 CABLE ACT MANDATES FULL DIGITAL MUST CARRY.

A. The Text of the 1992 Cable Act Requires Digital Must Carry.

In the *Report and Order*, the Commission failed to recognize that the 1992 Cable Act already mandates full and immediate mandatory carriage of digital broadcast signals – without further need for agency rulemaking. The text of the 1992 Cable Act is clear – Section 614 (a) provides that "each cable operator shall carry on the cable system of that operator, the signals of local commercial television stations."[4] The 1992 Cable Act defines a "local commercial television station" as:

> any full power broadcast station . . . licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.[5]

This carriage requirement makes <u>no distinction between analog and digital signals</u>. Thus, under the plain language of the 1992 Cable Act, subject to the limits set forth in the Cable Act and the Commission's rules (regarding one third channel capacity, duplication and signal quality), any full power commercial television station, whether analog or digital, operating in the same market as a particular cable system is entitled to carriage. This is Congressional language reviewed and upheld by the Supreme Court.

Moreover, Congress was not silent with regard to the must carry rights of digital broadcast signals. Section 614(b) of the 1992 Cable Act provided for cable carriage of "Advanced Television" (now digital) signals and gave the Commission a single mission:

> At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems <u>necessary to insure cable</u>

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[4] 47 U.S.C. § 534(a).

[5] 47 U.S.C. § 534(h)(1)(A).

> carriage of broadcast signals of local commercial television stations which have been changed to conform with such modified standards.[6]

Thus, the statute requires DTV carriage when broadcasters' signals are changed, which they irrefutably are at the moment DTV transmissions commence. At that point, the broadcaster has the right to choose cable carriage of either its analog or digital signals since the 1992 Cable Act specifically prohibits the carriage of duplicative program signals. To reach any other conclusion, the phrase "signals . . . which have been *changed*" must be reinterpreted to mean "signals . . . which have been *exchanged,*" which Congress did not say. Indeed, Congress also used the word "changes" in the same critical sentence (*i.e.*, "establish any changes in the signal carriage requirements").[7] The 1992 Cable Act did not require the "exchange" of an analog signal for a digital signal, but only the initiation of digital broadcast. DTV carriage therefore is required upon broadcasters' commencement of digital service if that is what the broadcaster elects.

B. Legislative History Supports Digital Must Carry.

Furthermore, the legislative history surrounding Section 614(b) makes it clear that Congress presumed the mandatory carriage of digital signals and intended the Commission to take whatever steps were necessary, from a strictly technical standpoint, to insure that television broadcasters' digital signals were carried by local cable systems. This directive from Congress is contained in the section of the must carry provisions addressing the technical aspects, (*e.g.*, signal degradation). The placement of the digital

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[6] 47 U.S.C. § 534(b)(4)(B) (emphasis added).

[7] *Id.*

must carry discussion in this section indicates that the question of must carry was not at issue, just the technical aspects.[8]

Additionally, the Conference Report accompanying the 1992 Cable Act required the Commission to "make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry televisions signals complying with [digital] standards in accordance with the objectives of this section."[9] Congress directed the Commission to accomplish for "Advanced Television" signals exactly what Paxson requests; namely, to ensure that television stations transitioning to digital continue to have their free over-the-air broadcast services available as a part of the basic service tiers of cable systems, regardless of whether such services are analog or digital.

Congressional interest in, and support of, the full mandatory carriage rights of digital broadcasters is strong as evidenced by the Congressional letters being sent to the Commission on this matter. Members of both the House and Senate continue to closely monitor the progress of DTV and have requested the Commission to reconsider its decision not to provide immediate and full cable carriage of free over-the-air digital broadcast signals.[10] This support further underscores the FCC's failure to recognize and enforce the Congressional intent expressed in the 1992 Cable Act.

C. The 1992 Cable Act Addresses the Burdens on Cable Operators.

While Congress sought to protect over-the-air broadcast services by establishing the must carry provisions, it also sought to limit the burdens placed on cable operators.

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[8] See *Circuit City Stores v. Saint Clair Adams*, 121 S.Ct. 1302, 2001 U.S. Lexis 2459, *24 (March 21, 2001) (statutory terms must be evaluated in the context of the surrounding statutory language and consistent with Congressional intent).

[9] CONF. REP. NO. 102-862, at 67 (1992).

[10] Paxson understands that letters from certain members of Congress supporting full digital must carry are being separately filed with the Commission such as those attached hereto as Attachment 1.

The must carry obligation, for instance, is limited to one-third of each cable system's capacity.[11] Moreover, stations carried pursuant to retransmission consent rather than must carry nevertheless count towards the one-third cap. Congress further restricted carriage to those stations capable of delivering a good quality signal to the cable system's headend while allowing broadcasters broad discretion in delivering those signals to the cable headends, allowed cable operators discretion in choosing between competing and qualified signals of duplicative programming and permitted carriage of public stations on unused public, educational and governmental channels in some circumstances.[12]

As previously noted, the 1992 Cable Act does not distinguish between broadcasters' analog and digital signals. Just as cable operators' obligations under the 1992 Cable Act extend to the digital world, so do cable operators' protections under the Act. Cable operators' carriage obligations for digital broadcast stations remain limited to one-third of the capacity of their cable systems – regardless of whether that one-third is occupied by digital or analog broadcast signals.

D. The Supreme Court's Decisions Apply Equally to DTV.

The Supreme Court twice considered and ultimately rejected claims that must-carry represents an unconstitutional burden on the rights of cable operators. The Supreme Court found the must carry provisions constitutionally permissible because they furthered the three important government interests of preserving free, over-the-air broadcast television service, promoting the widespread dissemination of information from a

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[11] 47 U.S.C. § 534(b)(1).

[12] 47 U.S.C. §§ 534-535.

multiplicity of sources, and promoting fair competition in the market for television programming, without unduly burdening cable operators.[13]

As the Supreme Court stated explicitly in *Turner II*, "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest."[14] "[B]roadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population"[15] and there is a corresponding "governmental purpose of the highest order" in ensuring access to a multiplicity of sources.[16] The same important governmental interests that the Supreme Court identified as justifying the burden on cable operators have not changed. Indeed, without the Commission's assurance that broadcasters will receive the mandated fully digital must carry, the conversion to digital increases the risk of economic failure for local stations. DTV construction costs are so onerous that they exceed the valuation of some small market broadcast stations, making financing uncertain and potentially unavailable.[17] Moreover, the very stations that provide the greatest diversity of viewpoints – independent stations, affiliates of emerging networks, foreign language broadcasters, and noncommercial stations – are ones most likely to falter or, even fail, under such conditions. Meanwhile, the horizontal concentration and vertical integration in the cable industry that

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[13] Turner Broadcasting System, Inc. v. FCC, 520 US 180 (1997) ("*Turner II*").

[14] *Turner II*, 520 U.S. at 190 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)); 1992 Cable Act, § 2(a)(12).

[15] *Turner II*, 520 U.S. at 190 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

[16] *Id.*

[17] Andrew Bowser, *The DTV Waiting Game*, BROADCASTING & CABLE, Sept. 4, 2000, at 42.

troubled both Congress and the Court have continued unabated, increasing cable operators' ability and incentive to discriminate against broadcasters.[18]

While the governmental interests in must carry apply with equal, if not greater, force in the digital world, the must carry burden on cable operator will decrease as cable systems and broadcast stations continue the transition to digital. Average cable system capacity has more than doubled since the passage of the 1992 Cable Act and as more and more cable systems convert to digital operations, systems with at least 750 MHz of capacity offering hundreds of channels of programming will become the norm.[19] As a result of cable's compression capabilities, broadcast stations will come to occupy a smaller percentage of (and become a smaller burden on) cable systems' capacity. The governmental interests remain and the burdens on cable operators are decreasing, thus, the Supreme Court's rationale for upholding must carry applies with greater force to the full carriage of digital signals.

II. THE COMMISSION EXCEEDED ITS AUTHORITY IN THE REPORT AND ORDER.

The 1992 Cable Act not only fully anticipated digital must carry, it anticipated the Commission's role in putting it into effect. Congress clearly directed the Commission to make rules regarding the *technical changes* needed to ensure carriage *and nothing more*.

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[18] *Turner II*, 520 U.S. at 197-202; CONF. REP. NO. 102-862 at 56 (1992). In *Turner II*, the Supreme Court evinced concern that the top ten MSOs market share had increased from less than 42% of all cable subscribers in 1985 to nearly 54% of all cable subscribers in 1989. As of 2000, the top ten MSOs accounted for 83.4% of cable subscribers. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*, CS Docket No. 00-132, FCC 01-1 at ¶¶ 137, 171, 175 (rel. Jan. 8, 2001). Moreover, given the recent D.C. Circuit Court of Appeals decision striking down both the vertical and horizational ownership caps for cable operators, cable ownership concentration is likely to increase. *See Time Warner Entertainment Co. v. FCC*, 2450 F.3d 1126 (2001).

[19] NCTA's own estimates indicate that at least sixty-five percent of cable homes are already passed by 750 MHz cable plant. *See Report and Order* at ¶125.

All of the Commission's actions beyond this mandate are beyond the Commission's statutory authority and should be eliminated upon reconsideration.

As noted above, the Act provides that the Commission shall initiate proceedings "to establish any changes in the signal carriage requirements of cable television systems necessary to insure cable carriage of broadcast signals of local commercial television stations which have been changed to conform with such modified standards."[20] The legislative history of this provision makes it clear that Congress intended the Commission to take whatever steps were necessary, *from a technical standpoint*, to insure that television broadcasters' digital signals (just as with their analog signals) are carried by local cable systems. The House Report interpreting the above language noted that:

> The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.[21]

The Commission's mandate was clear: *make whatever technical changes are necessary* to ensure continued mandatory carriage of local television stations in the digital world. As noted above, this mandate from Congress was contained in the section of the must carry provisions of the 1992 Cable Act dealing with the technical aspects of must carry, (*e.g.*, signal degradation). The placement of the digital must carry discussion in this same section is indicative of the Congressional intent that the question of must carry was not at issue, just the technical aspects.[22] Any actions concerning cable carriage matters beyond such technical aspects of digital must carry were beyond the scope of the Commission's

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[20] 47 U.S.C. § 534(b)(4)(B).

[21] H.R. REP. No. 102-628, at 94 (1992).

[22] *Circuit City Stores v. Saint Clair Adams*, 121 S.Ct. 1302, 2001 U.S. Lexis 2459, *24.

statutory mandate and must be eliminated. Any other policy matters regarding must carry are simply not permitted to be considered by the FCC under the 1992 Cable Act.

III. THE COMMISSION'S ACTION ON "PRIMARY VIDEO" IS INCONSISTENT WITH THE 1992 CABLE ACT.

A. The 1992 Cable Act Requires Carriage of Multicast Programming.

In addition to being beyond the Commission's statutory authority, the Commission's decision on multicast must carry directly contradicts the 1992 Cable Act. Section 614(b)(3)(A) of the 1992 Cable Act states that cable operators "shall carry, in its entirety ... the primary video, accompanying audio ... and, to the extent technically feasible, programming-related material carried in the vertical blanking interval or on subcarriers."[23] In the *Report and Order*, the Commission concluded that "'primary video' means a single programming stream and other program-related content,"[24] and, therefore, only a single programming stream is entitled to carriage, even if a digital television station is programming multiple streams of free over-the-air programming. This strained reading of the 1992 Cable Act, however, excludes carriage of multicast signals and, as a result, is a policy position of the Commission not permitted by the 1992 Cable Act, is totally at odds with the text, legislative history and all of the policy goals of the 1992 Cable Act, and ignores the Supreme Court's findings, especially in terms of the multiplicity of information sources which multicast must carry would enhance.

In reaching its unsupportable conclusion, the Commission completely ignored the second half of Section 614(b)(3), which states:

> The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized

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[23] 47 U.S.C. § 534(b)(3)(A).

[24] *Report and Order* at ¶57.

> to be substituted, under [the Commission's rules regarding nonduplication protection and syndicated exclusivity and sports broadcasting].[25]

While the Commission purports to rely on one canon of statutory construction,[26] it overlooks another: avoid interpreting a provision in a way inconsistent with the policy of another provision.[27] The Commission's unnecessary reading of "primary video" in Section 614(b)(3)(A) conflicts with the policy and plain language of Section 614(b)(3)(B) – if a cable operator is not carrying the multicast programming of a digital station, it cannot be carrying the entirety of the television station's programming schedule. The only legal interpretation that reconciles these sections is to require carriage of stations' multicast signals and the Commission was legally wrong to order anything less.

As previously noted, the 1992 Cable Act does not distinguish between analog and digital. Analog broadcasters carry the entirety of their programming schedule on a single video stream, while digital broadcasters may carry different parts of their programming schedule on multiple video streams. Nothing in the 1992 Cable Act allows the abridgment of the broadcaster's programming schedule on the basis of the number of video streams used to deliver that programming. In fact, Section 614(b)(3)(B) of the 1992 Cable Act specifically states that the only allowable reason for carrying less than the entirety of the a broadcaster's programming schedule is to ensure compliance with the Commission's rules regarding nonduplication protection, syndicated exclusivity and sports broadcasting. The Commission was not free to create exceptions in addition to those specified by

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[25] 47 U.S.C. § 534(b)(3)(B).

[26] *Report and Order* at ¶54 (*citing* SUTHERLAND, STATUTORY CONSTRUCTION , Vol. 2A, at Section 46.06 (Each word to be given effect.)).

[27] *See United Sav. Ass'n. v. Timbers of Inwood Forst. Assocs.*, 484 U.S. 365, 371 (1988).

Congress.[28] As such, the entirety of the programming schedule is entitled to cable carriage regardless of whether broadcasters carry programming on one video stream or several video streams. Insofar as the *Report and Order* permits carriage of anything less than the entirety of a qualified broadcaster's programming schedule and/or signal, it directly contradicts the requirements of the 1992 Cable Act and must be reversed.

B. "Primary Video" Was Not Intended To Be a Limitation.

In its reading of Section 614 (b)(3) of the Cable Act, the Commission completely mistakes the meaning and importance of the words "primary video." The term was not intended to limit carriage to single channel programming. The word "primary" does not connote singular. "Primary" is singular if the noun it modifies is singular and plural if the noun it modifies is plural (*e.g.*, "primary colors").[29] In the *Report and Order*, the Commission cites dictionary definitions of the word "primary" in support of its conclusion. While Paxson respectfully submits that Section 614(b)(3)(B) of the 1992 Cable Act should take precedence over *The American Heritage Dictionary of the English Language*, it also notes that a further definition of the word primary is "from which others are derived; fundamental."[30] This is the true sense of the word "primary" as it was used by Congress in Section 614(b)(3)(A) because it defines "primary video" in contrast to ancillary and supplementary services, which are those services secondary to, or *derived from*, the "primary video." "Primary video" therefore is properly defined as those programming services that are not ancillary or supplementary services. This definition not only allows for consistency with the requirement to carry the entirety of the programming schedule, but

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[28] *See United States v. Smith*, 499 U.S. 160, 166-67 (1991).

[29] *See* Letter from Jonathan D. Blake, Esq., counsel for MSTV, to Magalie Roman Salas, Esq., FCC (Jan. 17, 2001).

[30] WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS (1996).

conforms with Section 336(b)(3) of the Communications Act of 1934, as amended, which excludes ancillary and supplementary services from mandatory carriage under Sections 614 and 615.[31] Accordingly, primary video as used in the 1992 Cable Act includes the free, over-the-air multicast signals of television stations.

C. The Commission's Approach To "Primary Video" and "Program Related Content" Will Be Unworkable.

As further evidence of the Commission's confusing and incorrect decisions, it did not determine that carriage rights were limited to a single programming stream in all circumstances. In the *Report and Order*, the Commission concluded that, in addition to primary video, "program-related content" also is entitled to mandatory carriage. Thus, in the Commission's view, some multiple programming streams are "program-related content" entitled to carriage and some are not. As such, multicast carriage rights will not only vary from broadcaster to broadcaster but may vary from moment to moment for each broadcaster, depending on the degree of "program-relatedness" of a given video stream at any given moment. This approach is contrary to the Commission's Congressional mandate, is needlessly complex, creates enormous uncertainties, and is unworkable. It also places the Commission in the business of content regulation which is clearly beyond its mandate and is an area where the current Chairman does not intend to take this Commission. It is simply an infringement of broadcasters' free speech rights.

The Commission's request for comments in the *Further Notice of Proposed Rulemaking* ("Further Notice") on the parameters of "program-related" only hints at the

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[31] 47 U.S.C. § 336 (b)(3). The conformity between Sections 336 and 614 is particularly noteworthy because Congress certainly was aware of the potential for multicasting when it passed the 1992 Cable Act, as well as the Telecommunications Act of 1996. *See Report and Order* at n. 158. Congress could have excluded multicast signals from the must carry requirements, as it did for ancillary and supplementary services, or included multicasting within the definition of ancillary and/or supplementary services. Congress choose not to do so.

difficulties the Commission's approach will create. The *Report and Order*, for instance, specifically cites the coverage of a single sporting event from multiple angles as a "program related" use of multiple video streams.[32] The flexibility of DTV, however, would allow a station to preempt a multicast sporting event on one video stream to cover breaking news (a downtown fire, for example) while continuing to cover the game on the remaining video streams. May the cable operator carrying this broadcaster's signal simply drop, mid-broadcast, programming it deems insufficiently program-related? Is this station required to warn the cable operator before cutting away to the non-program-related fire? How will the Commission entertain, let alone resolve, complaints for carriage when the scope of a broadcaster's right to carriage changes on an hourly basis? Of course, this does not even begin to address how such an approach might be accomplished technologically or (keeping in mind the two year delay in issuing the *Report and Order*) how cable operators and broadcasters are to conduct themselves while the Commission considers the comments it gathers from the *Further Notice*. And finally, by denying the protections of the must carry statute, the Commission's approach denies to the public the programming diversity and competition that multicast programming will create.

D. Only Mandatory Carriage of the Entire Programming Schedule is Consistent with the Policy Goals Underlying the Must Carry Statute.

As previously noted, the principal policy goals underlying analog must carry apply with equal, if not greater, force to digital programming. This is especially true for multicast programming. In *Turner II*, the Supreme Court held that must carry requirements advance three interrelated important government interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of

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[32] *Report and Order* at ¶57.

information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.[33]

Congress believed that mandatory carriage was necessary to prevent "a reduction in the number of media voices available to consumers"[34] and found that the cable industry posed a threat to free, over-the-air broadcast television.[35] Evidence indicated that cable systems had both the incentive and ability to drop carriage of local broadcast stations to favor affiliated cable programmers,[36] causing Congress to predict that the "economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."[37] In *Turner II*, the Supreme Court affirmed, on the basis of a substantial record, that the must carry provisions advanced the important governmental interests in a direct and material way.

The implementation of digital television raises precisely the same concerns about loss of service, economic failure, and discriminatory treatment that initially prompted Congress to enact mandatory carriage provisions. The past is prologue. Unless digital television stations' multicast programming is afforded the protection of must carry, cable operators will have the power and the incentive to discriminate against the multicast programming of independent stations, emerging networks, foreign language broadcasters and noncommercial television stations. Many such broadcasters have expressed the belief that multicasting will be crucial to the long term survival of free, over-the-air local

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[33] *Turner II*, 520 U.S. at 212-213.

[34] 1992 Cable Act, § 2(a)(4).

[35] *Turner II*, 520 U.S. at 199.

[36] *Id.*

[37] 1992 Cable Act, § 2(a)(16).

broadcast television.[38] Multicast must carry is thus synonymous with an increase in the multiplicity of information sources – in keeping with the Supreme Court's ruling. For many, multicasting is a central part of offsetting the cost of mandatory digital construction and remaining competitive in a digital multichannel environment. Without the guarantee of access provided by full digital must carry, however, the business models upon which these stations intend to rely are cast in doubt.

Stations cannot be expected to devote the substantial resources necessary to implement digital multicasting in the face of such uncertainty. DTV was implemented to preserve a free, universal broadcasting service and promote the full benefit of the new technology to the public.[39] Without a guarantee that multicast signals will have access to cable homes, however, the viability of one of the most innovative uses of that new technology is gravely in doubt. This will certainly harm competition and the long term viability of free, over-the-air broadcasting. Moreover, multicasting, by increasing the competitiveness of local stations, provides a greater multiplicity of programming sources and viewpoints from a local perspective.

IV. THE PAXSON DTV MUST CARRY PROPOSAL IS CONSISTENT WITH THE 1992 CABLE ACT.

The Paxson DTV Must Carry Proposal (the "*Paxson Proposal*") is fully consistent with the existing technical requirements established by the 1992 Cable Act. The carefully

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[38] *See e.g.* Reply Comments of Association for Maximum Service Television, CS Docket No. 98-120 (filed December 22, 1998) at 27-29; Reply Comments of Association of Local Television Stations, Inc., CS Docket 98-120 (filed December 22, 1998) at 12; Comments of Entravision Holdings, LLC, CS Docket 98-120 (filed October 13, 1998) at 10-11; Comments of Sinclair Broadcast Group, CS Docket 98-120 (filed October 13, 1998) at 8-9; Comments of Arkansas Broadcasters Association, CS Docket 98-120 (filed October 13, 1998) at 7-9.

[39] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry*, 10 FCC Rcd 10540, 10541 (1995).

formulated *Paxson Proposal* represents a reasonable and practical means of promoting the goals of the must carry statute, encouraging the development of digital services, speeding the return of broadcasters' analog spectrum, and placing the least intrusive burden on cable operators.[40] The *Paxson Proposal* would allow broadcasters to elect to have either their analog or digital signals carried on cable systems recognizing the non-duplicative language in the 1992 Cable Act. For the carriage of their digital signals, the main programming would be down-converted by the cable operator to analog and carried on the analog portion of the cable system. The incentive is to carry the digital signal and, therefore, rely less on the analog signal, thereby furthering the digital transition. This replacement carriage would be to the same number of cable homes and on the same channel as the basic analog carriage. In addition, television stations choosing to allow cable systems to remove their analog signal in favor of their digital signals would have their HDTV or digital multicast signals carried on the digital portion of the cable system, equipped with digital set-top boxes. The cable channel mapping protocol (PSIP) would permit the multicast channels to appear in sequence with the station's primary channel (*e.g.*, if the primary channel is 20, then the multicast channels would be 201, 202, 203, and 204). The downconverted digital signal (carried on the analog portion of the cable systems) and the multicast digital signals providing free programming services would be provided as part of the basic cable services provided to all analog cable subscribers and (for the multicast signals) to all subscribers with digital boxes. Thus, as digital set-top boxes are deployed and analog boxes replaced, full digital must carry would come to pass.

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[40] *See, e.g.*, Letter from Lowell W. Paxson to William E. Kennard, Chairman, Federal Communications Commission (May 3, 2000).

The *Paxson Proposal* can be characterized as falling under the Commission's so-called "Either-Or" category outlined in the *DTV Must Carry NPRM* and for which it sought comment.[41] In the *Report and Order*, the Commission only made passing reference to the Either-Or proposal, providing no explicit analysis regarding its legitimacy and consistency with the 1992 Cable Act.[42] The Either-Or proposal, however, embodied by the *Paxson Proposal*, is entirely consistent with the 1992 Cable Act, as extensively demonstrated above and, in fact, best meets the intentions of Congress and conforms to the 1992 Cable Act by avoiding the issue of program duplication.

Indeed, the Commission's own logic demonstrates that television stations should be able to elect digital carriage during the transition while continuing over-the-air analog service. The Commission made clear that mandatory cable carriage of a broadcaster's analog or digital signal would continue during the DTV transition. Television stations with paired digital allotments were assured of digital carriage upon return of their analog spectrum.[43] The Commission reasoned that such carriage placed a *de minimis* burden on cable operators and essentially served as a "trade-off in the case of a station substituting its digital signal in place of its analog signal."[44]

By this reasoning, the Commission should adopt the approach embodied in the *Paxson Proposal*. Why shouldn't a broadcast television station be able to elect mandatory carriage of either its analog or digital signals? A cable system carrying the digital signals and only the digital signals of a broadcast station should be indifferent to whether the

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[41] Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120, *Notice of Proposed Rule Making*, FCC 98-153, at ¶47 (1998) ("*DTV Must Carry NPRM*").

[42] *Report and Order* at ¶11.

[43] *Report and Order* at ¶12.

[44] *Id.*

station also is still transmitting in analog. The cable system suffers no greater burden if the analog station remains on the air and for purposes of cable carriage, the digital transition for a station would be complete once a broadcaster elects digital carriage. The arithmetic is revealing. A 750 MHz cable system is required by the 1992 Cable Act to devote 250 MHz to local television signals. Under the Paxson Proposal such a cable system operating in a market with 20 television stations would devote 120 MHz for the analog portion of the system and another 3 MHz per station on the digital tier for a total of 180 MHz – far below what the 1992 Cable Act requires be devoted to the carriage of such signals.

Moreover, the Commission's position does nothing to further the implementation of digital television. Under the Commission's recently adopted rules, only those television stations which terminate analog service are entitled to cable carriage of their digital signals. This makes no sense whatsoever. Under these circumstances, where is the incentive for consumers to purchase digital receivers? And broadcasters will have little incentive to give up analog service. In addition to the 30% of households which rely upon over-the-air signals, the other 70% of households relying on cable or some other MVPD each have over two television receivers that continue to rely on over-the-air signals. How many cable subscribers are expected to abandon their analog receivers and purchase a digital one (at a premium) just so they can continue watching existing local analog programming coming down the pipe? Without access to digital programming, digital penetration will not reach the 85% level required to terminate analog service.[45]

The Commission's new DTV must carry rules create an incentive structure that perpetuates analog service. Since households will have little incentive to switch to digital receivers, broadcasters have no incentive to terminate analog service to obtain digital

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[45] 47 U.S.C. §309(j)(14).

cable carriage. Analog spectrum will not be returned. Digital television will not be implemented. Innovation will not occur.

The *Paxson Proposal* represents a workable, reasonable way of accomplishing the Congressional goals underlying the must carry statute. First, and foremost, the *Paxson Proposal* will secure the future of free over-the-air broadcasting by guaranteeing that viewers will have access to the full programming services of broadcasters choosing to have their digital signals carried. Additionally, the *Paxson Proposal* will encourage the development of a wide range of new and innovative programming services by providing broadcasters with the assurance that such services will have access to the widest possible audience. Also, the *Paxson Proposal* promotes fair competition by giving digital broadcasting a chance to flourish or fail on the merits of its programming, rather than the whims of cable operators.

The *Paxson Proposal* will speed the ultimate transition to full digital operations for all stations and the return of broadcasters' analog spectrum. Congress identified the prompt transition to digital television as an important national interest, creating a more efficient use of the electromagnetic spectrum, recovering portions for new uses, and generating additional federal revenues.[46] As the amount of DTV programming grows, consumers will be more willing to buy DTV receivers, encouraging more DTV programming and bringing the transition closer to completion. The Paxson Proposal also will contribute to the three important governmental issues identified by the Supreme Court – multicasting must carry will contribute to programming diversity, the multiplicity of information sources and robust competition in the programming marketplace.

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[46] 47 U.S.C. § 337.

CONCLUSION

For the foregoing reasons, as well as those stated in its prior pleadings, Paxson respectfully requests that the Commission reconsider and reverse its decisions in the *Report and Order* as detailed herein and adopt an Order implementing full digital multicast must carry for television stations electing such carriage whether or not the stations also are operating in an analog mode.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

By: _____
Name: WILLIAM L. WATSON
Title: Vice President

Paxson Communications Corporation
601 Clearwater Park Road
West Palm Beach, FL 33401

Dated: April 25, 2001

ATTACHMENT 1

Congress of the United States

Washington, DC 20515

April 24, 2001

The Honorable Michael K. Powell, Chairman
Federal Communications Commission
455 N 12th Street, S.W
Washington, DC 20554

Dear Mr. Chairman:

The Final Rule and Further Notice of Proposed Rulemaking (FNPR) pertaining to the "Carriage of Digital Television Broadcast Signals" (CS Docket No. 98-120, 00-96, 00-2; FCC 01-22) were published in the Federal Register on March 26, 2001. We understand that the Federal Communication (FCC) will entertain comments regarding certain parts of this rule until April 25, 2001.

Since adoption of the Final Rule, a number of small and emerging broadcasters have contacted us to express their deep concerns regarding the impact of the rule's multicast must-carry provision. In addition, hearings conducted by the Senate Commerce, Science & Transportation Committee on March 1, 2001 and the Telecommunications & the Internet Subcommittee of the House Energy & Commerce Committee on March 15, 2001 further illustrate continued interest in studying digital transition issues and related must-carry rules.

According to your testimony on March 29, 2001 before the House Subcommittee on Telecommunications and the Internet, the FCC's multicast, must-carry interpretation of statute will "will probably have a disproportionate impact" on small and independent, spiritual, Spanish-language and emerging network broadcasters. These emerging network and independent broadcasters are vital to the diversity of programming and digital television. In order to balance this disproportionate effect, we respectfully request that you move to reconsider the multicast must-carry provision of the Final Rule. Congress may need additional time to fully contemplate the intent of the statute and consider input from the broadcast television and cable industries.

We appreciate your attention to this matter.

Sincerely,

Cliff Stearns

Martin Frost

Ileana Ros-Lehtinen

Carrie P. Meek

Jose E. Serrano

Corrine Brown

Clay Shaw

Earl F. Hilliard

Peter Deutsch

Asa Hutchinson

Mark Foley

Robert Wexler

Joe Baca

Sylvestre Reyes

Solomon Ortiz