



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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Carriage of the Transmissions of)	CS Docket No. 98-120
Digital Television Broadcast Stations)	
)	
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. <u>00-96</u>
)	
Application of Network Non-Duplication,)	CS Docket No. 00-2
Syndicated Exclusivity and Sports Blackout)	
Rules to Satellite Retransmission of)	
Broadcast Signals)	

To: The Commission

**PAXSON COMMUNICATIONS CORPORATION
REPLY TO OPPOSITIONS**

Pursuant to Section 1.429 of the Commission's rules,¹ Paxson Communications Corporation ("Paxson") hereby submits this consolidated Reply to the Oppositions² to its Petition for Reconsideration of the First Report and Order in the above-captioned proceeding.³ The Oppositions, individually and collectively, misconstrue both Paxson's

¹ 47 C.F.R. § 1.429 (2000).

² Opposition to Petitions for Reconsideration of Time Warner Cable, CS Docket 98-120 (May 25, 2001) (the "Time Warner Opposition"), Opposition to Petitions for Reconsideration of the National Cable & Telecommunications Association, CS Docket Nos. 98-120, 00-96 and 00-2 (May 25, 2001) (the "NCTA Opposition"), Comments of A&E Television, CS Docket No. 98-120 (May 25, 2001) (the "A&E Opposition" and, collectively with the Time Warner Opposition and NCTA Opposition, the "Oppositions").

³ 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) (the "Report and Order").

Petition for Reconsideration (the "Petition") and the requirements of the 1992 Cable Act. The FCC, therefore, should disregard the *Oppositions* and, upon reconsideration of the *Report and Order*, adhere to the plain language of the 1992 Cable Act (as upheld by the Supreme Court) which permits broadcasters to elect immediate and full carriage of digital broadcast signals, whether HDTV or multicast, pursuant to the proposals set forth in the *Petition*.

I. The 1992 Cable Act Requires Immediate Digital Must Carry.

A. The Statutory Language Requires Digital Must Carry.

The *Oppositions* assert that Paxson and other broadcast petitioners misconstrue Section 614 of the 1992 Cable Act (47 U.S.C. §534), which, the *Oppositions* further assert, prohibits digital carriage during the DTV transition.⁴ At most, Time Warner argues, Section 614(b)(4)(B) provides the FCC with discretion to impose digital must carry.⁵ No such discretion exists – as Paxson demonstrated in the *Petition*, it was the clear intent of Congress as reflected in Section 614 to require the immediate carriage of the digital signals of qualified local broadcasters.⁶

Section 614(b)(4)(B) states:

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 necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

⁴ See Time Warner Opposition at 3-5, NCTA Opposition at 7, and A&E Opposition at 2.

⁵ Time Warner Opposition at 5.

⁶ Petition for Reconsideration of Paxson Communications Corporation, CS Docket Nos. 98-120, 00-96, and 00-2 (Apr. 25, 2001) at 3-4 (the "Petition").

47 U.S.C. § 534(b)(4)(B). Time Warner Cable (“Time Warner”) crucially misreads Section 614(b)(4)(B) by insisting that the clause “which have been changed” refers solely to “television stations.” This misreading allows Time Warner to insist that the FCC’s duty to “ensure cable carriage” applies only to some undefined “signals” of the modified stations. Time Warner’s twisted reading of Section 614, however, makes no sense. Section 614(b)(4)(B) addresses the “modifications of the standards for television broadcast signals” --- not modifications to television stations. Thus, the clause “which have been changed to conform with such modified standards” must refer to the signals and not the stations. Properly read, Section 614(b)(4)(B) provides no discretion on the part of the FCC, it must ensure cable carriage of signals which have been changed to digital.

B. The Paxson Proposal Addresses Cable Concerns.

Time Warner and the National Cable & Telecommunications Association (“NCTA”) strenuously object to “dual carriage” of analog and digital signals during the DTV transition. Paxson, however, has not proposed that the FCC adopt dual carriage. Rather, Paxson proposes an approach entirely consistent with the 1992 Cable Act under which broadcasters could elect to have either their analog or digital signals carried pursuant to the mandatory carriage rules.⁷ This approach addresses many of the concerns raised by the Oppositions, particularly with respect to the burden placed on cable operators and programmers. Under the Paxson Proposal, the main programming of stations electing carriage of their digital signals would be down-converted by the cable operator to analog and carried on the analog portion of the cable

⁷ See Petition at 16-20 (describing the Paxson Proposal).

system, while the HDTV or digital multicast signals would be carried on the digital portion of the cable system equipped with digital set-top boxes.

Thus, the Paxson Proposal eases the burdens imposed by digital must carry in several ways. The Paxson Proposal clearly lightens the potential load on cable operators' systems because it requires less cable system capacity than a dual carriage regime. Indeed, under the Paxson Proposal, cable operators would be required to devote substantially less capacity to must carry signals than the 1992 Cable Act requires. A 750 MHz cable system, for instance, 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 the 250 MHz required by the 1992 Cable Act.

Moreover, the Paxson Proposal is incremental – cable systems without digital tiers will not be required to clear capacity for broadcasters' HDTV or digital multicast programming. Rather, the requirement to carry such programming only attaches to digital systems, which, presumably, have greater capacity than analog-only systems. Thus, the Paxson Proposal keeps demands of must carry in line with the capacity to meet those demands. Additionally, the Paxson Proposal eliminates the possibility of carrying duplicative programming associated with dual carriage.⁸

C. The Supreme Court's Decisions Support Digital Must Carry.

The Oppositions, however, do not limit themselves to dual carriage. Fundamentally, the Oppositions object to any mandatory carriage of digital signals during the transition as an unconstitutional burden on cable operators and

programmers.⁹ This position does not withstand the most rudimentary scrutiny. 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 multiplicity of sources, and promoting fair competition in the market for television programming, without unduly burdening cable operators.¹⁰

Time Warner suggests that competition from DBS eliminates all of the Supreme Court's concerns regarding cable operators ability and incentive to discriminate against local broadcasters.¹¹ While Paxson understands that the cable industry is genuinely alarmed at facing competition of any kind, the fact remains that cable still controls access to approximately seventy percent of television homes. Additionally, the horizontal concentration and vertical integration that troubled both Congress in 1992 and the Supreme Court thereafter have continued, increasing cable operators' ability and incentive to discriminate against broadcasters.¹² Moreover, given the recent D.C. Circuit Court of Appeals decision striking down both the vertical and horizontal

⁸ See A&E Opposition at 4.

⁹ Time Warner Opposition at 8-9; NCTA Opposition at 7; A&E Opposition at 5-6.

¹⁰ *Turner Broadcasting System, Inc. v. FCC*, 520 US 180 (1997) ("*Turner II*").

¹¹ Time Warner Opposition at 8.

¹² *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).

ownership caps for cable operators, cable ownership concentration and vertical integration is likely to increase.¹³

Thus, as Paxson and other petitioners have shown, the *Turner II* rationale applies with greater force to digital broadcasting. While the threat of discrimination and exclusion continues unabated, the conversion to digital increases the risk of economic failure for local stations. Moreover, the stations that provide the greatest diversity of viewpoints – independent stations, affiliates of emerging networks, foreign language broadcasters, and noncommercial stations – are the stations most likely to fail under such conditions and the most likely to be dropped by cable operators in favor of more popular, and profitable, cable networks. Meanwhile, as noted above and in the Petition, the burden imposed by digital must carry – particularly as set forth in the Paxson Proposal – is no greater than that imposed by analog must carry. Indeed, as cable companies continue to expand channel capacities, this burden will only continue to decrease. As such, the First Amendment concerns raised by the Oppositions have been fully addressed.

II. The 1992 Cable Act Requires Full Digital Must Carry.

Both Time Warner and NCTA object to Paxson's assertion that "primary video" in the context of Section 614, must include the free, over-the-air multicast programming of qualified local television stations. NCTA notes, as the FCC did in the *Report and Order*, that "there is some video that is primary and some that is not."¹⁴ NCTA then asserts that the petitioners, including Paxson, "never identify *any* video that is not the primary

¹³ See *Time Warner Entertainment Co. v. FCC*, 2450 F.3d 1126 (2001).

¹⁴ NCTA Opposition at 8 (*citing* Report and Order at ¶54).

video.”¹⁵ That is not true. Paxson, for one, noted that “primary video” was properly defined in contrast to those programming services that are *not* “primary” – *i.e.*, ancillary or supplementary services (which are as likely as not to be video services).¹⁶

NCTA also claims that mandatory carriage of multicast signals will not further any of the governmental interests specified by the Supreme court in *Turner II*.¹⁷ As noted above, however, 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.

As Paxson noted in the Petition, 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. 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 broadcast television.¹⁸ For many, multicasting is a

¹⁵ *Id.*

¹⁶ Petition at 12.

¹⁷ NCTA Opposition at 11-12.

¹⁸ See *e.g.* Petition for Reconsideration of the Association of America’s Public Television Stations, et. al., CS Docket No. 98-120 (Apr. 25, 2001) at 13-14, Petition for Reconsideration of Telemundo Communications Corporation, CS Docket No. 98-120 (Apr. 25, 2001) at 7, Reply Comments of Association for Maximum Service Television, CS Docket No. 98-120 (Dec. 22, 1998) at 27-29; Reply Comments of Association of Local Television Stations, Inc., CS Docket 98-120 (Dec. 22, 1998) at 12; Comments of Entravision Holdings, LLC, CS Docket 98-120 (Oct. 13, 1998) at 10-11; Comments of Sinclair Broadcast Group, CS Docket 98-120 (Oct. 13, 1998)

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.

Moreover, digital multicasting promises a dramatic increase in the number of diverse voices. Public television stations, for example, intend to use multicasting to provide additional educational and children's programming.¹⁹ Likewise, foreign language broadcasters will be able to provide expanded foreign language programming services.²⁰ Thus, NCTA's complaint that multiple video programming streams from a single broadcaster does not enhance the availability of programming from a multiplicity of sources is shortsighted. **With multicasting, a single source can have many diverse voices.**

Meanwhile, Time Warner accuses Paxson and other broadcasters of "a transparent sleight of hand" in defining the term "primary video" and then proceeds to perform some linguistic legerdemain of its own.²¹ Time Warner bends and twists Section 614(b)(3)(A) to arrive at the conclusion that "primary" must be singular because it modifies the singular noun "video ... transmission" rather than the collective noun "video."²² In addition to being wrong, Time Warner misses the point – the word

at 8-9; Comments of Arkansas Broadcasters Association, CS Docket 98-120 (Oct. 13, 1998) at 7-9.

¹⁹ Petition for Reconsideration of the Association of America's Public Television Stations, et al., CS Docket No. 98-120 (Apr. 25, 2001) at 11-12.

²⁰ Petition for Reconsideration of Telemundo Communications Corporation, CS Docket No. 98-120 (Apr. 25, 2001) at 3.

²¹ Time Warner Opposition at 12.

²² *Id.*

“primary” may be singular or plural and, therefore, can not, in and of itself, justify restricting carriage to a single programming stream.²³

Finally, both Time Warner and NCTA take issue with Paxson’s assertion that Section 614(b)(3)(B), which compels the carriage of the entirety of the program schedule of qualified local broadcasters, requires the carriage of multicast signals.²⁴ NCTA, however, misconstrues the statute, creating distinctions where there are none.²⁵ Section 614(b)(3)(B), NCTA argues, “has nothing to do with carriage of multiple channels.”²⁶ While Section 614(b)(3)(B) does not specifically address digital multicasting, neither does it not distinguish between digital and analog. Analog broadcasters carry their entire programming schedule on a single video stream. Digital broadcasters may carry their programming schedule on several video streams. Section 614(b)(3)(B) applies to both without distinction and NCTA fails to justify creating such distinctions.

Time Warner, on the other hand, misconstrues Paxson’s argument. Paxson does not take the position that “the entirety of the program schedule” effectively means “all programming,” as Time Warner suggests.²⁷ The obligation to carry the entirety of the programming schedule of a digital broadcaster is no different than the obligation to carry the entirety of the programming schedule of an analog broadcaster. In each case,

²³ The fact that the word “transmission” in Section 614(b)(3)(A) is singular clearly indicates that it solely refers to the line 21 closed caption transmission because if it referred to the primary video and accompanying audio, as well as the line 21 closed caption material, the word “transmissions” would be used.

²⁴ Petition at 3.

²⁵ NCTA Opposition at 13.

²⁶ *Id.*

²⁷ Time Warner Opposition at 14-15.

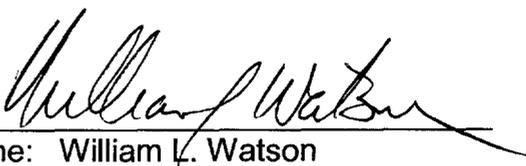
to the extent that programming is not part of the primary video (i.e., it is ancillary or supplementary) it is not part of the programming schedule subject to must carry. Thus, the Oppositions fail to justify the FCC's clear departure from the 1992 Cable Act in denying full digital must carry rights to multicast signals.

CONCLUSION

For the foregoing reasons, as well as those stated in its prior pleadings, Paxson respectfully requests that the FCC disregard the Oppositions and reconsider and reverse its decisions in the *Report and Order* 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,

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Dated: June 7, 2001

CERTIFICATE OF SERVICE

I, **William L. Watson**, do hereby certify that on this 7th of June, 2001, I caused a copy of the foregoing **REPLY TO OPPOSITIONS** to be served by first – class mail, postage prepaid, to the parties listed below:

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