

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Carriage of Digital Television Broadcast Signals)	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, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals)	CS Docket No. 00-2
)	

**COMMENTS OF
HOME BOX OFFICE**

Home Box Office (“HBO”), a Division of Time Warner Entertainment Company, L.P., by its attorneys, and pursuant to Section 1.415 of the Commission’s Rules, hereby submits its comments in response to the Commission’s Further Notice of Proposed Rulemaking in CS Docket No. 98-120.^{1/} In the *FNPRM*, the Commission requests information concerning the issue of mandatory dual carriage of analog and digital signals of local television broadcast stations. HBO will direct its comments i) to the effect on cable program networks of requiring cable

^{1/} *In the Matter of Carriage of Digital Television Broadcast Signals, 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 the Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, CS Docket No. 00-2, Further Notice of Proposed Rulemaking, (rel. Jan. 23, 2001) (“FNPRM”).*

operators and other multichannel video programming distributors (“MVPDs”) to carry the digital television signal of a station, in addition to the analog signal of that same station, and ii) to how the resolution of that carriage issue will impact the digital transition process.

HBO endorses the Commission’s initial conclusion that a dual carriage requirement is likely to create an unconstitutional burden on cable operators’ and other MVPDs’ First Amendment interests. Moreover, as will be demonstrated below, although overall cable operator capacity may be increasing, there is likewise increasing demand for that capacity from new and enhanced cable networks (many of which are being launched by broadcasters themselves) and from other non video services offered over cable systems. In light of these circumstances, for the FCC to award by regulation hundreds of cable channels to broadcasters would give them a significant, unnecessary advantage in a highly competitive market for MVPD “shelf space.” Such a result would burden the First Amendment rights of others seeking to obtain carriage for their programming in the marketplace, and, in the end, would retard, not hasten, the transition to digital television.

I. Interest of HBO

Since the 1970s, HBO has been engaged in providing television programming services, initially for distribution over cable television systems, and today for distribution over a wide variety of MVPD facilities (cable, wireless cable, direct broadcast satellites (“DBS”), fixed satellite service satellites (“FSS”), satellite master antenna television (“SMATV”), etc.).

In 1992, HBO became the first network in the United States to offer full-time digital transmission of its television programming. Today, HBO provides 26 standard- and 2 high-definition television (“SDTV” and “HDTV”) digital feeds of its HBO and Cinemax premium

programming services.^{2/} In 1992, the digital feeds were transmitted by satellite to cable system headends where they were decoded and transmitted down the cable plant in an analog format. Beginning in 1997, many of HBO's cable affiliates began distribution of HBO's digital feeds over their cable systems in a digital format, directly to subscriber digital set-top decoders, which, in turn, deliver an analog output to the subscribers' television sets.

In 1994, HBO programming began to be distributed digitally by direct-to-home ("DTH") satellite service operators, both DBS and medium power FSS. Today, DTH signals of HBO programming are transmitted directly from DBS and C-band FSS satellites to consumers' antennas and digital integrated receiver/decoders. All of the HBO digital services were SDTV until 1999, when HBO added an east and west coast version of its HBO service in HDTV utilizing the 1080 interlace format, making HBO the first 24-hour HDTV service in the United States.

II. Imposition of Dual Must Carry Would Create an Unconstitutional Burden on Cable Program Networks' First Amendment Rights

In the initial round of comments in this proceeding in 1998, HBO and others demonstrated that a dual carriage requirement would burden cable operators' First Amendment interests substantially more than is necessary to further the government's interest in preserving the benefits of free over-the-air local broadcast television and in promoting competition in the

^{2/} HBO provides east and west coast time zone analog feeds of HBO and Cinemax and an east and west coast time zone feed of HBO HDTV. In addition, HBO provides east and west coast time zone digital feeds of the following: HBO, HBO PLUS, HBO SIGNATURE, HBO FAMILY, HBO LATINO, HBO COMEDY, HBO ZONE, CINEMAX, MOREMAX, ACTIONMAX, and THRILLERMAX, as well as an east coast time zone feed of WMAX, @MAX, 5STARMAX and OUTERMAX.

market for programming. Not only would such rules infringe upon the MVPD's First Amendment rights to select the digital services of their choice, the rules would impair the First Amendment rights of HBO by depriving it, in many cases, of the opportunity to obtain distribution of its digital services because of the broadcasters' priority over limited channel capacity.

The overwhelming record developed in this proceeding in 1998 showed that there was real and vigorous competition among many program services seeking initial and expanded carriage on cable systems. In this environment the imposition of a dual must carry requirement would work to the competitive advantage of broadcast programming and to the detriment of alternative non-broadcast offerings.

There has been little material change from the situation that existed during the first round of filings. In fact, the growth in the number of cable networks and of "multiplexed" cable network channels, and the competition for cable channel capacity coming from non-video services, has exacerbated the competition for cable channels. Although over the last two years, cable operators have continued to upgrade their systems and increase channel capacity, the fact remains that operators continue to be channel-limited.

For example, between October of 1998 and October of 2000, the number of subscribers served by cable systems with a 54+ channel capacity rose by less than nine percent.^{3/} During this same period, the proliferation of cable program networks has proceeded apace. For instance, Discovery Communications Inc. had 5 channel offerings at the beginning of 1998, but by

^{3/} See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, Sixth Annual Report ("1999 Competition Report"), 15 FCC Rcd 978; *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-132, Seventh Annual Report ("2000 Competition Report"), FCC 01-1 (rel. Jan 8, 2001).

October of 2000, Discovery had increased its offerings to 9 programming services.^{4/} HBO also has increased the number of channels that it seeks to have carried on cable systems. For example, in 1998, HBO had 20 digital feeds of its HBO and Cinemax services and today it has 26 such feeds, plus two channels of HDTV.

In addition to the dramatic increase in the number of channels programmed by existing program networks, many new program networks also compete for channel space. Between October 1998 and October 2000, 52 national video programming services have launched, in addition to numerous regional video-programming services.^{5/} An even greater number are currently planned.^{6/}

Many of the cable program services competing for channel capacity are owned by broadcasters themselves. Disney, for instance, now owns a national television broadcast network (ABC), numerous local television broadcast stations, and numerous advertiser-supported networks (Disney Channel, six of ESPN's networks, Toon Disney, SoapNet, and portions of A&E, E! Entertainment, and Lifetime). Local broadcasters likewise are starting cable channels in their local television markets and compete with other program services for carriage on local cable systems. It is becoming more commonplace for broadcasters to exercise their government-granted leverage from analog retransmission consent/must carry rights to secure channel space for their cable networks.^{7/} Now, the broadcasters are seeking government help to leverage

^{4/} See *2000 Competition Report*, Appendix D, Table D-1.

^{5/} *Id.*, Appendix D, Tables D-1, D-2, D-3.

^{6/} *Id.*, Appendix D, Table D-4.

^{7/} "Just two days before their Dec. 31 extension was set to expire, Disney was able to resolve its issues with Comcast, which involved the linkage of retransmission consent with a Disney Channel move to basic and carriage of SoapNet." Linda Moss, *Comcast, Cable One Reach Disney Deal*, Multichannel News, Jan. 1, 2001, at 2.

carriage of their digital signals, despite the fact that they so far have offered little in the way of HDTV programming.

Not only is the supply of cable capacity being strained by an increasing number of competing video services, but much of the capacity being added by cable operators has been earmarked for other services, including non-video offerings. In a recent report, it was observed that:

[C]able operators have shifted their marketing efforts to selling new services to their existing customer base, rather than selling the same services (i.e., cable TV) to new consumers. Cable operators are now selling multimedia services, digital video, video-on-demand, telephony and high-speed data services.^{8/}

Many of these new services will require significant amounts of cable capacity:

Analysts predict that by 2003, worldwide cable modem subscriptions will leap from 2.2 million by the end of 1999 to almost 12.7 million in 2003

* * *

Current network capacity is being taxed by increases in take-rates (subscribers) and the addition of new services and applications such as data, Internet Protocol (IP) telephony and streaming video.^{9/}

^{8/} *DSL v. Cable Modems: The Future of High-Speed Internet Access 2000-2005* (2000), at <http://www.insight-corp.com/adsl.html>. See also, *Communications Daily*, Dec. 7, 2000 (“[A]nalysts said cable's financial prospects remained bright because of industry's focus on generating extra revenues from digital video, high-speed data, VoD and other new services.”); *Looking Ahead: Cablevision, Comcast Show Path to Digital Future*, CableFAX Daily, Vol. 12, No. 90, May 9, 2001 at 1 (“[Cablevision] said it will be ready to roll out VOD and IP telephony services when it deploys Sony digital set-tops (expected this Sept.)”); Rick Bird, *Time Warner to Offer Video on Demand*, Augusta Chronicle, May 4, 2001 (“Time Warner will march out VOD in late summer”).

^{9/} Sara Manderfield, *Reconfiguring Networks for Dynamic Cable Modem Take-Rates*, Plant Management (Sept. 2000), at <http://www.cedmagazine.com/pm/0009/pm900c.htm>.

The foregoing demonstrates unequivocally that the constraints of channel capacity that prompted the Commission's initial conclusion that dual must carry is unconstitutional have hardly been alleviated. Concurrent with the upgrade of MVPD channel capacity has come an ever-increasing number of program network channels and other non-video services competing for channel capacity. The Commission accordingly must acknowledge that its inclination towards a finding that dual must carry would be unconstitutional remains correct in today's market environment.

III. Imposition of Dual Must Carry Would be Contrary to Public Policy

The digital television policy articulated by Congress and the Commission most recently is to energize the transition to DTV and complete it as soon as possible.^{10/} There is general recognition that the driving force in achieving this transition will be the increasing availability of high quality programming, especially HDTV. Nevertheless, broadcasters have yet to demonstrate the commitment to produce the required programming in HDTV.^{11/}

In contrast, such cable networks as HBO, Showtime, Discovery and MSG Network are well ahead of broadcasters in providing HDTV programming. For example, HBO provides more HDTV programming in any given week than all the broadcast networks combined, with Showtime carrying almost as much. This disparity in HDTV efforts comes despite the fact that

^{10/} See, e.g., *Communications Daily*, April 6, 2001 (FCC Chairman Powell calling the 2006 deadline for full switchover to DTV "premature"); *Communications Daily*, March 16, 2001 ("Rep. Dingell says DTV transition may require government intervention").

^{11/} See, e.g., Robert Pepper, FCC Office of Plans and Policy, *Communications Daily*, April 24, 2001 (noting that "only CBS and PBS have made a big commitment to HDTV programming"); and see Gary Shapiro, CEA President, *Communications Daily*, April 24, 2001 (stating that there is "a sense that broadcasters are not providing enough HDTV programming").

the broadcasters have been awarded a considerable benefit in the form of free digital broadcast spectrum, ostensibly to promote the development and availability of HDTV.

Furthermore, MVPD's have demonstrated that they will carry the quality programming that their subscribers demand, as witnessed by the head of the FCC's Office of Plans and Policy's recent statement that "if you offer compelling programming, cable will carry you."^{12/} The transition to DTV will best be accomplished by freeing cable operators and other MVPDs to offer their subscribers the most appealing programming available.

Consistent with enunciated policy to jumpstart the transition, the answer is not to award channels by government fiat to one group of programmers (broadcasters), regardless of whether they have demonstrated a commitment to producing programming of high content and technical quality. The best approach to achieve this policy goal is to let *all* programmers compete equally, based on the programming they offer. It is incumbent on the Commission, therefore, to permit cable operators to fill their available channels with the quality digital, and especially HDTV, programming services that are most likely to appeal to their viewers, regardless of origin.

^{12/} Robert Pepper, FCC Office of Plans and Policy, *Communications Daily*, April 24, 2001 (noting that "recent cable carriage deals with PBS showed that cable was willing to carry DTV if programming was good enough").

Conclusion

For the foregoing reasons, HBO urges the Commission to adhere to its initial conclusion and reaffirm that mandatory dual broadcast signal carriage would be an undue burden on the First Amendment rights of both MVPDs and non-broadcast program networks.

Respectfully submitted,

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