BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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JUN 4 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

REPLY OF THE WALT DISNEY COMPANY

The Walt Disney Company ("TWDC"), by its undersigned counsel, and pursuant to Section 1.429(g) of the rules of the Federal Communications Commission ("FCC" or "Commission"),[1] hereby submits this reply to the oppositions filed in response to TWDC's *Petition for Reconsideration*[2] of the *First Report and Order* in the above captioned proceeding.[3]

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1 47 C.F.R. § 1.429(g).

2 *See* Petition for Reconsideration of The Walt Disney Company, CS Docket 98-120, (filed Apr. 25, 2001) ("*Petition*").

3 *Carriage of Digital Television Broadcast Signals, Amendment of Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, FCC 01-22, released January 23, 2001 (*First Report and Order and Further Notice of Proposed Rulemaking* in CS Dockets No. 98-120, 00-96, and 00-2) [hereinafter "*Order*"].

I. INTRODUCTION

Digital television technology will transform the way consumers relate to and interact with television. Multicasting is one of the most innovative DTV services, providing broadcasters with the flexibility to produce and broadcast separate locally zoned newscasts, to air multiple programming streams simultaneously to serve a diverse base of viewers,[4] and to provide additional programming that will transform today's sports offerings.

The Commission, in adopting the digital television standard, stressed that its rules must "strengthen, not hamper, the possibilities of broadcast DTV's success."[5] In direct contradiction to its own admonition, however, the Commission's definition of the term "primary video" jeopardizes the feasibility of multicasting. Unless the Commission alters its present construction of the Must Carry statute, consumers (including cable consumers) likely will be denied the benefits of diverse enhanced digital services that broadcasters otherwise could provide.

None of the arguments in the *Oppositions*[6] successfully rebuts TWDC's position that the Commission's decision contravenes the express goals of the 1992 Cable Act[7] by arbitrarily denying the benefits of multicasting to a significant segment of the public, cable television subscribers, thereby disenfranchising them from the benefits of free, over-the-air broadcasting and placing that service at risk. Specifically, the *Oppositions* fail to undercut TWDC's conclusion that the Commission's construction of the phrase "primary video" in Section

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4 *E.g.*, additional children's programming.

5 *See In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809,12811-12, ¶¶ 3-6 (1997) (*Fifth Report and Order* in MM Docket No. 87-268) [hereinafter "*DTV Fifth Report and Order*"].

6 *See* Opposition of National Cable & Telecommunications Association ("NCTA Opposition"); Opposition of Time Warner Cable ("Time Warner Opposition") [hereinafter, collectively, "*Oppositions*"].

7 Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, 106 Stat. 1406, approved Oct. 5, 1994 ["1992 Cable Act" or "Cable Act"].

614(b)(3)(A) of the Cable Act was unnecessarily constrained; incompatible with the plain terms of Section 614(b)(3)(B);[8] and unworkable, rendering the digital Must Carry scheme impossible to administer. While the *Oppositions* reluctantly acknowledge the existence of Section 614(b)(3)(B), they offer only a dismissive explanation of its relevance, premised upon an analog view of broadcasting. Accordingly, TWDC submits that the Commission should grant the TWDC *Petition* and require the carriage of all digital multicast programming and program-related content that is transmitted free, over-the-air.

II. THE *ORDER* INTERPRETS PRIMARY VIDEO IN A MANNER THAT IS CONTRARY TO THE PUBLIC INTEREST AND THE CABLE ACT.

Almost five years ago, the Commission made the seminal decision to give digital broadcasters the flexibility to deliver multicast SDTV programming as well as HDTV programming.[9] The basis for the Commission's decision was the viability of free, over-the-air broadcasting.[10] Indeed, the Commission recognized that, in order to be able to compete with other video programming distributors that were also converting to digital technologies, broadcasters would need to be able to provide flexible digital program offerings:

> Because of the advantages to the American public of digital technology – both in terms of services and in terms of efficient spectrum management – our rules must strengthen, not hamper, the possibilities of broadcast DTV's success . . . [B]roadcasters' ability to adapt their services to meet consumer demand will be critical to their success.[11]

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[8] 47 U.S.C. § 534(b)(3)(B) (requiring carriage of "the entirety of the program schedule" of television stations carried on the cable system).

[9] *See DTV Fifth Report and Order*, 12 FCC Rcd at 12826 ¶41; *see also In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 11 FCC Rcd 17771, 17787-90 ¶¶ 30-43 (1996) (*Fourth Report and Order* in MM Docket No. 87-268) [hereinafter "*DTV Fourth Report and Order*"].

[10] *See DTV Fifth Report and Order*, 12 FCC Rcd at 12811-12, ¶¶ 3-6 ("[W]e wish to promote and preserve free, universally available, local broadcast television in a digital world. Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television's unique benefits: free, widely accessible programming that serves the public interest." *Id.* at 12811-12 ¶ 5).

[11] *Id.* at 12811 ¶ 3, 12812 ¶ 5

Moreover, the Commission found that limiting broadcasters' digital options to HDTV "could stifle innovation as it would rest on *a priori* assumptions as to what services viewers would prefer. Broadcasters can best stimulate consumers' interest in digital services if able to offer the most attractive programs, whatever form those may take. . ."[12]

The flexibility granted by the Commission gave broadcasters the incentive to innovate and create a variety of HDTV and SDTV services so as to give viewers a wide range of viewing options. This flexibility was intended to help preserve broadcasting. Similarly, the Must Carry provisions of the Cable Act were intended to help preserve broadcasting, whether analog or digital. Specifically, as the Commission acknowledged in the *Order*, the Cable Act was enacted to advance the bedrock societal interests "of preserving the benefits of free over-the-air local broadcast television, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming."[13]

The Commission appropriately has always applied primary video in the analog world to include only one programming stream because, quite simply, there can only be one programming stream in an analog signal. However, there is a world of difference between an analog and a digital signal. In the digital world, the Commission has endorsed multicasting as consistent with the public interest and has concluded that its rules "must strengthen, not hamper, the possibilities of broadcast DTV's success." Therefore, in interpreting the Must Carry provisions of the Cable Act for digital television, the Commission should include all of the programming delivered in the broadcaster's 6 MHz data stream, regardless of whether it is one HDTV program or multiple

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12 *Id.* at 12827 ¶ 42.

13 *Order* at 3 (citing *Turner Broadcasting System, Inc. v. U.S.*, 520 U.S. 180 (1997)).

SDTV programs at any given time in the program schedule. By not doing so, the Commission has contradicted both its determination that multicasting is in the public interest and its admonition that the Commission's rules must enhance the ability of digital broadcasters to succeed.

The Commission's approach also is flawed because it is inconsistent with the Cable Act. Congress expressly directed the Commission "to initiate a proceeding to establish any changes in the signal carriage requirements . . . necessary to ensure cable carriage of [digital] broadcast signals."[14] In enacting Section 614(b)(4)(B), Congress recognized that the facts available in 1992 ill-equipped it to predict what digital advancements might unfold in the future. Therefore, Congress directed the Commission to conduct a review of the changes brought about by the digital transition, and appropriately modify its rules to ensure that the protections afforded by the Cable Act were extended to the digital "broadcast signals of local commercial television stations."[15]

The issue of whether or not to grant Must Carry rights to all multicast programming goes to the heart of the Congressional concern that cable operators not use their market power to undermine broadcasting by denying carriage to free, over-the-air programming. If the Commission limits the ability of cable subscribers to access such advanced broadcast services – including the full scope of programming and services that DTV provides – the goals of the Cable Act will not survive the digital transition. The *Oppositions* place a false choice before the Commission, that is, they argue that the Commission is obliged to interpret primary video in a

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[14] 47 U.S.C. § 534(b)(4)(B).

[15] *Id.*

manner that fails to promote the overall goals of the Cable Act. TWDC respectfully asserts that the only correct statutory interpretation of the term "primary video" is one that includes all free, over-the-air broadcasting. This interpretation is consistent with the language and intent of the Cable Act, as well as the Commission's prior decisions.

III. WELL ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION COMPEL THE CONCLUSION THAT CABLE CARRIAGE OF MULTICAST PROGRAMMING IS REQUIRED

In its *Petition*, TWDC identified the fundamental analytical flaw in the Commission's construction of Section 614(b)(3); namely that, in attempting to divine the intended meaning of "primary" in subsection (A), the Commission wholly failed to consider the obligation of cable operators under subsection (B) of the statute to carry "the entirety of the program schedule of any television station carried on the cable system."[16] As a consequence, the Commission adopted a definition of "primary" that creates an irreconcilable conflict within the statute.

Under subsection (B), when a broadcaster elects to transmit multiple streams of SDTV programming, all of the programming on each of the multicast streams constitutes the "programming schedule of the television station" and, therefore, all must be carried. However, as demonstrated in the TWDC *Petition*, the Commission's interpretation of the phrase "primary video" in 614(b)(3)(A) effectively nullifies that obligation.[17] As the *Petition* demonstrated, settled principles of statutory construction,[18] dictate that the two subparts of Section 614(b)(3) be read in *pari materia* with one another and considered in the broader context of the statutory

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16 47 U.S.C. § 534(b)(3)(B).

17 *See Petition* at 10.

18 Indeed, these are the very same principles upon which the Commission stated that it relied in interpreting subsection (A).

objectives of the 1992 Cable Act. Doing so leads to the inescapable conclusion that these two subsections are intended to provide broadcasters with basic protection from the market power of cable operators in order to preserve the viability of free, over-the-air broadcasting in both the analog and digital environments.

The *Oppositions* to the *Petition* attempt to reconcile the conflict left by the Commission; however, their arguments only serve to underscore the inconsistency in their proffered statutory construction. While they acknowledge the existence of Section 614(b)(3)(B), the *Oppositions* essentially dismiss its interrelationship with its companion subsection. For example, NCTA cites the statement in the Cable Act's legislative history that Section 614(b)(3)(B) was intended to "prohibit[ ] 'cherry picking' of programs from television stations by requiring cable systems to carry the entirety of the program schedule of the television stations they carry . . . ."[19] This is, of course, precisely the point. Properly read in the digital context, Section 614(b)(3) requires cable operators to carry all of the programming and program related material transmitted in a broadcaster's digital signal and prohibits operators from 'cherry picking' individual streams of digital multicast programming, just as they are prohibited from 'cherry picking' individual analog programs at present.[20] Time Warner simply asserts that TWDC's interpretation of subsection (B), if correct, would render 614(b)(3)(A) "a nullity."[21] This contention fails for two reasons. In the first place, it is simply wrong: the *Petition* clearly articulated a construction of "primary

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[19] *See* NCTA Opposition at 13, citing H.R. Rep. No. 92-628, 102d Cong., 2d Sess. 65-66 (1992).

[20] *See Id.* NCTA's contention that subsection (B) "requires cable operators to carry the entire program lineup that is assembled by a broadcaster on a particular channel 24/7," *id.*, is certainly true in the analog context where a broadcaster provides only one programming stream. However, this observation merely begs the question of whether, in the digital environment, the requirement to carry the entirety of the programming line-up applies to all of the programming streams in a broadcaster's multicast signal. Apart from its conclusory assertion, NCTA offers nothing to rebut the analysis set forth in the *Petition* demonstrating that it the requirement does so apply.

[21] Time Warner Opposition at 14.

video" that both gave full meaning to the term "primary" and harmonized it with subsection (B).[22] Second, it offers no response to the thesis, well documented in the *Petition*, that Time Warner's interpretation of subsection (A), if correct, would nullify 614(b)(3)(B).

IV. CARRIAGE OF MULTIPLE STREAMS OF DIGITAL BROADCAST PROGRAMMING REQUIRES NO ADDITIONAL BANDWIDTH CAPACITY FROM CABLE OPERATORS.

In addition, to their statutory construction arguments, the *Oppositions* argue that requiring carriage of multiple streams of digital broadcast programming would increase the burden on cable operators and upset the delicate balance of constitutional rights reached in the Cable Act.[23] This argument is empirically and demonstrably false.

As TWDC demonstrated in its *Petition*, requiring carriage of multicast digital broadcast programming will require no more bandwidth from cable operators than do the existing analog Must Carry requirements. Currently, cable operators must set aside approximately 6 MHz of cable system capacity for the carriage of analog Must Carry stations. In the Cable Act, Congress determined that this was a fair obligation to place on cable operators in order to preserve free, over-the-air broadcasting. In the digital environment, cable operators will need to set aside this same amount of spectrum, again, to further the goal of preserving free, over-the-air broadcasting. Even when a broadcaster elects to transmit multiple SDTV programs rather than HDTV programming, that transmission occupies no more capacity on the cable system than the 6 MHz of capacity previously set aside for analog Must Carry. Because the actual obligation imposed on cable operators by requiring carriage of multicast digital programming is no greater than that imposed by the carriage of analog broadcast signals, there is no "constitutional issue" that

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22 *Petition* at 8, 10-11 & n.15. *See also* discussion in Section V, *infra*, at 9 and note 24.

23 *See* NCTA Opposition at 12; Comments of A&E Television Networks at 8.

warrants denying millions of cable subscribers access to the fruits of free, over-the-air broadcast digital multicasting.

V. THE NARROW MEANING OF "PRIMARY VIDEO" EMPLOYED IN THE *ORDER* AND *OPPOSITIONS* FAILS DEFINITIONALLY AND CONFLICTS WITH A COMPLETE READING OF THE STATUTE IN CONTEXT.

In the *Order*, the Commission relies on a dictionary definition of the word "primary" that connotes singularity, and therefore construes the phrase "primary video" to mean one of potentially several digital programming streams. The *Oppositions* support this view, arguing that any other interpretation would render the word "primary" redundant and superfluous.[24] As multiple parties demonstrate in other petitions for reconsideration, this interpretation ignores more reasonable definitions of the word "primary,"[25] and produces a result that defeats the express goals of the statute.

Reading the statute in context, as detailed above, it becomes clear that Congress intended the word "primary" to describe that portion of the video signal which is not first in a sequence, but rather which is more important to the consumer (*i.e.*, the programming and program related content intended to be seen or utilized by the viewer) as distinguished from those portions of the video signal (*e.g.*, non-program related material or ancillary or supplementary information) that are not subject to carriage under the statute. This interpretation is entirely consistent with the plain meaning of the word "primary," and is consistent with the express goals and aims of the 1992 Cable Act.

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[24] *See* NCTA Opposition at 9; Time Warner Opposition at 11.

[25] *See* TWDC Petition at 8; *see also* Petition for Reconsideration of NAB/MSTV/ALTV at 11 ("[T]he word 'primary' does not connote singularity. The first definition of 'primary' in the Random House Unabridged Dictionary is 'first or highest in rank or importance; chief; principal: *his primary goals in life*." *Id.*); Petition for Reconsideration of Arizona State University, et al. at 5; Petition for Reconsideration of Paxon Communications Group at 4.

VI. CONCLUSION

Digital television promises to bring innovative and diverse programming to new generation of television viewers. However, unless the Commission reconsiders its definition of the term "primary video," the ability of broadcasters to succeed in the digital era by developing and providing multicast programming will be seriously jeopardized. Accordingly, the Commission should reconsider its decision and adopt a definition of "primary video" that is consistent with the Cable Act's goal of preserving free, over-the-air broadcasting.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie Suerth, a secretary with the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, hereby certify that this fourth (4th) day of June, 2001, I have caused copies of the foregoing "Reply of The Walt Disney Company" to be served by First Class United States Mail, postage prepaid, upon the following:

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STAMP AND RETURN

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APR 25 2001

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To: The Commission

PETITION FOR RECONSIDERATION OF THE WALT DISNEY COMPANY

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April 25, 2001

TABLE OF CONTENTS

Executive Summary i

I. INTRODUCTION 2

II. THE COMMISSION MUST DEFINE 'PRIMARY VIDEO' TO ENCOMPASS ALL PROGRAMMING, AND PROGRAM-RELATED CONTENT, INCLUDED IN A BROADCASTER'S FREE, OVER-THE-AIR DIGITAL SIGNAL TO ENSURE THAT CABLE CONSUMERS ENJOY THE FULL BENEFIT OF THE INNOVATIVE DIGITAL SERVICES THAT BROADCASTERS WILL PROVIDE 3

III. THE COMMISSION'S "DICTIONARY DEFINITION' OF THE WORD "PRIMARY" IS MISPLACED, AND ITS INTERPRETATION OF SECTION 614(b)(3)(A) VIOLATES PRINCIPLES OF STATUTORY CONSTRUCTION BY CREATING A DIRECT CONFLICT WITH SECTION 614(b)(3)(B) 7

A. The "Dictionary Definition" of "Primary" Employed by the Commission Is Not the Only Definition Available and Is Particularly Inappropriate in this Instance 7

B. The Commission's Construction of Section 614(b)(3)(A) Directly Conflicts With The Plain Terms of Section 614(b)(3)(B) 9

C. The Commission's Present Definition of "Primary Video" Is Unworkable and Would Render the Digital Must Carry Scheme Impossible to Administer 11

IV. THE LEGISLATIVE HISTORY OF SECTION 614(b)(3) REFUTES ANY INFERENCE THAT CONGRESS WAS CONTEMPLATING DIGITAL MULTIPLEXING WHILE DRAFTING THE CABLE ACT OR DURING THE ENSUING DEBATE 13

V. BY DENYING MUST-CARRY RIGHTS TO ALL MULTICAST DIGITAL PROGRAMMING, THE CONSTRUCTION OF "PRIMARY VIDEO" ADOPTED IN THE *ORDER* UNDERMINES THE CORE OBJECTIVES THAT CONGRESS SOUGHT TO ACHIEVE WHEN IT ENACTED THE MUST-CARRY REQUIRMENTS 15

VI. CONCLUSION 17

EXECUTIVE SUMMARY

The Walt Disney Company, by this petition, urges the Commission to reconsider its interpretation of the phrase "primary video." The Commission construes "primary video" in Section 614(b)(3)(A) of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") to afford a broadcaster delivering multiplexed standard definition digital television ("SDTV") programming as part of its broadcast DTV service a right to compulsory cable carriage for only one of the multiple programming streams that it otherwise provides free to its over-the-air viewers. To reach this conclusion, the Commission relies on a legal analysis of Section 614(b)(3) which rests on unsound premises and a fatally incomplete reading of the text and accompanying legislative history of the statute. Unless the Commission alters its present construction of the statute, cable consumers will not share in the benefits of the diverse enhanced digital services that broadcasters will provide, as well as those features, as yet unforeseen, that may be developed in the future.

The Commission should adopt a definition of "primary video" that requires full carriage of the entire 19.4 Mbps bit stream of a local broadcaster's digital signal, except for those ancillary and supplementary services expressly excluded by statute. Such a standard will impose no greater burden on cable operators than that created by the existing analog must-carry requirements, or by carriage of a full HDTV signal.

The Commission's construction of "primary video" relies on a superficial approach to determining the plain language of Section 614(b)(3)(A), and directly conflicts with the plain terms of 614(b)(3)(B). Section 614(b)(3)(B) states that "the cable operator shall carry the entirety of the program schedule of any television station carried on the cable system." When a digital broadcaster elects to multicast SDTV, all of the programming on each of the multicast channels constitutes the "program schedule of the television station," and Section 614(b)(3)(B) clearly dictates that such program schedule must be carried in its entirety. However, under the Commission's construction of Section 614(b)(3)(A), only the programming schedule of the "primary video" stream would be entitled to carriage.

Not only is the Commission's definition of "primary video" unsustainable as a matter of law, it creates an unworkable administrative quagmire as a matter of practice. Digital technology enables broadcasters to offer enhanced entertainment, news and advertiser-related information. In addition to high definition programming, DTV allows broadcasters to multicast multiple streams of broadcasting to provide consumers with a more focused and targeted viewing experience. Under the Commission's directive, a broadcaster would need to make an election as to which of these potential programming streams is "primary," and then communicate that election to the cable operator, who, in the absence of any clear standard, would have an incentive to object to the validity of the election. The resulting disputes would put the Commission in the position of conducting an unending series of proceedings to determine which service or combination of services may be subject to carriage.

In attempting to support its interpretation of the statute, the Commission relies on a view of congressional intent that is unsupportable. Specifically, the Commission surmises that, because adoption of the Cable Act was "reasonably contemporaneous" with a "gradual change"

in the "common understanding" of anticipated digital television from being a primarily HDTV service to being DTV with a multiplexed SDTV signal, Congress must certainly have been anticipating such a multichannel digital service when it used the phrase "primary" video. This surmise of congressional intent is wholly unsupported by any reference to the legislative history, and becomes even more dubious in light of the fact that Congress, in Section 614(b)(4)(B), specifically delegated to the Commission the authority to initiate this proceeding to modify the signal carriage requirements to accommodate DTV in a manner that best effectuates the purposes of the Cable Act.

While the Commission's interpretation is legally infirm and administratively unworkable, it also would visit significant inquiry on the statute's public policy objectives. The must-carry requirements of the Cable Act were intended to advance the bedrock societal interests "of preserving the benefits of free over-the-air local broadcast television, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming." The issue of whether or not to grant must-carry rights to all multicast programming goes to the heart of the Congressional concern that cable operators not use their market power to undermine local broadcasters by denying carriage to the free over-the-air programming offered by them. If the Commission now limits the ability of cable subscribers to access such advanced broadcast services -- including the full scope of programming and services that DTV provides -- the goals of the Cable Act will not survive the digital transition.

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1 47 C.F.R §1.429 (1999)

2 *Carriage of Digital Television Broadcast Signals, Amendment of Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, FCC 01-22, released January 23, 2001 (*First Report and Order and Further Notice of Proposed Rulemaking* in CS Dockets No. 98-120, 00-96, and 00-2) [hereinafter "*Order*"]. A summary of the *Order* appeared in the Federal Register on March 26, 2001. 66 Fed. Reg. 16533 (March 26, 2001).

I. INTRODUCTION

In this Petition, TWDC respectfully asks the Commission to reconsider one discrete, but critical, element of its analysis and conclusions in the *Order* that, if left unchanged, will materially impair the ability of cable television subscribers to share fully in the benefits associated with the array of enhanced programming and services that digital broadcast television ("DTV") will yield; namely, its interpretation of the phrase "primary video." Specifically, the Commission construes "primary video" in Section 614(b)(3)(A) of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act")[3] to afford a broadcaster delivering multiplexed standard definition digital television ("SDTV") programming as part of its broadcast DTV service a right to compulsory cable carriage for only one of the multiple programming streams that it otherwise provides free to its over-the-air viewers.

As the separate statements accompanying the *Order* demonstrate, several members of the Commission were deeply troubled by the serious policy consequences that such an interpretation would produce.[4] Nevertheless, the Commission reluctantly settled on this interpretation based on the belief that it was compelled by a plain reading of the statute.

The Commission was correct regarding the crippling policy result but wrong that it had no choice but to reach it. The Commission's legal conclusion is flawed. Had the Commission's legal analysis not been flawed, it could have reached the desirable policy result of mandating carriage of all multicast programming streams.

The Commission's legal analysis of Section 614(b)(3) rests on unsound premises and a fatally incomplete reading of the text and accompanying legislative history of the statute. For the

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[3] 47 U.S.C. § 534(b)(3)(A).

[4] *See, e.g., Order*, slip op. at 88.

reasons set forth herein, the Commission should correct its flawed interpretation of Section 614(b)(3) and adopt a definition of "primary video" that encompasses all of the programming and program-related content delivered in a broadcaster's digital signal that is transmitted and received free, over-the-air.

II. THE COMMISSION MUST DEFINE 'PRIMARY VIDEO' TO ENCOMPASS ALL PROGRAMMING, AND PROGRAM-RELATED CONTENT, INCLUDED IN A BROADCASTER'S FREE, OVER-THE-AIR DIGITAL SIGNAL TO ENSURE THAT CABLE CONSUMERS ENJOY THE FULL BENEFIT OF THE INNOVATIVE DIGITAL SERVICES THAT BROADCASTERS WILL PROVIDE

In order to provide consumers with the full range of improved and diverse services that digital television has to offer, broadcasters are investing in new digital technologies that will greatly enhance free over-the-air television service. This technology will enable broadcasters to offer enhanced entertainment, news and information that will completely transform the way consumers relate to and interact with their televisions.

One of the most exciting services that DTV will provide is multicasting. Multicasting gives broadcasters the ability to provide consumers with a much more focused and targeted viewing experience. For example, a local network serving the D.C. metropolitan area will be able to produce and broadcast separate locally 'zoned' news programs focusing on Northern Virginia, the Maryland suburbs, and the District of Columbia. Other applications include offering a second version of popular programming targeted for children, and providing separate camera angle streams for sporting events.[5]

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[5] While reserving other aspects of the "program-relatedness" question for further comment, the Commission, in the *Order*, expressly ruled that such multiple camera angles would constitute program-related information and, thus, would be entitled to carriage under the scheme adopted. *See id.*, slip op. at 25 ¶ 57. However, as discussed *infra* Section III(C) & n.17, to the extent that such alternative camera angles would need to be carried as separate programming streams, the Commission's interpretation would appear to negate this determination. At the very least, the Commission's rule is unclear in this regard.

However, unless the Commission alters its present construction of the statute, cable consumers will not share in the benefits of these diverse enhanced digital services that broadcasters will provide, as well as those features, as yet unforeseen, that may be developed in the future. The only way to ensure that cable consumers will have access to such future DTV services is to adopt a clear standard now that dictates the carriage of such services as they are developed and deployed, regardless of whether they are carried on one, or multiple, video streams. Thus, the Commission should adopt a definition of "primary video" that requires full carriage of the entire 19.4 Mbps bit stream of a local broadcaster's digital signal, except for those ancillary and supplementary services expressly excluded by statute.[6]

A guarantee of carriage of all of the programming and program-related content in the broadcaster's digital bit stream will provide broadcasters with the flexibility to provide the panoply of programming services that DTV makes possible. It serves consumers by creating a strong incentive for broadcasters to invest in the development of new digital services. Moreover, it also mitigates the incentive, recognized by Congress in the Cable Act, that cable operators would have in the absence of such a requirement, to delay or otherwise impair the successful roll-out of such services.

At its core, the Cable Act was designed to protect the benefits to the public of free over-the-air broadcasting by preserving broadcasters' ability to reach a mass audience in the face of cable's "undue market power."[7] Congress understood the inextricable relationship between the ability of free over-the-air broadcasting to continue to serve the public interest and the assured opportunity for broadcasters to continue to reach all potential viewers. It was deeply concerned

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6 *See* 47 U.S.C. § 336(b)(3).

7 *See* Conference Rep. No. 862, 102nd Cong., 2nd Sess. 3 § 2(a)(2) (1992).

that cable operators would have a motive to "delete, reposition, or not carry local broadcast signals" in order to favor their own competing programming services, thereby threatening the viability of free, over-the-air broadcasting.[8] In short, broadcasting was to be given a fair opportunity to compete through a mandate that programming available to consumers over the air would be passed through by competing cable operators. It is unimaginable that, had it happened at that time, there would have been any serious question about whether cable operators could refuse to pass through color pictures. Yet the advancement of digital multicasting is of the same revolutionary character with even greater potential long-term impact.

As discussed more fully hereinafter, nothing in the Cable Act suggests that Congress intended to limit broadcasters' to delivering to cable viewers only such programming as technology made possible in 1992. On the contrary, the existence of Section 614(b)(4)(B) expressly manifests Congress' intention that digital television broadcasters be afforded the same opportunity to serve cable viewers as analog broadcasters now possess. Moreover, if anything, the technological advances that have been made in television distribution only heighten the legislative concerns that underlie the Cable Act.

More and more, broadcast services will compete with cable operators for audience share on the basis of new, exciting types of programming made possible by innovative technology that enhances the viewing experience. And more and more, technological change will afford cable operators new means to erode broadcasters' viability (often to the advantage of competing content owned by the cable operators) by refusing to pass through program enhancements that will progressively come to define the medium. If the protections of the Cable Act are to be given meaning, they must be applied to preclude this result.

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8 *See id.* § 2(a)(16) (1992).

In addition to being statutorily necessary, imposing an obligation that cable operators carry the entire 19.4 Mbps DTV bit stream (exclusive of ancillary and supplementary services) is also entirely reasonable. Significantly, such a standard will impose no greater burden on cable operators than that created by the existing analog must-carry requirements, or by carriage of a full HDTV signal.[9] The 19.4 Mbps bit stream, regardless of whether it contains multiple SDTV streams or a single HDTV stream, will occupy no more spectrum on a cable system than the 6 MHz the operator is now required to set aside for analog broadcast signals. Moreover, the burden of digital carriage might well be considerably lighter. As the Commission noted in the *Order*, the use of certain digital modulation techniques (*e.g.*, 64 and 256 QAM) "likely will provide cable operators with a greater degree of operating efficiency" and "permit[ ] the carriage of higher data rates" thereby requiring less than 6 MHz of capacity to carry the same signal.[10]

One of the goals of this proceeding should be to ensure that cable television consumers enjoy unencumbered access to the full range of enhanced programming and services that will be available from television broadcasters in the digital environment in the same way that they now enjoy conventional television broadcast service under the analog regime. However, the standard for "primary video" adopted in the *Order* represents a quantum leap backward for consumers that is unjustified by any increased burden on cable operators.

As detailed hereinafter, a proper reading of Section 614(b) as a whole, fully supports a construction of "primary video" that requires the full carriage of a broadcaster's signal (unless

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[9] It should also be stressed that requiring carriage of multicast channels is an issue wholly separate and apart from dual carriage of a broadcaster's analog and digital signals during the transition.

[10] *Order*, slip op. at 34 ¶ 76. Moreover, the Commission should recognize that, however much of the broadcast signal the Commission ultimately requires cable systems to carry (whether

such carriage is specifically exempted by statute). Unlike the view adopted in the *Order*, this construction harmonizes Section 614(b)(3)(A) with its companion subsection (B). Moreover, TWDC's proffered construction finds support in the legislative history of the statute. Finally, TWDC's construction would effectuate all of the statutory and public policy goals inherent in Section 614.

III. THE COMMISSION'S "DICTIONARY DEFINITION' OF THE WORD "PRIMARY" IS MISPLACED, AND ITS INTERPRETATION OF SECTION 614(b)(3)(A) VIOLATES PRINCIPLES OF STATUTORY CONSTRUCTION BY CREATING A DIRECT CONFLICT WITH SECTION 614(b)(3)(B)

The initial failing of the Commission's analysis in the *Order* lies in its superficial approach to determining the "plain meaning" of Section 614(b)(3). Rather than reading the section as a whole, the Commission focuses exclusively on subsection (A), and, more specifically, on only the word 'primary' in that section. By overlooking the important contextual background of the statute, the Commission erroneously relies on a dictionary definition for "primary" that is inappropriate to the effort in which Congress was engaged. Moreover, the Commission's interpretation also creates an internal inconsistency between subsections (A) and (B) of Section 614(b)(3), thereby offending the same rules of statutory construction upon which the Commission relied in reaching its conclusion in the *Order*.

A. The "Dictionary Definition" of "Primary" Employed by the Commission Is Not the Only Definition Available and Is Particularly Inappropriate in this Instance

In the *Order*, the Commission defines "primary video" as relative to one of a series of programming streams in a digital environment – a definition for which no support exists. By reciting the "dictionary definition" of the word "primary" without analysis or the benefit of

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19.4 Mbps or something less), cable operators will almost certainly employ such engineering compression tools to conserve as much spectrum as possible for their own uses and applications.

context, the Commission misses the only interpretation for which legislative and historical support does exist; namely, that Congress employed the word "primary" to describe that portion of the video signal which is not first in a sequence but rather which is most important from the consumer's perspective (*i.e.*, the programming, and program-related material, intended to be seen or utilized by the viewer) as distinguished from those portions of the video signal which are not of equal importance (*e.g.*, the "other material in the vertical blanking interval or other nonprogram-related material" that, under the statute, may be carried at the cable operator's discretion).

While Congress was certainly aware of, and anticipated, the emergence of digital television when the Cable Act was adopted in October 1992, it does not follow that Congress intended that, in the digital context, the term "primary video" should mean a single programming stream. Indeed, Congress explicitly put off to another day the parameters of digital signal carriage requirements, expressly delegating to the Commission in Section 614(b)(4)(B) the authority to "initiate a proceeding to establish any changes . . . necessary to ensure cable carriage of such broadcast signals." The best reading of this provision is that Congress left it to the Commission to determine at a later time, when digital technology was more fully developed, what changes were necessary. Since Congress' overriding concern was that cable operators not use their market power to undermine local broadcasters by denying carriage to the over-the-air programming offered by them, a Commission decision to require carriage of multiple free over-the-air programming streams would best fulfill the purposes of the Act.

As discussed below, an examination of the legislative history of Section 614(b)(3) reinforces this conclusion.[11] Although Congress may have intended to invest the text of Section 614 with sufficient flexibility to make it adaptable to the digital environment, nothing in the legislative record suggests that Congress was specifically trying to address its syntax to the facts of a digital future that had yet to unfold. Perhaps the strongest evidence of the error in the Commission's construction of Section 614(b)(3)(A), however, is its stark incompatibility with the requirements of subsection (B) of that same section.

B. The Commission's Construction of Section 614(b)(3)(A) Directly Conflicts With The Plain Terms of Section 614(b)(3)(B)

In its *Order*, the Commission cites the basic principle of statutory construction that all words in a statute are to be given meaning.[12] Importantly, a corollary of the very same rule of construction also demands that no section of a statute be construed to conflict with any other.[13] Yet the interpretation that the Commission has given to Section 614(b)(3)(A) creates just such a conflict.

Specifically, Section 614(b)(3)(B) states in relevant part that "the cable operator shall carry <u>the entirety of the program schedule of any television station</u> carried on the cable system."[14] Thus, when a digital broadcaster elects to multicast SDTV, all of the programming on

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[11] However, as also discussed below, the Commission regrettably did not conduct any meaningful examination of the legislative history.

[12] *Order*, slip op. at 23-24 ¶ 54 & n.154 (citing Sutherland, Statutory Construction, Vol. 2A § 46.06).

[13] *See* Sutherland, Statutory Construction, Vol. 2A § 46.06 ("Each Word Given Effect") ("A statute should be construed so that effect is given to all of its provision, so that no part will be superfluous, void or insignificant, and so that one section will not destroy another.") *Id.*

[14] 47 U.S.C. § 534(b)(3)(B) (emphasis added).

each of the multicast channels constitutes the "program schedule of the television station," and Section 614(b)(3)(B) clearly dictates that such program schedule must be carried in its entirety. However, under the Commission's construction of Section 614(b)(3)(A), only the programming schedule of the "primary video" stream would be entitled to carriage. This outcome is irreconcilable with the plain language of the statute taken as a whole.

If, as the *Order* contends, Congress was aware of the development of multicasting, and did not intend for all multicast programming to enjoy must-carry rights, Congress presumably would have appropriately limited the scope of Section 614(b)(3)(B) to require, for example, carriage of the entirety of the programming schedule of the primary video stream of the television station. However, Congress adopted no such limitation, and the Commission makes no attempt to reconcile these two sections. Indeed, the Commission devotes no discussion or analysis to the interrelationship between Sections 614(b)(3)(A) and (B) at all. This oversight is particularly surprising in view of the fact that, in the past, the Commission has read these requirements in *pari materia*.[15]

Had the Commission appropriately construed Section 614(b)(3) as a whole, rather than focusing solely on the phrase "primary video" in isolation, it would have been led to the

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[15] *See, e.g., Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, 10 FCC Rcd 11494, 11498 (1995) (stating that "[t]hese must carry provisions apply to programming as a whole and ensure that none of its constituent parts, audio or video, as a whole, are deleted."); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6745 (1994) (In applying the "entirety of the program schedule" requirement to retransmission consent stations as well as must-carry stations, the Commission observed that: "Congress indicated its strong belief that absent the must-carry provisions, local broadcast stations would not be readily available to cable subscribers. In the Senate Report, Congress stated that 'it is for this reason that the legislation incorporates a special provision focusing just on the carriage of local broadcast signals. Moreover, this provision addresses both the primary concern of carriage and the secondary concerns of the terms of carriage.").

conclusion that Section 614(b)(3)(B) mandates the carriage of the entirety of multicast programming schedules. As a consequence, the definition of "primary video" must be reconciled with this explicit statutory directive.

C. The Commission's Present Definition of "Primary Video" Is Unworkable and Would Render the Digital Must Carry Scheme Impossible to Administer

As little regard as the Commission appears to have given to the historical and textual context surrounding Congress' use of the phrase "primary video," the *Order* evidences even less thought devoted to precisely how the adopted formulation would be applied in practice. The result is a construction that is wholly unworkable in several respects.

Specifically, in holding that only "a single programming stream and other program-related content" within a digital broadcaster's multiplexed signal is entitled to mandatory cable carriage, and leaving it to the broadcaster to elect which of these "several separate, independent and unrelated programming streams" is "primary,"[16] the Commission appears to assume that broadcasters will either always use the separate streams for program-related content (presumably entitled to carriage), or will always use them for separate, independent programming streams (all but one of which will not).

Setting aside the Commission's failure to define precisely what is necessary for programming streams to be deemed "separate, independent and unrelated," the actual nature of DTV broadcasts is not likely to be so clear, however. In fact, a digital broadcast signal may be configured in a variety of ways throughout the day. For example, a broadcaster may offer at one point, simultaneously, a game show, a program for children, a situation comedy, and a daytime drama. An hour later, while two of these programs continue, the others may be superseded by a

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16 *Order*, slip op. at 25 ¶ 57.

single newscast containing multiple streams delivering localized reports to particular communities. Still later, the bit stream may contain a sports telecast with multiple camera angles, and a separate program stream containing additional background information on the teams, players, etc. Or, in the evening, the entire bit stream might be used to air a single program or motion picture in HDTV.

In such circumstances, the broadcaster would be required at multiple times throughout the broadcast day to ascertain whether the programming elements being televised are independent or related, program-related, or otherwise. Having made the determination, the broadcaster would then have to communicate the election of the "primary" designation to the cable operator who, in the absence of any clear standards, would have an incentive to object to the validity of the election. Moreover, such elections may change by the hour, and may not be entirely predictable. For example, a broadcaster delivering a movie in HDTV may cut-away from its regularly scheduled programming in order to cover a breaking news story, which may be broadcast on multiple SDTV streams.[17] The resulting disputes would invariably require the Commission to conduct an unending series of proceedings to determine whether each new service or programming feature is entitled to carriage and, presumably, to attempt to promulgate procedures by which broadcasters can notify cable operators of the constantly changing election

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[17] Indeed, Commissioner Ness took notice of this problem, observing that the single stream construction of "primary video" adopted by the Commission has the

> odd result of requiring broadcasters and cable operators to continuously examine broadcasters' content to determine whether the signal is primary video, program related, or something else. For example, if a broadcaster in a tri-state area offers a main news program, and then breaks away to three video streams to cover local news in each state, would the entire news program be primary video, would the breakout streams be program related, or neither?

Order, slip op. at 87 (Statement of Commissioner Ness).

of which "primary" stream must be carried. Clearly the standard adopted by the Commission, if put into practice, would create an administrative quagmire for all concerned.

IV. THE LEGISLATIVE HISTORY OF SECTION 614(b)(3) REFUTES ANY INFERENCE THAT CONGRESS WAS CONTEMPLATING DIGITAL MULTIPLEXING WHILE DRAFTING THE CABLE ACT OR DURING THE ENSUING DEBATE

Just as the Commission's interpretation of "primary video" lacks textual support, so too does it lack any foundation in the legislative history. Indeed, in the *Order*, the Commission concedes that the legislative history is "silent on the issue of multiplexing."[18] Thus lacking any direct evidence in the legislative record to support its statutory interpretation of Congress' intent, the Commission attempts to create it by imputing such an intention to the lawmakers.

Specifically, the Commission offers the syllogism that, because adoption of the Cable Act was "reasonably contemporaneous" with a "gradual change" in the "common understanding" of anticipated digital television from being a primarily HDTV service to being DTV with a multiplexed SDTV signal, Congress must certainly have been anticipating such a multichannel digital service when it used the phrase "primary" video.[19] Yet, the only concrete evidence cited in the *Order* to support this expansive inference is a series of press reports (most post-dating enactment of the Cable Act) that reference statements about multicasting or multiplexing made not members of Congress, but rather by FCC commissioners and others.[20]

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[18] *Order*, slip op. at 24-25 ¶ 56 (emphasis added).

[19] *See id.*, slip op. at 24 ¶ 56.

[20] *Id.*, slip op. at 24 n.158. It should also be noted that each of the Commission's citations date to the late autumn of 1992, approximately the time of the passage of the Cable Act in October 1992. There are no earlier citations that would correspond with the hearings and debate in 1991 and early 1992 that presaged passage of the Cable Act.

The Commission's use of these articles to demonstrate a Congressional intent that allegedly existed in 1992 is, to say the least, suspect. As the Commission is aware, the transition in the "common understanding" of what the digital television landscape would look like, however "gradual" it may have been, was not yet underway in any meaningful fashion in 1992. In fact, the Grand Alliance DTV system – a single channel HDTV system – was not introduced until 1993,[21] and it was by no means clear that multiplexing would even be legal until multichannel SDTV was approved three years later.[22] Indeed, even as late as the middle of 1996, the Commission was itself characterizing the advent of multicasting as a "recent development."[23]

In sum, there is no evidence that Congress formed an intent that "primary video" should mean a single programming stream. What is clear is that Congress intended for the Commission to grapple with the signal carriage requirements for DTV at an appropriate future time. The delegation to the Commission in Section 614(b)(4)(B) accomplished that. It gave the Commission the authority to require carriage of multiple program streams.

The foregoing sections demonstrate that the Commission's construction of "primary video" creates internal inconsistency in Section 614(b)(3) and lacks support in the legislative history. These shortcomings are not the only vices of the Commission's actions, however. The Commission's interpretation also would visit significant injury on the statute's public policy objectives.

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21 *See* ATSC Digital Television Standard Doc. A/53 at 1 (September 16, 1995).

22 *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12826-27 ¶¶ 41-42 (1996) (*Fifth Report and Order* in MM Docket No. 87-268).

23 *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 11 FCC Rcd 6235, 6246 (1996) (*Fifth Further Notice of Proposed Rule Making* in MM Docket No. 87-268).

V. BY DENYING MUST-CARRY RIGHTS TO ALL MULTICAST DIGITAL PROGRAMMING, THE CONSTRUCTION OF "PRIMARY VIDEO" ADOPTED IN THE *ORDER* UNDERMINES THE CORE OBJECTIVES THAT CONGRESS SOUGHT TO ACHIEVE WHEN IT ENACTED THE MUST-CARRY REQUIRMENTS

As the Commission has acknowledged, the must-carry requirements of the Cable Act were intended to advance the bedrock societal interests "of preserving the benefits of free over-the-air local broadcast television, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming."[24] In addition to these general objectives, the Commission has more specifically identified several statutory and public policy goals that inhere in Section 614 in particular. Among these are: 1) promoting efficiency and innovation in new technologies and services; 2) advancing multichannel video competition; 3) maximizing the introduction of digital broadcast television; and, 4) maintaining the strength and competitiveness of broadcast television.[25] All of these principles reflect a fundamental concern for the needs and interests of consumers. Regrettably, however, the *Order* paid little more than lip service to these important concerns, and the Commission's interpretation of the "primary video" requirement in Section 614(b)(3)(A), if left unchanged, will visit great harm to these salutary objectives.

The issue of whether or not to grant must-carry rights to all multicast programming goes to the heart of cable television subscribers' ability to share in the benefits of new and innovative broadcast DTV services that are otherwise available free, over-the-air. This consumer interest lies, of course, at the core of the Cable Act of 1992. Congress understood the inextricable relationship between the ability of free over-the-air broadcasting to continue to serve the public

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24 *Order*, slip op. at 3 (citing *Turner Broadcasting System, Inc. v. U.S.*, 520 U.S. 180 (1997)).

25 *Id.*, slip op. at 4.

interest and the assured opportunity to reach all potential viewers. If the Commission now limits the ability of cable subscribers to access such advanced broadcast services -- including the full scope of programming and services that DTV provides -- the goals of the Cable Act will not survive the digital transition.

Moreover, an overly restrictive definition of "primary video" is inconsistent with the strongly enshrined public policy goal of encouraging broadcasters to exploit to the fullest the spectrum they have been assigned. Indeed, in granting broadcasters the flexibility to offer a wide array of exciting new digital services, the Commission observed that this flexibility "would increase the ability of broadcasters to compete in an increasingly competitive marketplace, and would allow them to serve the public with new and innovative services."[26] By denying must-carry rights to multicast broadcast programs, the Commission will, as a practical matter, discourage flexible use of the broadcast spectrum and, as a policy matter, defeat each of the inherent objectives of Section 614. Specifically, it will:

(1) discourage broadcasters from developing innovative multicast programming, thereby diminishing efficiency and innovation in these new technologies and services;

(2) bar broadcasters from entering the multichannel video market thereby denying consumers the benefits of their competition against entrenched cable operators or cable networks;

(3) delay or reduce the amount of digital broadcast services introduced; and

(4) weaken the overall competitiveness of digital broadcast television.

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[26] *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 10 FCC Rcd 10541, 10543 (1995) (*Fourth Further Notice/Third Inquiry* in MM Docket No. 87-268).

Each of these consequences would redound to the detriment of consumers. However, all of these adverse results can be avoided, and the goals of the Commission and Congress can be met, if the Commission reconsiders its decision regarding the carriage of multicast broadcast signals, and adopts a standard for carriage that embraces both Sections 614(b)(3)(A) and (B).

VI. CONCLUSION

For the foregoing reasons, the Commission should revisit and reconsider its decisions in the *Order* and adopt a definition of "primary video" that preserves the existing rights of broadcasters in the digital environment. If left unchanged, the Commission's decisions will materially impair the ability of broadcasters to effectively compete with cable operators and other multichannel video programming distributors in the emerging digital marketplace, and threaten the continuing viability of free, over-the-air television for consumers.

Respectfully submitted,

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Date: April 25, 2001