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 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).

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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,

THE WALT DISNEY COMPANY

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Date: June 4, 2001

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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Date: June 4, 2001

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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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