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

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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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

**REPLY COMMENTS OF
NATIONAL HOCKEY LEAGUE,
PGA TOUR, INC.,
AND OFFICE OF THE
COMMISSIONER OF BASEBALL**

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Introduction and Summary

In their Comments, the National Hockey League and the PGA TOUR, Inc. (collectively, the "Sports Event Programmers") explained that digital content used to enhance coverage of sports broadcasts—including multiple camera angles, textually and graphically represented data and statistics, and video highlights—is "program-related" material entitled to mandatory carriage. The Sports Event Programmers also explained that the FCC's *WGN*-based standard for determining whether content is program-related is sufficiently flexible to adapt as digital offerings evolve. A number of commenters reached consistent conclusions and some specifically agreed that enhanced sports coverage constitutes program-related material entitled to carriage.

A few commenters, however, mischaracterize applicable precedent. Some go so far as to claim that material such as multiple camera angles used in a sports broadcast would not be program-related content entitled to carriage, despite specific FCC statements to the contrary. In these Reply Comments, the Sports Event Programmers—now including the Office of the Commissioner of Baseball—dispel these misconceptions concerning existing "program-related" precedent. In particular, the Sports Event Programmers demonstrate that enhanced video broadcasts of a sports event—including multiple camera angles, textually and graphically represented data and statistics, and video highlights—are subject to the must-carry obligations, regardless of whether the material is advertiser-supported, Internet-enhanced, or multicast.

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REPLY COMMENTS OF
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AND OFFICE OF THE COMMISSIONER OF BASEBALL

The National Hockey League,[1] PGA TOUR, Inc.,[2] and Office of the Commissioner of

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[1] The National Hockey League, with 30 teams in the U.S. and Canada, has five-year national contracts with ABC and ESPN, as well as four national contracts with Canadian networks, for regular season and playoff telecasts. In addition, all clubs televise regular season games locally, using over-the-air television or cable.

[2] The PGA TOUR, Inc., operates three tours: the PGA TOUR, the SENIOR PGA TOUR, and the BUY.COM TOUR, and co-sanctions the World Golf Championships. The PGA TOUR, Inc., is the exclusive copyright holder of coverage of all these events. For the 1999-2002 period, the PGA TOUR, Inc., has licensed rights to the ABC, CBS, and NBC broadcast networks, as well as to ESPN, USA Networks, The Golf Channel, and FoxSportsNet as cable and satellite distributors. For 2003 to 2006, the PGA TOUR, Inc., has licensed rights to ABC, CBS, NBC, USA, ESPN, and The Golf Channel.

Baseball[3] (collectively, "Sports Event Programmers"[4]), by their undersigned counsel, submit these Reply Comments in response to the *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[5]

As the Sports Event Programmers explained in their Comments, enhanced coverage of a sports broadcast—including multiple camera angles, textually and graphically represented data and statistics, and video highlights—is program-related to that broadcast under the FCC's *WGN*-based standard because the broadcaster intends the material to be seen by the same viewers, the material is available during the same interval, and the material is an integral part of the video program.[6] Consequently, such enhanced coverage of a sports broadcast would be subject to the must-carry obligation. The NFL and Gemstar concurred in their comments.[7] In the words of Gemstar:

> [M]aterial that is similar thematically to the content in the main program stream should be considered as "integral" to that content within the meaning of the "program-related" test. Broadcasters will

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[3] The Office of the Commissioner of Baseball licenses the right to telecast Major League Baseball games nationally to the Fox Networks (including Fox, FX and Fox Family) and ESPN. In addition, each Major League Baseball club licenses the right to telecast its games locally to local broadcasters and regional sports networks.

[4] The National Hockey League and PGA TOUR, Inc., previously filed Comments in this proceeding. The Office of the Commissioner of Baseball now joins in these Reply Comments.

[5] *See In re* 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, CS Dockets No. 98-120, 00-96, and 00-2, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-22 (rel. Jan. 23, 2001) (*DTV Must-Carry First Report and Order*).

[6] *See* Comments of the National Hockey League and the PGA TOUR, Inc. at 3, 4-9.

[7] NFL Comments at 3-4; Gemstar Comments at 12-13.

> assuredly offer multiple streams, in data format or otherwise, providing background information, complementary information, or explanatory assistance to viewers interested in their core offerings. ... Sports content also produces a wealth of thematically related information that could be presented outside the main program—for example, additional statistics, different camera angles, scores of other games, highlights and the like.[8]

Some commenters attempt to exclude certain content—including sports-related material—from the must-carry obligation by claiming that Congress and the Commission have excluded advertiser-supported, Internet-enhanced, and multicast content from the definition of program-related material. As the Sports Event Programmers explain below, however, such content can be program-related under the Communications Act and FCC rules and precedent.

I. Enhanced Coverage of a Sports Broadcast Is Subject to the Must-Carry Obligations

A. Advertiser-Supported Material Can Be Program-Related

Under Section 614(b)(3) of the Communications Act, as amended, advertiser-supported material can be program-related content subject to the must-carry obligation. AT&T claims "that cable operators shall have discretion over whether to carry material that is '*subscription and advertiser-supported,*'" quoting Section 614(b)(3).[9] In doing so, however, AT&T ignores the rest of the provision. The actual language states that:

> A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval [VBI] or on subcarriers. Retransmission <u>of other material</u> in the vertical blanking interval <u>or other nonprogram-related material</u> (including teletext and other subscription and

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8 Gemstar Comments at 12-13 (footnote omitted).

9 AT&T Comments at 29-30 & n.71 (quoting 47 U.S.C. § 534(b)(3) and adding emphasis).

> advertiser-supported information services) shall be at the discretion of the cable operator.[10]

The first sentence requires cable operators to carry the primary video and program-related material in its entirety. Thus, when the second sentence grants cable operators discretion whether to retransmit "other material," it is speaking of material other than the primary video and program-related content. Similarly, the parenthetical in the second sentence is preceded by the phrase "other nonprogram-related material." Thus, the language of Section 614(b)(3) itself only exempts subscription and advertiser-supported information services from the must-carry obligation when the material is not program-related.[11]

Importantly, this interpretation of Section 614(b)(3) is in harmony with Section 336(b)(3) of the Act, which states, in relevant part, that "no ancillary or supplementary service shall have

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[10] 47 U.S.C. § 534(b)(3)(A) (emphasis added). Recognizing that there is no VBI in a digital signal, the Commission has removed the reference to the VBI in its implementing rules. *See DTV Must-Carry First Report and Order* at ¶¶ 60, 62.

[11] International Cable, NCTA, and Starz Encore Group make much of House Report language stating that "[c]arriage of other program-related material in the vertical blanking interval and on subcarriers or other enhancements of the primary video and audio signal (such as teletext and other subscription and advertiser-supported information) is left to the discretion of the cable operator." H.R. Rep. No. 102-628, at 92-93 (1992) (emphasis added), *cited in* International Cable Comments at 16; NCTA Comments at 27-28 & n.54; Starz Encore Group Comments at 17. Significantly, however, the Senate Report speaks not of "other program-related material," but instead states that "[t]he cable operator has discretion on whether to retransmit other material which may be transmitted in the vertical blanking interval or on subcarriers which are unrelated to the main program service." S.Rep No. 102-92 at 85, *cited in* NCTA Comments at 28 n.54. The Conference Report is silent on the issue. Thus, the House and Senate Reports seem to conflict, but the provision as enacted appears to adopt the approach of the Senate Report. International Cable and Starz Encore Group also point to House Report language expressing an intent to exclude "scores of games other than the one being telecast or other information about the sport or particular players." H.R. Rep. No. 102-628, at 101, *cited in* International Cable Comments at 16; Starz Encore Group Comments at 17. This report language, however, is discussing the noncommercial provisions eventually adopted as Section 615(g)(1), not the commercial provisions of Section 614(b)(3).

any rights to carriage under section 614 or 615."[12] The Commission has ruled "that ancillary and supplementary services include 'any service provided on the digital channel other than free, over-the-air services.'"[13] In fact, Section 73.624(c) of the Commission's rules states "that any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary."[14] Thus, advertiser-supported material, if broadcast to viewers at no direct charge, is explicitly excluded from the definition of ancillary and supplementary.

Moreover, the rest of Section 614(b)(3)(A) makes clear that any discretion would not apply to all advertiser-supported material, but only to "advertiser-supported information services."[15] The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[16] Thus, even under this interpretation of the parenthetical, cable operators would only have discretion over advertiser-supported material that they offer "via telecommunications," and that also meets the other criteria to be an information service.[17]

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12 47 U.S.C. § 336(b)(3).

13 *DTV Must-Carry First Report and Order* at ¶ 59 & n.164 (emphasis added).

14 47 C.F.R. § 73.624(c).

15 47 U.S.C. § 534(b)(3)(A) (emphasis added).

16 47 U.S.C. § 153(20).

17 Note also that to claim that the advertiser-supported material is delivered "via telecommunications" is to suggest that the cable distribution of that advertiser-supported material is a telecommunications service. Although this might mean that the advertiser-supported material is not subject to the must-carry rules, it might also mean that the cable distribution service is subject to common carrier regulation under Title II as a telecommunications service.

B. Internet-Enhanced Video Broadcasts Can Be Program-Related

Internet-enhanced video broadcasts that integrate interactivity and data into the signal to provide more robust coverage of a sports event can be program-related material entitled to carriage.[18] AT&T alleges that the FCC has ruled that Internet offerings are not program-related.[19] To support its claim, AT&T, in a footnote, attributes to the FCC the statement "that 'carriage of Internet offerings by a cable operator would likely not be required under the must carry provisions ...,'"[20] quoting part of a sentence from paragraph 60 of the *DTV Must Carry First Report and Order* (ellipsis in original AT&T comment). AT&T fails, however, to include critical qualifying language from the rest of the sentence. The full relevant passage states that:

> What is anticipated is that a television station will provide internet-based services, such as e-commerce applications, to the public. While this type of business plan promises to enhance a television station's digital presence, the carriage of internet offerings by a cable operator likely would not be required under the must-carry provisions unless the broadcaster can demonstrate that such material should be considered program-related.[21]

Thus, in its full context, and in stark contrast to what AT&T asserts, the FCC statement actually indicates that if a broadcaster demonstrates that an Internet offering is program-related, the material would be subject to mandatory carriage.

AT&T and NCTA are quick to allege that, under Section 73.624(c) of the Commission's rules, ancillary or supplementary services include:

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18 *Accord* NFL Comments at 3-5.

19 AT&T Comments at 27.

20 *Id.* at 27 & n.63.

21 *DTV Must-Carry First Report and Order*, at ¶ 60 (emphasis added).

> "computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, [and] subscription video ..." (ellipsis in original AT&T and NCTA comments).[22]

Again, AT&T and NCTA both omit with the ellipsis critical language from Section 73.624(c). As discussed above, the quoted rule goes on to state "that any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary."[23] Thus, to the extent that Internet-enhanced coverage of a sports event constitutes a video broadcast signal provided at no direct charge to viewers, it would not be ancillary and supplementary.[24]

Consequently, NCTA misstates the applicable law when it claims without qualification that "[t]he broadcaster may offer these enhancements free over the air or on a subscription basis—but in either case, they are ancillary and supplementary and hence not entitled to mandatory carriage."[25] Similarly, the Sports Event Broadcasters disagree with the NCTA when it states without qualification that interactive materials would be ancillary and supplementary and not entitled to carriage.[26]

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22 AT&T Comments at 30-31 & n.76 (quoting part of 47 C.F.R. § 73.624(c)); NCTA Comments at 29 & n.60 (same).

23 47 C.F.R. § 73.624(c).

24 *Accord* CEA Comments at 10; Disney Comments at 3-4, 15-16; Entravision Comments at 7; Gemstar Comments at 3-4, 6-9, 12-14; NAB Comments at 40-41; Public Broadcasters Comments at 24.

25 NCTA Comments at 29 (footnote omitted) (emphasis added).

26 *Id.* at 30.

C. Multicast Offerings Can Be Program-Related

The FCC has already ruled that digital content that enhances coverage of a sports broadcast, including multicasting of multiple camera angles, is program-related.[27] Indeed, the Commission has held that:

> [w]ith the advent of digital television, broadcast stations now have the opportunity to include in their video service a panoply of program-related content. Indeed, far more video content is possible broadcasting a digital signal than broadcasting in an analog format. For example, a digital television broadcast of a sporting event could include multiple camera angles from which the viewer may select. The statute contemplates and our rules require that cable operators provide mandatory carriage for this program-related content.[28]

Thus, the Commission currently acknowledges "a panoply of program-related content"—one example of which is multiple camera angles used in a sports broadcast—and "require[s] that cable operators provide mandatory carriage for this program-related content." Any claims to the contrary should be confined to the pending reconsideration proceeding,[29] and are not subject to debate here.

Nonetheless, AT&T argues that the Commission "has ruled that program-related does *not* extend to ... multicast services."[30] Again, AT&T's comments are misleading. The Commission

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27 *Accord* NFL Comments at 3-4.

28 *DTV Must-Carry First Report and Order* at ¶ 57 (emphasis added).

29 *See* Public Notice, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Report No. 2481 (rel. May 3, 2001) (listing petitions for reconsideration filed in the DTV Must Carry Proceeding).

30 AT&T Comments at 27. *See also* International Cable Comments, at 17 (arguing that "uses that require additional video streams, such as streams showing alternative camera angles or multicast educational programs, should not be required to be carried"); Starz Encore Group Comments at 18 (same).

has stated, as AT&T itself quotes, that "if a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of those streams is considered primary and entitled to mandatory carriage."[31] The Commission's use of the phrase "independent and unrelated" indicates that it was discussing non-program-related material. If a digital broadcaster elects, on the other hand, to divide its digital spectrum into several program-related streams, they all would be entitled to mandatory carriage under Section 614(b)(3) of the Act.[32]

International Cable, Starz Encore Group, and Time Warner argue that material such as multiple camera angles and sports statistics would not be program-related within the meaning of the statute.[33] In fact, in identical passages in their comments, International Cable and Starz Encore Group claim that any digital content other than closed captioning information, program ratings data for use in conjunction with the V-Chip function of receivers, Source Identification Codes used by Nielsen Media Research in the preparation of program ratings, and the channel mapping

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[31] AT&T Comments at 27 n.65 (emphasis added) (quoting *DTV Must-Carry First Report and Order* at ¶ 57).

[32] International Cable, NCTA, Starz Encore Group, and Time Warner claim that multicasting will be costly in terms of bandwidth, and that "program-related" should be construed narrowly because setting aside bandwidth for services such as multiple camera angles would come at the expense of other diverse services that viewers might prefer. International Cable Comments at 17; NCTA Comments at 30; Starz Encore Group Comments at 18; Time Warner Comments at 29-30. It seems unlikely, however, that broadcasters would provide particular program-related material for long unless it draws significant audience share. In any event, Disney, NAB, MSTV, and ALTV point out that program-related material contained in DTV signals will be part of the same 6 MHz of spectrum (19.4 Mbps digital bitstream) used for the main programming in analog transmissions, and so would not require any more bandwidth from cable operators than already required under the existing analog must-carry requirements. Disney Comments at 15-16; NAB Joint Comments at 37 n.100.

[33] International Cable Comments, at 15-17; Starz Encore Group Comments at 17-18; Time Warner Comments at 29.

and tuning protocols that are part of PSIP, as were set fourth in *First Report and Order* at ¶ 61, is ancillary and supplementary material not entitled to carriage.[34]

The Commission, however, has stated otherwise. As discussed above, under FCC rules, video broadcast signals provided at no direct charge to the viewer are, by definition, not ancillary or supplementary. Moreover, paragraph 61 of the Commission's order, which International Cable cites above, clearly states that program-related materials "include, but are not limited to," the list cited by International Cable and Starz Encore Group.[35] Thus, the Commission has not described program-related content as a narrow, closed-ended universe. If it had, the Commission would have found no need in paragraph 61 to state that it would "continue to use the same factors enumerated in *WGN* that are used in the analog context to determine what material is considered program-related."[36]

NCTA claims that the Commission has determined that only one digital stream shall be considered part of the primary video, and that the Commission has failed to cite any statutory support for carriage of multiple, program-related streams.[37] The Commission clearly states in paragraph 57 of the *DTV Must-Carry First Report and Order*, however, that "[b]ased on the

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34 International Cable Comments, at 15-17; Starz Encore Group, at 17-18.

35 *DTV Must-Carry First Report and Order* at ¶ 61 (emphasis added).

36 *Id.*

37 NCTA Comments at 30 & n.62 (citing *DTV Must-Carry First Report and Order*, at ¶ 57).

language in 614(b)(3), Congress was concerned that mandatory carriage be limited to the broadcaster's primary program stream but also include related content as described here."[38]

Moreover, the Sports Event Programmers disagree with Time Warner's assertion that "any reading under which non-primary video material in digital signals is required to be carried would be inconsistent with the Commission's reading of the term 'primary video.'"[39] In support, Time Warner cites paragraph 57 for the proposition that the Commission has determined that only one digital multicast signal can qualify as a station's primary video signal.[40] However, in the first sentence of that paragraph the Commission concludes that "'primary video' means a single programming stream and other program-related content."[41]

II. The FCC's *WGN*-Based Test Continues to Be an Appropriately Flexible Framework for Determining Whether Content is Program-Related

NCTA argues that "[t]he potential for unintended consequences and disruption to customers' viewing experiences in the digital world—not to mention the potential for numerous disputes that the FCC would need to adjudicate—caution against loosening the stringent tests that have been adopted."[42] NCTA has it backwards.

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38 *DTV Must-Carry First Report and Order*, at ¶ 57 (emphasis added). For the language and further discussion of Section 614(b)(3), codified at 57 U.S.C. § 534(b)(3), see note 10 and accompanying text.

39 Time Warner Comments at 29.

40 *Id.*

41 *DTV Must-Carry First Report and Order*, at ¶ 57 (emphasis added).

42 NCTA Comments at 26.

The *WGN*-based test is not stringent. In fact, it is decidedly flexible.[43] As the FCC observed in the *DTV Must-Carry First Report and Order*, the Commission originally "declined to further define 'program-related,' apart from the *WGN* analysis, [because] carriage of information in the VBI was rapidly evolving."[44] Indeed, the Commission has even said that "the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness."[45] Finding that "there will be instances where material which does not fit squarely within the factors listed in *WGN* will be program-related under the statute,"[46] the Commission determined that material may be "program-related" if it "constitutes information intrinsically related to the particular program received by the viewer."[47]

Thus, NCTA misses the mark when it expresses concern over "unintended consequences." The goal here is to embrace unintended consequences, and to encourage the innovation that digital broadcasting has to offer. Rather than resulting in a "disruption to customers' viewing experiences," as asserted by NCTA, a broad definition of "program-related" will provide viewers with a greater variety of more advanced programming choices. Clearly, broadcasters will not spend much time offering material that consumers do not watch. Consequently, as a number of commenters pointed out, applying the *WGN*-based standard in the digital context provides an

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43 *Accord* Gemstar Comments at 8.

44 *DTV Must-Carry First Report and Order*, at n.171.

45 *In re* Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues in MM Docket No. 92-259, *Memorandum Opinion and Order*, 9 FCC Rcd. 6723, 6734 (1994).

46 *Id.*

47 *Id.*

appropriately flexible means of determining program-related content without costing additional bandwidth.[48]

III. Conclusion

As the Sports Event Programmers have demonstrated, enhanced coverage of a sports broadcast is program-related material subject to the must-carry obligation when broadcast at no direct charge to the viewers, even if the material uses multiple camera angles, textually and graphically represented data and statistics, or video highlights, and regardless whether the material is advertiser-supported, Internet-enhanced, or multicast.

Respectfully Submitted,

THE NATIONAL HOCKEY LEAGUE
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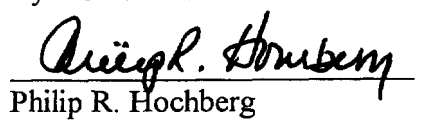
By their counsel



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[48] *See* Disney Comments at 3-4, 15-16; Gemstar Comments at 3-4, 6-9, 12-14; NFL Comments at 4, 5-6.