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March 6, 2002

VIA ELECTRONIC FILING

William F. Caton
Acting Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington DC 20554

**Re: *Ex Parte*: In the Matter of Carriage of Digital Television Broadcast Signals,
CS Dkt. Nos. 98-120, 00-96.**

Dear Mr. Caton:

On March 5, 2002, Tim Bellamy, Vice President and General Counsel of TechTV LLC, Frank Buono, Willkie Farr & Gallagher, and the undersigned met with the following Commission staff to discuss issues relating to the digital must-carry proceeding: Susanna Zwerling, Legal Advisor to Commissioner Copps; Catherine Bohigian, Legal Advisor to Commissioner Martin; Stacy Robinson, Legal Advisor to Commissioner Abernathy; Bill Johnson, Cable Services Bureau; Ben Golant, Cable Services Bureau; Eloise Gore, Cable Services Bureau; and Mary Beth Murphy, Cable Services Bureau.

Mr. Bellamy and counsel urged the Commission to affirm its decisions in the *Digital Must-Carry Order* (FCC 01-22) with respect to dual must-carry and primary video, and raised the points included in the attached materials.

Kindly direct any questions regarding this matter to my attention.

Sincerely,

/s/ Jonathan A. Friedman
Jonathan A. Friedman
Counsel for TechTV LLC

cc: Parties on attached service list

Att.

Washington, DC
New York
Paris
London

CERTIFICATE OF SERVICE

I, Robin Smith, do hereby certify that I caused one copy of the foregoing *Ex Parte* Letter of TechTV LLC (“Letter”) to be served by hand delivery on the following parties this 6th day of March, 2002.

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/s/ Robin Smith
Robin Smith

TechTV Presentation -- March 5, 2002

THE COMMISSION SHOULD REAFFIRM ITS DUAL MUST-CARRY AND "PRIMARY VIDEO" DECISIONS.

I. EXPANDING DIGITAL MUST-CARRY TO INCLUDE MULTICAST SERVICES WOULD HARM NON-BROADCAST SERVICES AND CONSUMERS.

A. Analog Must-Carry *Already* Negatively Impacts Services Like TechTV.

- In many markets, particularly the most important large markets, TechTV has been unable to obtain carriage at all on cable systems or has been denied carriage on the most widely subscribed analog cable tiers because of the large numbers of analog must-carry stations. For example:
 - **Chicago:** TechTV has 153,000 cable subscribers out of 2 million cable TV households (7.7%).
 - **San Francisco:** TechTV has 199,000 cable subscribers out of 2.1 million cable TV households (9.5%).
 - **New York City:** TechTV has 713,000 cable subscribers out of 6.3 million cable TV households (11.3%).

B. Multicast Must-Carry Would Further Harm Services Like TechTV, As Well As Consumers, Both During And After The Digital Transition.

1. Harm *During* the Transition Period.

- Cable operators would have to dedicate up to *twice as much* spectrum (12 MHz) to a broadcaster's services as for analog must-carry (6 MHz).
 - This is because a broadcaster could insist that cable operators: (1) downconvert its primary signal to analog (6 MHz); and (2) carry its multicast services on the digital tier (up to an additional 6 MHz).
 - For a sense of the aggregate amount of additional spectrum that would be lost to non-broadcast services like TechTV, consider that there are 15, 21, and 22 local broadcast stations, respectively, in the Chicago, San Francisco, and New York DMAs.
- A multicast carriage requirement would thus force cable operators with capacity constraints to drop existing (and, in many cases, highly popular) non-broadcast services to make room for new digital broadcast services.

- Alternatively, a multicast carriage requirement would severely limit the ability of TechTV and other non-broadcast programmers to increase their distribution (and long-term viability), as cable operators would have to devote significant amounts of additional capacity to broadcasters.
- Whether TechTV and other non-broadcast programmers are dropped or simply fail to obtain carriage, the effect would be to reduce program diversity and program quality, thereby harming consumers.

2. **Harm After the Transition is Complete.**

- Even after all broadcast stations convert to digital, multicast must-carry would still significantly and unconstitutionally harm non-broadcast programmers.
- It is incorrect to argue that analog broadcasters get 6 MHz of cable spectrum today and should therefore get 6 MHz when the transition is complete. Rather, the Commission must focus its post-transition must-carry analysis on the very different spectrum and carriage dynamics associated with *digital*, as opposed to *analog*, technology. With digital, the focus is on megabits per second (Mbps), rather than megahertz (MHz).
- For example, in the digital realm, TechTV delivers a 2.5 Mbps signal to cable headends for carriage on a digital tier. In comparison, digital broadcasters arguing for multicast must-carry rights are seeking carriage for the full 19.4 Mbps payload that comprises their digital signal. *See Digital Must-Carry Order* ¶ 71 & n.111. **In effect, broadcasters want over seven times the amount of digital content delivered by non-broadcast services, such as TechTV.**
- In reality, the broadcasters' request is even more egregious because they want a government *guarantee* of 19.4 Mbps while non-broadcast services like TechTV have to *negotiate* for 2.5 Mbps.
- What this means in terms of the *number of services* carried is that a multicast must-carry requirement would entitle each digital broadcaster to guaranteed carriage for *six or more* separate services (based on today's technology). In comparison, if non-broadcast services like TechTV are carried at all, they typically get carriage for only a *single* service (after an intense, arms-length, market-driven bargaining process).
- In short, affording broadcasters guaranteed carriage post-transition for the full 19.4 Mbps -- *i.e.*, six or more multicast services -- would impose far *greater* competitive burdens and harms on non-broadcast services like TechTV than currently exist under analog must-carry.

- *Turner II* barely found analog must-carry constitutional when each broadcast station was displacing a *single* competing non-broadcast programmer. It would be a far different and less defensible constitutional proposition were each digital broadcast station to displace *six or more* non-broadcast programmers as a result of a multicast must-carry right.
 - Multicast must-carry would “render it more difficult for cable programmers to compete for carriage,” in violation of the *narrow tailoring* requirement established in the *Turner* decisions. *Turner I*, 512 U.S. 622, 668 (1994) (emphasis added); *Turner II*, 520 U.S. 180, 214 (1997).
- Granting broadcasters such preferential treatment in blatant disregard for subscribers’ viewing preferences is also “impossible to reconcile with the Supreme Court’s repeated admonition that the interests of viewers should be considered ‘paramount’ in the First Amendment calculus.” *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453-54 (D.C. Cir. 1985) (striking down an earlier version of must-carry) (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).
 - *See also Turner I*, 512 U.S. at 675 (O’Connor, J., dissenting) (“A cable programmer that might otherwise have been carried may well be denied access in favor of a broadcaster that is less appealing to the viewers but is favored by the must-carry rules. It is as if the Government ordered all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers.”).
 - *See also Turner II*, 520 U.S. at 226 (Breyer, J., concurring) (“I do not deny that the compulsory carriage that creates the ‘guarantee’ extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and *it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. This ‘price’ amounts to ‘suppression of speech.’*”) (emphasis added).
- Moreover, as a policy matter, the effect of the broadcasters' proposal on diversity and program quality is likely to be severe. It is true that a broadcaster, like a non-broadcast service, will want to make its service attractive to consumers so that, for example, it can realize higher advertising revenue. However, broadcasters will not have to compete to be carried and, therefore, the further incentive to produce high quality programming (particularly on multicast feeds other than the primary

video) in order to "beat out" other services competing for the cable operators' channel capacity will not exist for broadcasters. Indeed, one can see this happening already in the way that broadcasters have initially used their digital spectrum to provide multiplexed programming that is mostly duplicative of their primary video offerings.

II. THERE IS NO PRINCIPLED BASIS TO EXPAND BROADCASTERS' PRIVILEGED STATUS, PARTICULARLY GIVEN THAT NON-BROADCAST SERVICES LIKE TECHTV ARE LEADING THE CHARGE IN CREATING INNOVATIVE, HIGH-QUALITY DIVERSE PROGRAMMING.

- TechTV has invested tens of millions of dollars to develop an innovative service that is very popular with a broad base of viewers. The industry generally has invested almost \$19 billion over the last two years on programming services.
- Non-broadcast programmers like TechTV, rather than broadcasters, are the ones playing an increasingly prominent role in providing news, public affairs, children's, sports, entertainment, and other public interest programming.
 - TechTV is often the sole source for unique coverage of technology-related news, politics, and public affairs, and just opened a news bureau in Washington, D.C. to expand its coverage of such issues.

III. THE BEST WAY TO ACCELERATE THE DIGITAL TRANSITION IS TO CREATE A LEVEL PLAYING FIELD AND ALLOW COMPETITION BETWEEN DIGITAL BROADCAST AND NON-BROADCAST SERVICES.

- If the Commission properly refrains from granting broadcasters more expansive must-carry privileges, broadcasters will have an increased incentive to develop high-quality digital programming in order to compete more effectively with non-broadcast programmers.
- This, in turn, will make their programming more attractive to cable operators and other MVPDs and more likely motivate consumers to purchase DTV sets.
- Pursuing such an approach is the best way to achieve an efficient digital transition without trampling on program diversity, consumer choice, the statute, or the constitutional rights of non-broadcast programmers and cable operators.

IV. THE STATUTORY LANGUAGE COMPELS THE COMMISSION TO AFFIRM ITS "PRIMARY VIDEO" DECISION.

- TechTV strongly supports the Commission's determination in its *Digital Must-Carry Order* that the statutory requirement that cable operators carry a broadcaster's "primary video" signal only requires carriage of a single programming stream and other "program related" material.

- The Commission: “The term primary video, as found in Sections 614 and 615 of the Act, suggests that there is some video that is primary and some that is not. In this instance, we rely on the canon of statutory construction that effect must be given to every word of a statute and that no part of a provision will be read as superfluous. Here, we must give effect to the word ‘primary.’ The dictionary definitions of ‘primary’ are ‘First or highest in rank, quality, or importance,’ and ‘Being or standing first in a list, series or sequence.’ Based on the plain words of the Act, we conclude that, to the extent a television station is broadcasting more than a single video stream at a time, only one of such streams of each television signal is considered ‘primary.’” *Digital Must-Carry Order* ¶ 54 (citations omitted).
- Chairman Powell: “I believe our decision [on primary video] is compelled by the language of the statute, leaving us little choice but to interpret it faithfully.” *Separate Statement of Commissioner Powell*.
- The broadcasters’ proposal to have the Commission require cable operators to carry a broadcaster’s digital multicast services, not just its primary signal, would have the Commission interpret “primary video” to mean “all video.” But this interpretation is wrong. If Congress had intended the statute to have the meaning the broadcasters suggest, it would simply have instructed cable operators to carry *all* the broadcasters’ video programming. By including the adjective “primary,” Congress must have meant to narrow the cable operators’ obligation.
- Indeed, the Commission’s prior primary video decision is consistent with the D.C. Circuit’s decisions in *Century* and *Quincy* -- which were well-known to Congress in 1992 when it adopted the must-carry statute -- that any must-carry obligation must be narrowly tailored in order to pass constitutional muster. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985).
- In particular, the FCC-developed must-carry rules provided that: “Where a television broadcast signal is carried by a community unit, pursuant to the rules of this subpart, *the programs broadcast shall be carried in full, without deletion or alteration of any portion*” 47 C.F.R. § 76.55 (1984) (emphasis added). **Importantly, this rule made no distinction between a broadcaster’s *primary video* and any other video.**
- Seen in this light, Congress’ inclusion of the words “primary video” in the 1992 must-carry statute must be viewed as Congressional intent to narrow the broadcast carriage obligation of cable operators in response to the *Quincy* and *Century* decisions.

- Nor does it help the broadcasters' argument to assert that there can be more than one "primary" video, as in primary colors (*i.e.*, red, blue, yellow). The statute only requires cable operators to carry a broadcaster's "primary video," not its "primary videos." Thus, even if it were true that there are multiple primary videos -- a proposition for which there is no support in the legislative history or the record of this proceeding -- the statute plainly only obligates cable operators to carry one of them.



TECHTV OVERVIEW

DESCRIPTION

TechTV is the only 24-hour cable television network dedicated to showcasing the impact technology has on our everyday lives and the world at large. By creating and delivering entertaining and insightful programming regarding today's and tomorrow's technology news, events, products, and people, TechTV enables viewers to stay current and connected with all things related to technology. Previously known as ZDTV, TechTV is owned by Vulcan Inc., which purchased it from Ziff-Davis Inc.

OFFICES

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DISTRIBUTION

U.S.

TechTV is distributed to approximately 30 million subscribers nationwide -- a 76% increase from 1999 -- which includes DirecTV, EchoStar, C-band, SMATV, and cable subscribers.

International

TechTV is the world's largest producer and distributor of television programming about technology. Globally, TechTV's programming is available to more than 75 million households across 70 countries. In Asia, TechTV delivers a 24 hour international version via satellite. TechTV Canada is a digital channel that launched in September 2001. A Pan-European version of TechTV is planned for 2002.

AUDIENCE

TechTV reaches out to the Tech Fan. Tech Fans cover a broad age range and are evenly split from a gender perspective. They are positively engaged and interested in technology, view technology as an integral part of their lives, view TV as a key resource, see information as entertaining, and are interested in technology-based programming. Tech Fans view technology as most relevant when it is practical, and can be applied to their own life as well as the world at large.

WEB SITE

TechTV offers more than a cable television network, delivering a fully integrated, interactive Web site. Techtv.com allows viewers to participate in programming, provide feedback, interact with hosts, send video emails, and further explore the latest tech content featured on the television cable network. In addition, techtv.com has one of the Web's most extensive technology-specific video-on-demand features (VOD), offering users immediate access to more than 5,000 videos as well as expanded tech content of more than 2,000 in-depth articles.

ADVERTISING

According to MRI*, TechTV is a top ranking cable network among Adult 25-54 viewers with an annual household income of \$60K+, making it an ideal choice for advertisers. TechTV reaches a specialized audience of tech-interested consumers. Some of our current top advertisers include General Motors, Circuit City, IBM.

*Source: MRI, Fall 2001; Indexed to Adults 18+; Ranking is among all Cable Networks

NETWORK PROGRAM GUIDE

AudioFile

Liam Mayclem and Kris Kosach host this weekly half-hour show that explores how music, technology, and artists interconnect in the digital age. From interviews with stars and producers, to insight into the creative process and primers on tools to help create your own music, **AudioFile** discovers how technology is changing the music industry.

Big Thinkers

This weekly half-hour talk show takes viewers into the future of technology through insightful and down-to-earth interviews with the industry's most influential thinkers and innovators of our time.

Call For Help

This daily, hour long, fully interactive call-in show hosted by Chris Pirillo takes the stress out of computing and the Internet for both beginners and pros. Each day, **Call For Help** tackles viewers' technical difficulties, offers tips and tricks, provides product advice, and offers viewers suggestions for getting the most out of technology.

CyberCrime

This weekly half-hour news magazine provides a fast-paced inside look at the dangers facing technology users in the digital age. Hosts Alex Wellen and Jennifer London take a hard look at fraud, hacking, viruses, and invasions of privacy, to keep Web-surfers aware and secure on the Web.

Eye Drops

"Eye Drops" showcases today's best computer generated animated shorts. From highly skilled amateurs to the most high-end professionals, these brilliant pieces demonstrate the power and beauty of technology when placed in the hands of contemporary artists.

Extended Play

In this weekly half-hour show, video game expert hosts Kate Botello and Adam Sessler provide comprehensive reviews of the hottest new games on the market, previews of games in development, and tips on how to score the biggest thrills and avoid the worst spills in gaming. Whether a seasoned pro or gaming novice, this show is a must-see for game lovers.

Fresh Gear

From color PDAs to ultra-light notebooks, digital cameras to PVRs, virtual operating rooms to wearable computers, **Fresh Gear** offers a lively, in-depth look at the technologies shaping the way we live. Hosted by Sumi Das, this weekly half-hour show offers the latest product reviews, advice on what to buy and what to bypass and intriguing looks inside the technologies of tomorrow.

Silicon Spin

Noted technology columnist John C. Dvorak anchors this daily half-hour in-depth look at the stories behind today's technology headlines. CEOs, experts, and entrepreneurs cast a critical eye at industry hype and separate the facts from the spin.

Tech Live

Tech Live is TechTV's unique concept in live technology information programming. This groundbreaking information and news format offers interviews, product reviews, advice, technology analysis, and news. Tech Live focuses on the technology world's most important people, companies, products, and issues and how they affect consumers, investors and the industry.

Tech Of

From the food we eat, to the sports we play, to buildings in which we work, technology has a profound impact on the way we live. "Tech Of" is an engaging series that goes behind the scenes of modern life and shows you the tech that makes things tick.

TechTV's Titans of Tech

TechTV's Titans of Tech is a series of hour-long specials profiling high technologies' most important movers and shakers - the CEOs, entrepreneurs and visionaries driving today's tech economy. Through insightful interviews and in-depth profiles, these specials offer viewers a rare look at where the new economy is headed.

The Screen Savers

Whether you're cracking code, struggling with Windows, or just want to stay up to speed on what's happening in the world of computers, **The Screen Savers** are here to help. Leo Laporte and Patrick Norton unleash the power of technology with wit and flair in this live, daily one and one-half hour interactive show geared toward the technology enthusiast.

Tomorrow's World

This daily, half-hour show produced by the BBC takes a look at the latest innovation and discovery in diverse areas including medicine, space, entertainment, sports, transportation and law enforcement. Featuring reports from every corner of the globe, **Tomorrow's World** is a fascinating, informed and fact-based view of the future. **Tomorrow's World** looks at the significant developments in science and technology that can affect society, today and in the future.