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June 5, 2002

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

On June 4, 2002, Mike Nagle, division of cable and satellite distribution for Bloomberg Television, Greg Babyak, division of federal affairs for Bloomberg L.P., Frank Buono, Willkie Farr & Gallagher, and the undersigned met with the following Commission staff to discuss issues relating to the digital must-carry proceeding: Susan Eid, Legal Advisor to Chairman Powell; Jordan Goldstein, Senior Legal Advisor to Commissioner Copps; Catherine Bohigian, Legal Advisor to Commissioner Martin; and Stacy Robinson, Legal Advisor to Commissioner Abernathy.

Mr. Nagle, Mr. Babyak, 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 Bloomberg L.P.

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 Bloomberg L.P. (“Letter”) to be served by hand delivery on the following parties this 5th day of June, 2002.

Susan Eid
Office of Chairman Powell
Federal Communications Commission
The Portals
445 12th Street, S.W.
Room 8-B201
Washington, D.C. 20554

Catherine Bohigian
Office of Commissioner Martin
Federal Communications Commission
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445 12th Street, S.W.
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/s/ Robin Smith
Robin Smith

THE COMMISSION SHOULD AFFIRM 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* Harms Services Like Bloomberg Television.

- In many markets, particularly the most important large markets, Bloomberg Television (“BTV”) 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, BTV was unable to gain analog carriage in Comcast’s cable systems in the Washington, D.C. area because Comcast had to carry so many must-carry broadcast stations from the D.C. and Baltimore markets.
- Likewise, BTV could not obtain analog carriage in Cablevision’s New York City cable systems, even after BTV offered to pay \$8-10 per subscriber for carriage. Instead, BTV obtained digital carriage only after it agreed to eliminate simulcasting some of its programming on a local analog broadcast station (WNBC).

B. Multicast Must-Carry Would Further Harm Services Like BTV, As Well As Consumers.

1. Harm *During* the Digital Transition Period.

- Cable operators would have to dedicate between 50% and 100% more spectrum (9-12 MHz) for each broadcaster’s services as they do 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 (an additional 3-6 MHz).
- 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 BTV 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 BTV 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. This is particularly true given that, unlike broadcasters, non-broadcast programmers have no access to viewers over the air.
- Claims that without multicast must-carry cable capacity would go unused are incorrect. Technology already exists, from at least one company called BigBand, that allows cable systems to dynamically reallocate the spectrum that is unused during a multicast period. *See* <http://www.bigbandnet.com>. Time Warner and Cox have already deployed this technology in certain markets.

2. **Harm After the Digital Transition Is Complete.**

- Even after all broadcast stations convert to digital (or when certain stations in the 700 MHz band transition early), multicast must-carry would still significantly and unconstitutionally harm non-broadcast programmers.
- For example, BTV delivers a signal to cable headends for carriage on a *digital* tier in the range of 2-5 megabits per second (Mbps). 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 four to nine times the amount of digital content delivered by non-broadcast services, such as BTV.**
- 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 compression technology). In comparison, if non-broadcast services like BTV 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 BTV 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.

II. THERE IS NO BASIS TO EXPAND BROADCASTERS' PRIVILEGED STATUS, PARTICULARLY GIVEN THAT NON-BROADCAST SERVICES LIKE BTV ARE DELIVERING HIGH-QUALITY DIVERSE PROGRAMMING.

- BTV has invested tens of millions of dollars to develop an innovative service that is very popular with a broad base of viewers. The non-broadcast programming industry generally has invested almost \$19 billion over the last two years on programming services.
- Non-broadcast programmers like BTV are leaders in providing news, public affairs, children's, sports, entertainment, and other public interest programming.
 - BTV is a leading source for financial news coverage, providing continuous market coverage 24/7, including live evening and overnight reporting from Asia and Europe.
- In short, there can be no legitimate argument that broadcasters somehow deserve expanded must-carry rights because they deliver uniquely important content. This is particularly true given that broadcasters have consistently opposed government efforts to require them to (1) live up to their repeated promises to deliver HDTV content (*see* attached chart on broadcasters' ever-changing story on HDTV), and (2) embrace specific public interest obligations in the digital realm in exchange for their privileged regulatory status.

III. THE BEST WAY TO ACCELERATE THE DIGITAL TRANSITION IS TO 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.
- By contrast, absent such a competitive imperative to drive broadcasters to develop compelling digital content, must-carry stations like Paxson will continue to use their digital spectrum to provide multiplexed programming that is mostly duplicative of their primary video offerings. They will also be more inclined to

fill unused programming time with long-form infomercials (broadcasters get to keep all these revenues, whereas BTV is prohibited by contract from airing infomercials unless it provides a revenue share to its distributors). In fact, broadcasters are already making extensive use of infomercial programming with their analog signals. In short, consumers would end up with less program diversity, less choice, and more commercials.

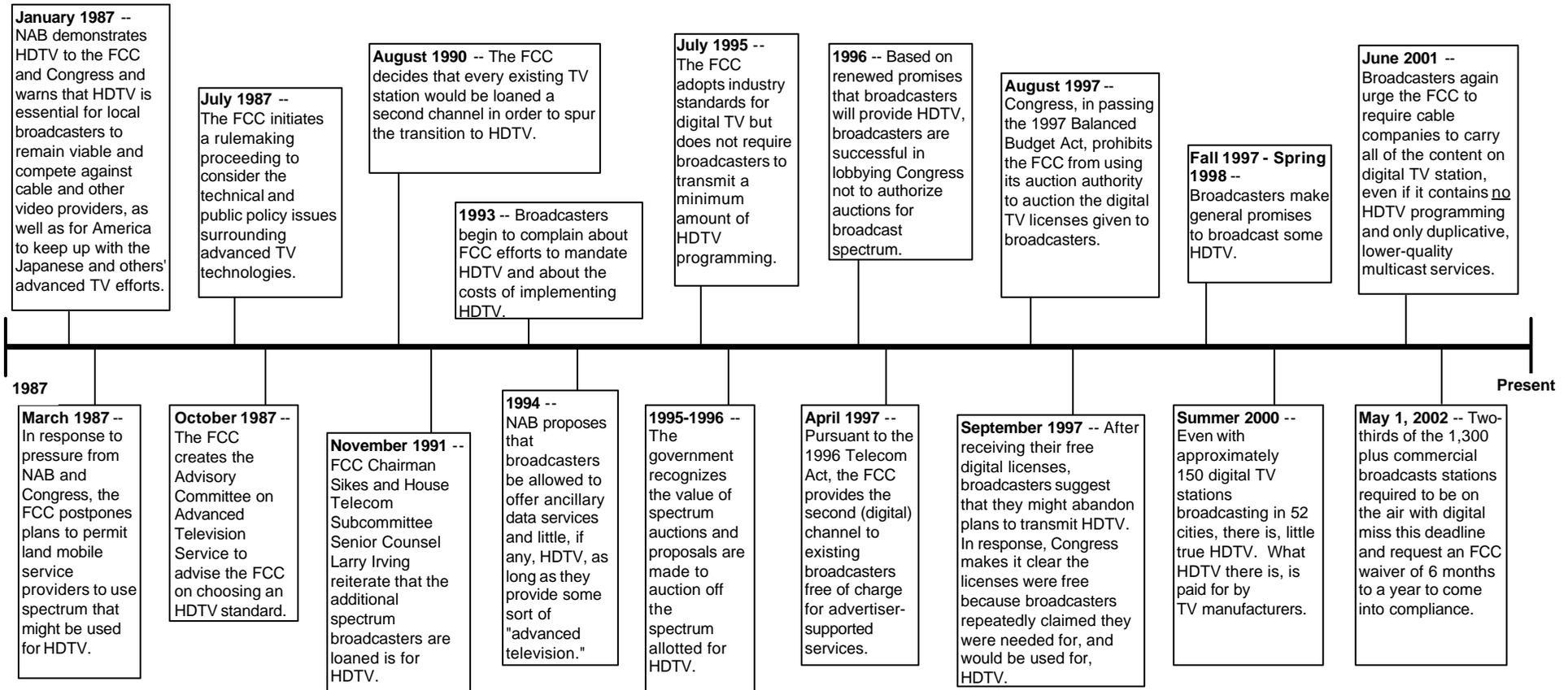
IV. THE STATUTORY LANGUAGE COMPELS THE COMMISSION TO AFFIRM ITS “PRIMARY VIDEO” DECISION.

- BTV supports the Commission’s determination in its *Digital Must-Carry Order* that the statutory mandate that cable operators carry a broadcaster’s “primary video” requires carriage of only a single video programming stream.
 - 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*.
- Moreover, case law interpreting the use of the term “primary” supports the Commission’s interpretation of the phrase “primary video.” See *Hakala v. Atxam Corp.*, 753 P.2d 1144, 1148 n.4 (Alaska 1988) (relying on the *Black’s Law Dictionary* definition of “‘primary’ as ‘[f]irst; principal; chief; leading. First in order of time, or development, or intention’” and stating that “*in essence . . . there can only be one ‘primary’ anything*” (emphasis added)); *City of Ketchikan v. Cape Fox Corp.*, 85 F.3d 1381, 1384 (9th Cir. 1996) (citing the *Black’s Law Dictionary* and *Webster’s New World Dictionary* definitions of “primary” and holding that the word “primary” in the term “primary place of business” “connotes a *single* leading location,” and that because the “focus of the phrase is the word ‘primary,’ . . . a business may have only *one* ‘primary place’” (emphasis added)); *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 482 (7th Cir. 1991) (relying on the *Webster’s Third New International Dictionary* definition of “primary” as “‘something that stands *first* in order, rank, or importance’” (emphasis added)). Cf. 49 C.F.R. § 387.303 (2001) (“‘Primary security’ means

public liability coverage provided by the insurance or surety company responsible for the *first* dollar of coverage.” (emphasis added)); *Costle v. Pacific Legal Found.*, 445 U.S. 198, 201 (1980) (noting that the EPA “defines ‘primary treatment’ as ‘the *first* stage in wastewater treatment’” (emphasis added)).

- America’s Public Television Stations (“APTS”) suggests in a recent *ex parte* that: (1) the word “primary” modifies the word “video”; (2) “video” is a collective noun because it denotes a collection of persons or things regarded as a unit; and (3) “primary video therefore describes a collection of programming streams that may be regarded as a unit because they are all available free over the air.” APTS *Ex Parte*, filed in CS Dkt. No. 98-120 (May 9, 2002).
- APTS’s analysis is incorrect.
 - Under APTS’s own reasoning, if Congress understood the term “video” to be a collective noun and intended for cable operators to carry all of a broadcaster’s digital multicast services, it would simply have instructed cable operators to carry the broadcaster’s “video,” not its “primary video.” By using the phrase “*primary video*,” rather than the noun “video” by itself, Congress must have meant to narrow the cable operators’ obligation to a single video stream.
 - APTS’s suggestion that “primary” denotes “free” is equally unsupported. No plain language theory or dictionary definition endorses this view. Had that been Congress’ intention, it would have used the phrase “free video” instead of “primary video.”
- Finally, APTS is wrong when it suggests that the phrase “primary colors” somehow supports its multicast must-carry argument.
 - As an initial matter, “primary colors” is *not* a collective noun. The very point of a collective noun is that it is a *single* word used in *singular* form that “denotes a collection of persons or things” (*e.g.*, flock, gaggle, herd). See *The New Fowler’s Modern English Usage*, “Collective Noun” (Oxford Univ. Press 1968) available at <http://www.xrefer.com/entry/592088>.
 - To the extent the phrase may have any relevance to this proceeding, it actually *supports* the Commission’s decision on the “primary video” issue. In particular, the word “primary” in “primary colors” modifies a *plural* noun. Hence, there are *several* primary colors (*e.g.*, red, blue, and yellow). Where, however, the word “primary” is used with the *singular* “color,” the term “primary color” denotes a *single* color (*e.g.*, red, blue, or yellow). Similarly, when Congress used “primary” to modify “video” in the must-carry statute, it intended to denote just *one* of the broadcaster’s video streams.

BROADCASTERS' EVER-CHANGING STORY ON HDTV





BLOOMBERG TELEVISION OVERVIEW

DESCRIPTION

Bloomberg Television is the first 24-hour global financial news channel. Launched in 1994 and distributed on ten separate networks programmed in seven different languages, Bloomberg Television provides viewers with a distinct local perspective of global financial events. Its staff of more than 1200 reporters in 80 news bureaus worldwide provides comprehensive coverage of major business news. Bloomberg uses a unique, multiscreen format that provides an easy-to-read uninterrupted stream of financial data and the latest headlines. Bloomberg Television is also the first financial network to market interactive products through which viewers can access financial information on demand. In addition to its cable and DBS offerings, Bloomberg Television creates syndicated programming for television networks and stations around the world that includes live reports from the floors of the world's major stock exchanges. Bloomberg has offices worldwide in New York, Princeton, and San Francisco, as well as Sao Paulo, Tokyo, Hong Kong, Singapore, Sydney, London, and Frankfurt.

DISTRIBUTION

United States

Bloomberg Television is distributed to approximately 20 million subscribers in the United States (and over 91 million if Bloomberg Television's part-time morning carriage on the USA network is counted). Multichannel Video Programming Distributors ("MVPDs") carrying Bloomberg Television include Time Warner Cable, Cox, AT&T Broadband, Adelphia, Cablevision, Charter, DirecTV, and EchoStar.

International

Bloomberg Television is available to more than 200 million households worldwide. To emphasize financial news of local interest, Bloomberg distributes its programming through ten regionally focused networks in seven languages. Bloomberg Television also provides Bloomberg Interactive Television, the world's only financial interactive product that allows viewers to access financial information on demand. Bloomberg Interactive Television operates in partnerships with Respond TV, Liberate, Microsoft's MSN TV, Wink, and WorldGate. In addition to these offerings, Bloomberg Television creates syndicated programming for television networks and stations around the world that includes live coverage of breaking financial news.

AUDIENCE

Bloomberg Television attracts a unique audience of senior executives and decision-makers, professional investors, and consumers. A 2001 Beta Research Satellite Dish Subscriber Study concluded that Bloomberg Television viewers find the financial value of the information on the network to be greater than that provided by competitors CNBC and CNNfn. According to Nielsen Media, Bloomberg Television attracts more than twice the number of early morning business news viewers aged 25-54 than CNBC. The Bloomberg Television audience also includes early adopters enthusiastic about developing technologies. Bloomberg viewers are more likely to subscribe to a digital tier than viewers of other emerging networks, and the number of Bloomberg subscribers who have been active Internet users for 5 or more years is substantially higher than the national average.

WEB SITE

Bloomberg.com ranks among the top five financial Web sites, reaching nearly 8 million people. Bloomberg provides the largest number of global regional financial web sites in local languages, totaling ten in all. Bloomberg.com also provides streaming video of content currently airing on Bloomberg TV and features top headlines and news updates.

ADVERTISING

According to MRI, Bloomberg Television is a top ranking cable network among adult 25-54 viewers with an annual household income of \$100K+, making it an ideal choice for advertisers. Bloomberg Television reaches a specialized audience of investors and technology savvy professionals. Some of Bloomberg's current top advertisers include Citibank, the Wall Street Journal, Chase Manhattan, and E-Trade.

NETWORK PROGRAM GUIDE

Bloomberg London Live

The program provides viewers with live financial information from London.

Bloomberg Market Action

For three hours every weekday morning, anchors Dean Shepherd, Carol Massar, Dylan Ratigan, and Page Hopkins discuss what investors should expect during the upcoming business day. The program provides a complete news round-up and live reports from London, Tokyo, the New York Stock Exchange, and the NASDAQ market.

Bloomberg MarketLine

Anchors Kathleen Campion, Su Keenan, and Suzy Assaad review the final hours of trading on Wall Street. Live reports of the most current numbers are provided from the floors of the New York Stock Exchange and the NASDAQ market. The program also includes national and world news updates.

Bloomberg Money

Every Saturday and Sunday morning, anchor Lane Bajardi recaps the previous week's business and financial news events.

Bloomberg Moneycast Asia

The program spotlights the beginning of trading day in Asia. Live reports from Tokyo, Hong Kong, Singapore, Sydney, and New York detail how breaking developments are affecting Asian markets and offer unique insights into trends affecting local economies and investments.

Bloomberg MoneyWise

A staple of the Bloomberg Television afternoon line-up, the program highlights the top stories for the day and provides reports on major market players up until the closing bell. The program includes live reports from the New York Stock Exchange and the NASDAQ market.

Bloomberg Morning Markets

Page Hopkins and Dean Shepherd host this one-hour show that opens the trading day. This hour of financial news profiles developments in US market futures and explores breaking news topics and overseas market activity. Vince Lipari provides comprehensive news briefs from the United States and international markets, including live reports from London, Hong Kong, and Tokyo. Brian Sullivan provides "Money Flow" segments about the hottest stocks.

Bloomberg On the Money

Anchors Kavita Maharaj and Mark Barton report live from London after and during the opening bells of the European markets. The program also explores afternoon activities in the Asian markets and includes analysis from experienced journalists and market commentators. The program also includes a preview of the U.S. market day.

Bloomberg Personal Finance

This half-hour program focuses on the area of personal finance. Anchor Lane Bajardi touches on major financial topics that affect consumers, such as saving for a college education, investing for a comfortable retirement, and amassing a vacation fund.

Bloomberg Small Business

Every weekend, anchor Lane Bajardi analyzes a topic of particular interest to small businesses.

Morning Call on Bloomberg

For two hours every weekday, anchor Dylan Ratigan looks ahead to the upcoming day with his analysis of market futures and breaking news stories. Melissa Lee and Soledad Deleon provide live reports from the floor of the New York Stock Exchange and the NASDAQ market. In his "Stocks to Watch" segments, Brian Sullivan analyzes stock performance using the Bloomberg Professional Service tools and functions. The program also features live reports from the London, Hong Kong, and Tokyo markets.