

CHARTER COMMUNICATIONS  
Ex Parte CS Docket 98-120  
August 14, 2002

- There is no justification to discriminate in favor of multicasting by broadcasters.
  - New businesses should compete for spectrum on an equal footing and allow market forces to shape what is carried. Discovery and other programmers are innovating in high-definition services. Multicasting must carry (or full-spectrum must carry) will squeeze out part-time niche networks, like International Channel or Filipino Channel thereby reducing consumer access to diverse programming.
  - The retransmission consent model is the logical means for allowing market forces to select the optimal mix of programming.
    - Congressional intent is to allow the marketplace to drive the mix of programming available to the public.
    - The FCC has recognized that retransmission consent agreements between broadcasters and cable operators would alleviate carriage issues and lessen the impermissible burden on speech created by dual carriage.
- Charter has other business plans for that spectrum.
  - Plans include offering existing and new customers current broadcast services and interactive services such as High Speed Data (Cable Modem), Video-on-Demand, SVOD, Network Based PVR, HDTV, Interactive TV, and even IP Telephony. Additionally, to enhance today's service offerings will require more bandwidth.
- There is no constitutional defense to infringe upon cable operators' editorial rights in order to promote multicasting must carry.
  - There is no existing "over the air business" in multicasting to preserve.<sup>1</sup>
  - Must carry for multicasting would violate Congressional intent to confine must carry obligations.<sup>2</sup>
  - There are no Congressional findings to support discrimination in favor of broadcasters' multiple feeds.
  - Multicasting must carry would countermand Congress' goals of ensuring that a wide array of diverse programming remains available to American households.<sup>3</sup>
- Broadcasters accepted single channel must carry in 1986 as part of the must carry rules, as did Congress in 1992.<sup>4</sup>
  - Broadcasters understood and agreed that "primary video" would exclude such enhancements.

- Congress incorporated the industry agreement. If Congress desired a broader interpretation, it would have said “multiple” or “free over-the-air.”
- Must carry multicasting will undermine Congressional mandates for diversity in programming and preservation of cable operators’ editorial discretion.<sup>5</sup>
- All rulings to date reject multicasting and full-spectrum must carry.
  - FCC rulings to date distinguish old broadcast business from new.<sup>6</sup>
    - Second audio program (“SAP”), closed captioning, V-Chip ratings functions and Nielsen SID codes, and channel mapping and tuning protocols that are part of PSIP are “in.”
    - EPGs not tied to the specific program, multiple streams of video, and subscription services are “out.”
  - The Telecommunications Act of 1996 excludes “ancillary or supplementary” services from must carry requirements.<sup>7</sup>
  - The “program-related” test requires simultaneous viewing of integrally related material.<sup>8</sup>
  - Digital rulings specifically exclude ancillary and supplementary services, identifying them as those services provided “other than free, over-the-air services.”<sup>9</sup>
  - Spectrum used by educational broadcasters is divided between old and new uses: “new” may now include subscription television services or other programming for commercial purposes, while “old” uses are solely for noncommercial and nonprofit programming.<sup>10</sup>
- “Primary” means one.
  - Claiming that “primary” and “video” are collective nouns renders the words superfluous and defies statutory context.
  - An about-face to re-interpret “primary” and “over-the-air” would not be a reasoned decision. Claiming that “primary” means “over-the-air” would defy decades of contrary statute and FCC rulings.<sup>11</sup>
  - A re-interpretation would offend constitutional interests.<sup>12</sup> The FCC will not receive judicial deference for an interpretation that raises serious constitutional questions.<sup>13</sup>

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<sup>1</sup> *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (“*Turner I*”) (discussing statute’s objectives of preserving free over-the-air local broadcast television, promoting widespread dissemination from multiple sources and promoting fair market competition).

<sup>2</sup> *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 215-16 (1997) (“*Turner II*”) (“Congress took steps to confine the breadth and burden of the regulatory scheme”).

<sup>3</sup> *Cable Television Consumer Protection and Competition Act of 1992*, P.L. 102-385, 106 Stat. 1460 (Sec. 2(b)) (October 5, 1992). The Act’s policy includes promoting public access to diverse views, promoting that diversity through market forces, ensuring cable operators expand capacity and programming services, ensuring consumer interests are protected in receiving cable services in the absence of effective competition, and ensuring cable television operators do not have undue market power vis-à-vis video programmers and consumers. 106 Stat. 1460, Sec. 2(b).

<sup>4</sup> Letter from Edward O. Fritts (NAB), Margita E. White (TOC) and Preston Padden (INTV) to James P. Mooney (NCTA), Feb. 26, 1986, Exhibit A to Submission of Joint Industry Agreement, MM Docket No. 85-349 (the “February 26, 1986 Letter”) (endorsing industry agreement regarding implementation of new must carry rules). See *In re Amendment of Part 76 of the Commission’s Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd. 864, ¶¶ 1, 27 (rel. November 28, 1986). See *Statements on Introduced Bills and Joint Resolutions*, 102 Cong. 1<sup>st</sup> Sess. 1991, 137 Cong. Rec. S 582, S 592 (1991) (incorporating the industry agreement into the 1992 Act); see also, *Cable Television Consumer Protection and Competition Act of 1992*, S. Rep. No. 92, 102<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 1991, reprinted in 1992 U.S.C.C.A.N. 1193, note 94, 95.

<sup>5</sup> See, e.g., 47 U.S.C. § 521(4) (“cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public”); *Turner I*, 512 U.S. at 662 (discussing the statute’s objectives of promoting “widespread dissemination of information from a multiplicity of sources, and [] promoting fair competition in the market for television programming.”); *First Report & Order*, 16 FCC Rcd. 2598, ¶ 66.

IN-Existing Business	OUT-New Business
<p><b>SAP</b></p> <ul style="list-style-type: none"> <li>• <i>In re Implementation of Video Description of Video Programming</i>, 15 FCC Rcd. 15320, ¶ 30 (2000);</li> <li>• <i>First Report &amp; Order</i>, 16 FCC Rcd. 2598, ¶ 61.</li> </ul>	<p><b>EPGs</b></p> <ul style="list-style-type: none"> <li>• <i>See In re Gemstar Int'l Group, Ltd.</i>, 16 FCC Rcd. 21531 (rel. Dec. 6, 2001);</li> <li>• <i>First Report &amp; Order</i>, 16 FCC Rcd. at 2625.</li> </ul>
<p><b>Closed Captioning</b></p> <ul style="list-style-type: none"> <li>• 47 U.S.C. § 534; 47 C.F.R. §§ 76.606, 79.1(c);</li> <li>• <i>First Report &amp; Order</i>, 16 FCC Rcd. 2598, ¶ 61.</li> </ul>	<p><b>Multiple Streams of Video</b></p> <ul style="list-style-type: none"> <li>• <i>First Report &amp; Order</i>, 16 FCC Rcd. 2598, ¶ 54;</li> <li>• 47 U.S.C. § 534(b)(3)(A) (addressing carriage of primary video).</li> </ul>
<p><b>V-Chip Ratings Functions</b></p> <ul style="list-style-type: none"> <li>• <i>In re Technical Requirements to Enable Blocking of Video Programming based on Program Ratings</i>, Report &amp; Order, 13 FCC Rcd. 11248, 11259 (1998);</li> <li>• <i>First Report &amp; Order</i>, 16 FCC Rcd. 2598, ¶ 61.</li> </ul>	<p><b>Subscription Services</b></p> <ul style="list-style-type: none"> <li>• <i>In re Subscription Video Services</i>, 2 FCC Rcd. 1001 (1987) (subscription service is neither broadcast nor common carrier), <i>aff'd sub nom. Nat'l Ass'n for Better Broadcasting v. FCC</i>, 849 F.2d 665 (D.C. Cir. 1988), on reconsideration, Memorandum Order and Opinion, 4 FCC Rcd. 4948, ¶ 6 (1989).</li> </ul>
<p><b>Nielsen SID Codes</b></p> <ul style="list-style-type: none"> <li>• <i>See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues</i>, 9 FCC Rcd. 6723, ¶¶ 45, 50 (1994);</li> <li>• <i>First Report &amp; Order</i>, 16 FCC Rcd. 2598, ¶¶ 61, 83.</li> </ul>	
<p><b>Channel Mapping &amp; Tuning Protocols</b></p> <ul style="list-style-type: none"> <li>• <i>First Report &amp; Order</i>, 16 FCC Rcd. 2598, ¶ 83.</li> </ul>	

<sup>7</sup> See 47 U.S.C. § 336(b)(3) (stating “no ancillary or supplementary service shall have any rights to carriage under section 614 or 615”); see also *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, 13 FCC Rcd. 6860, ¶ 26 (1998).

<sup>8</sup> *First Report & Order*, 16 FCC Rcd. 2598, ¶ 50; *WGN Continental Broadcasting, Co. v. United Video Inc.*, 693 F.2d 622 (7<sup>th</sup> Cir. 1982).

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<sup>9</sup> *First Report & Order*, 16 FCC Rcd. 2598, ¶ 60, n. 164 (citing *DTV Fifth Report and Order*, 12 FCC Rcd. at 1281 (establishing the DTV transition schedule and related requirements); *on reconsideration*, 14 FCC Rcd. 19931 (1999)).

<sup>10</sup> *In re Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, 16 FCC Rcd. 19042, ¶¶ 2, 3, 11, 13, n.24 (2001) (stating “public television stations do not have firm plans for the use of their digital spectrum, and it is impossible to predict what opportunities may be available to them or to what extent individual stations will take advantage of such opportunities.”).

<sup>11</sup> *First Report & Order*, 16 FCC Rcd. 2598, ¶ 57 (concluding “‘primary video’ means a single programming stream and other program-related context . . . only one of these streams is considered primary and entitled to mandatory carriage” and placing the onus on the broadcaster to designate its primary video).

<sup>12</sup> *Turner II*, 520 U.S. at 213-14 (agency cannot “burden substantially more speech than is necessary to further [the government] interest”).

<sup>13</sup> *Verizon Telephone Companies v. FCC*, 292 F.3d 903, 909-10 (D.C. Cir. June 18, 2002); *GTE Serv. Corp. v. FCC*, 205 F.3d 416 at 421 (D.C. Cir. 2000); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1240 (10<sup>th</sup> Cir. 1999) (holding the FCC’s failure to adequately consider the implications of its regulations raised a “serious constitutional question, invoking the rule of constitutional doubt.”); Laurence H. Tribe, *Why the Commission Should Not Adopt a Broad View of the “Primary Video” Carriage Obligation*, p. 17, NCTA Ex Parte Comments, CS Docket 98-120 (filed July 9, 2002) (stating the FCC’s consideration of dual carriage raises First and Fifth Amendment questions and that “statutes are to be construed where possible to avoid constitutional questions”) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988)) (additional citations omitted); *First Report & Order*, 16 FCC Rcd. 2598, ¶ 112 (recognizing “dual carriage may burden cable operators’ First Amendment interests more than is necessary to further the important governmental interests they would promote.”).