

August 30, 2002

EX PARTE

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Digital Must Carry
CS Docket No. 98-120

Dear Ms. Dortch:

On Thursday, August 29, 2002, Daniel L. Brenner, Senior Vice President, Law and Regulatory Policy, of NCTA, Diane Burstein, Deputy General, of NCTA, and Jill Luckett, Vice President, Program Network Policy, met with Catherine C. Bohigian, Legal Advisor, Mass Media & Cable, to discuss the definition of “primary video” as it relates to the digital signal of a broadcaster.

In particular we pointed out that, if there is a dispute as to the meaning of “primary video” in the statute, the principle of constitutional avoidance requires acting with the least impingement on the first amendment rights of cable operators and programmers. Defining “primary video” to allow must carry stations to multicast standard definition signals fails to meet the requirement of constitutional avoidance.

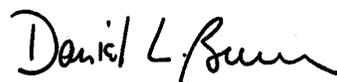
This is because a multicast requirement impinges on a cable operator’s first amendment right to decide what programming to carry; and on the first amendment right of non-broadcast

program services to compete for space on the operator's system without government favoring broadcaster services, beyond the single primary video signal. That this is a significant impingement on programmer and operator rights because the operator can use the spectrum not occupied by the broadcaster's single (and, we argue, primary) video standard definition (SD) program service for other non-broadcaster programs.

To illustrate the burden involved, we presented a chart (attached) that examines the 12 must carry stations in the Long Island, New York TV market. If each station is entitled to carriage of 6 multicast (SD) signals, this would lead to 72 channels of broadcast programming that the operator must carry. This arrangement also burdens any non-broadcast program service seeking carriage; it would find that the first available slot is pushed back 73 places instead of 13 places. The multicast requirement amounts to the government placing the broadcasters' additional 60 standard definition programming services ahead of any non-broadcast programming on the system's line-up.

Neither the language of the statute nor the legislative history reveals any explicit desire by Congress to make this judgment regarding preferred speech, let alone the factual findings supporting it. In particular, Congress made no finding that multiple program services are part of the "primary video" so long as those signals take up no more room than a single high definition signal would.

Respectfully submitted,

A handwritten signature in black ink that reads "Daniel L. Brenner". The signature is written in a cursive, flowing style.

Daniel L. Brenner

cc: Catherine C. Bohigian