

September 6, 2002

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Ex Parte Notification**
CS Docket No: 98-120

Dear Ms. Dortch:

On September 4, 2002, Eddie Fritts, Jack Goodman, Karen Kirsch and Valerie Schulte of NAB met with Commissioner Abernathy and her legal advisor Bryan Tramont to discuss and urge swift Commission action in favor of a broad reading of the “primary video” language in the must carry statute as it relates to carriage of broadcast DTV signals. We indicated our belief that the issues have been fully briefed to the Commission, including the point that a broad definition of primary video was required if multicasting to become a reality for over-the-air broadcasting. We talked about the purposes of must carry, as treated in the *Turner II* Supreme Court case, in relation to a broad definition of primary video, consistent with our arguments in NAB’s Petition for Reconsideration in the above-referenced docket. We discussed the constitutional issues concerning “primary video,” as covered in NAB’s August 5, 2002 ex parte communication containing the constitutional analysis by Jenner & Block, as well as our views that the constitutional test applied in *Turner II* does not require the “least restrictive burden” on the speech rights of cable interests, but rather one that fits with the statutory purposes of must carry. We further mentioned that the concurring opinion of Justice Breyer in *Turner II* did not suggest a more restrictive tailoring of the appropriate remedy and left with the Commissioner the attached memo to that effect. We also mentioned the need for carriage of the full PSIP information in the broadcast stream.

Sincerely yours,


Valerie Schulte

cc: Commissioner Abernathy
Byran Tramont

Attachment

The Breyer Concurrence Does Not Require a More Restrictive Application of Must Carry

- Breyer joined the opinion of the Court, other than its reliance on an “anticompetitive rationale.” 520 U.S. at 225
- Breyer voted to uphold the statute because it advanced other objectives, namely preserving the benefits of free, over-the-air local broadcast television and promoting the widespread dissemination of information from a multiplicity of sources. *Id.* at 226.
- The statute “undoubtedly seeks to provide over-the-air viewers who *lack* cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate.” *Id.* Permitting local stations that develop multi-cast programs the same opportunity to reach an audience will add to the “rich mix” of programming and achieve the goals that Congress set and the Breyer concurrence identified in upholding must carry.
- Courts must decide in applying intermediate scrutiny whether a regulation “strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences.” *Id.* at 227. Expanding the definition of primary video will directly enhance the variety of speech available to cable and non-cable homes while having at most a *de minimis* restriction on cable services, and is even less likely to have an impact on cable *program* services.
- Breyer agreed that cable “constitutes a kind of bottleneck that controls the range of viewer choice.” *Id.* at 227-28. He further recognized that without carriage rules, cable systems would carry fewer signals, that station revenues would decline, and that “*the quality of over-the-air programming on such stations would almost inevitably suffer.*” *Id.* at 228 (emphasis added).
- Breyer agreed that “the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers is limited and will diminish as typical cable system capacity grows over time.” *Id.*
- Breyer concluded that Congress was reasonable in believing that must carry “will help the typical over-the-air viewer (by maintaining an *expanded range of choice*) more than it will hurt the typical cable subscriber (by restricting cable slots otherwise available for preferred programming). The latter’s choices are many and varied, and the range of choice is rapidly increasing.” *Id.*
- Thus, Justice Breyer’s opinion does not set a more restrictive test for carriage regulations but instead rests on a conclusion that the broad purposes of must carry fully justify any minimum and declining restriction on cable choice. His reasoning fully supports a requirement that cable systems carry all non-subscription programming of local DTV stations.