

March 20, 2003

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Secretary
Fcdcral Communications Commission
445 12th Street. SW
Washington, DC 20554

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Rc: Ex Parte Filing
Docket No. 98-120

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Dortch:

The Association of Public Television Stations (APTS), the Corporation for Public Broadcasting (CPB) and the Public Broadcasting Service (PBS) hereby notify the Commission of the attached joint *ex parte* Comments in the above-referenced proceeding.

Sincerely,



Marilyn Mohrman-Gillis
Vice President, Policy and Legal Affairs

Enclosure

cc: Chairman Michael K. Powell
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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Carriage of Television Broadcast) CS Docket No. 98-120
Signals)
)
Amendments to Part 76 of the Commission's)
Rules)
)

EX PARTE COMMENTS OF PUBLIC TELEVISION

ORIGINAL

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March 20, 2003

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SUMMARY

These *Ex Parte* Comments respond to requests from Commissioners and other Commission personnel that public broadcasters further demonstrate why failure of the Commission to adopt a **requirement** that cable systems carry their free, digital **multicast** programming will substantially harm public broadcasting. Using evidence gathered from those who best understand the economic pressures on public television, this submission shows that public television stations denied carriage of their full DTV signal “will either deteriorate to a substantial **degree** or fail altogether.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997).

Accordingly, **these** comments **document** public broadcasters’ plans, adopted in partnership with state **governments** and other funding sources and in some cases already implemented, to take advantage of digital transmission technology to offer to the American public an array of new niche services -- and to do so without using more spectrum than will be used for a single high definition program stream. These new services will include, for example, a local government channel with gavel-to-gavel coverage of government proceedings and homeland security information, a cultural channel with previously uncovered cultural events, a channel for minority groups or the elderly, and an educational channel. These plans reflect the conviction of public broadcasting’s leaders that multicasting is necessary, not merely desirable, to solidify **existing audiences** and reach new viewers. Multicasting is also necessary for public television to achieve **greater** financial support -- which is essential for the future -- from local and national **underwriters**, foundations, state and local governments, and members.

Because cable **controls** about 70% of American households, cable carriage of multicast services is essential if public **television’s** strategy for achieving economic health is to

succeed. For example, national underwriters look for a minimum of 70% coverage before they will provide financial support for public television programming. Without cable carriage, the ability of public television's multicast services to reach this underwriting threshold is a **mathematical** impossibility. The absence of cable carriage will similarly thwart public broadcasters' efforts to seek financial support from **other** sources.

Over three years of intensive and largely unsuccessful efforts by public **broadcasters** to **negotiate** for voluntary cable carriage of their digital services -- **HDTV** and **multicast** -- have confirmed that a must carry requirement is necessary. Marketplace forces are not **sufficient**.

The availability of **free**, over-the-air broadcast service to the American public was **one** of the government interests held by the Supreme Court in *Turner II* to justify Congress' and the Commission's analog must carry requirement for cable systems. What is at stake here is not only the loss to American viewers of public stations' multicast services of the kind described in these comments, but also the **viability** of public **television** as a whole. Public television **executives**, a sample of whom have provided **the** declarations submitted with this pleading, believe that only by appealing to new viewers and new funding sources, via the multicast strategies **they** have developed and are **implementing**, can public television attain the economic viability **required** for it to survive in the new digital, multi-channel, niche programming environment.

These comments, therefore, amply sustain the Commission's ability and **responsibility** to prevent prospective **harms** that would cause public television stations to deteriorate to a substantial degree. In short, they provide the showing needed for the

Commission to adopt cable carriage requirements that embrace public broadcasting's new multicast program services.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Carnage of Television Broadcast |) | CS Docket No. 98-120 |
| Signals |) | |
| |) | |
| Amendments to Part 76 of the Commission's |) | |
| Rules |) | |
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EX PARTE COMMENTS OF PUBLIC TELEVISION

Public Television has made the case to this Commission, in written comments and in oral presentations, that mandatory cable carriage of multiple, free program streams contained within a television station's digital signal ("multicasting") is not only legal and in keeping with national communications policy goals, but also indispensable to the survival of a robust public television service.¹ Specifically, Public Television (which includes The Association for Public Television Stations ("APTS"), the Public Broadcasting Service ("PBS"), and the Corporation for Public Broadcasting ("CPB")) has urged the Commission to determine that the "primary video"

¹ See, e.g., Association of America's Public Television Stations ("APTS"), *ex parte* notice, CS Docket No. 98-120, Sept. 6, 2002 ("notice of 8/26 meeting with Commissioner Capps"); APTS, *ex parte* notice, CS Docket No. 98-120, Sept. 6, 2002 ("notice of 8/26 meeting with Susan Eid"); APTS, *ex parte* notice, CS Docket No. 98-120, Sept. 6, 2002 ("notice of 9/4 meeting with Chairman Powell"); APTS, Corporation for Public Broadcasting ("CPB"), and Public Broadcasting Service ("PBS"), *ex parte* submission, CS Docket No. 98-120, August 12, 2002; APTS and CPB, *ex parte* notice, CS Docket No. 98-120, March 7, 2002; APTS, PBS, and CPB, Reply Comments, CS Docket Nos. 98-120, 00-96, 00-2, **Aug.** 16, 2001; APTS, PBS, and CPB, Comments, CS Docket Nos. 98-120, 00-96, 00-2, June 11, 2001; APTS, CPB, and PBS, *ex parte* submission, CS Docket Nos. 98-120, 00-96, 00-2, June 11, 2001; see also National Association of Broadcasters, *ex parte* filing, CS Docket No. 98-120, Aug. 5, 2002 (brief on constitutionality of a digital must carry requirement that includes multiple streams of programming within a single broadcast signal.)

of a digital television station, which is entitled to mandatory cable carriage, includes the free, over-the-air video programming contained in the station's DTV signal, whether the programming is formatted as HDTV, standard definition, or a mix of the two, and whether it appears as a single program or multiple programs. In this submission, Public Television seeks to fortify the point that the lack of mandatory carriage for digital multicasting will result, at least for public broadcast stations, in the very harms that Congress sought to prevent with the 1992 Cable Act² and the prevention of which the Supreme Court recognized as an important federal interest in the *Turner* cases.³ If public television stations are not assured that their digital multicasting will be available to cable viewers in their markets, many of these stations will not survive the digital transition. These comments supplement the record on that point with important facts gathered from the public broadcasting community

These comments confirm the point that, given the failure of most public broadcasting stations to secure cable carriage agreements for their digital signals, must carry requirements are essential to ensure that the vast majority of viewers can access these signals, which stations are investing so much to transmit. The comments also address the question of why the inclusion of multicasting in public broadcasters' digital signals is so important for the future of the medium. For those who have asked why cable transmission of a single HDTV signal is not adequate, these comments provide answers given by public television executives who are in the best position to assess the direction public television must take to achieve financial viability. Exhibits B1 through B6 attached hereto are declarations from various public

² Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), Pub. L. 102-385, 106 Stat. 1460.

³ *Turner Broad. Sys., Inc. v. FCC* ("Turner I"), 512 U.S. 622 (1994); *Turner Broad. Sys., Inc. v. FCC* ("Turner II"), 520 U.S. 180 (1997).

television station executives around the country explaining the adverse consequences of non-carriage to the health and viability of public television in America.

Answers to these questions are critical in the constitutional calculus of whether the governmental interest in preventing substantial deterioration of broadcast television justifies the burden that mandatory carriage places on cable systems. Both public and commercial broadcasters have demonstrated that a must carry rule that covers a station's universally available broadcast schedule, transmitted digitally, poses no greater constitutional concern than the analog must carry rule that was upheld six years ago. This is true, whether the station broadcasts a single HDTV program stream or, at other times of the day, broadcasts multicast programming services, because a cable system need not dedicate a single additional hertz to carry a station's multicast programming than it does to carry the same station's HDTV programming, which the Commission has already guaranteed carriage

The impact of cable operators' failure to carry that multicast programming would, however, be devastating. Without carriage of multicast programming, the health of public television broadcasting will deteriorate substantially, subverting important government interests at the heart of the 1992 Cable Act and the Supreme Court's subsequent affirmation of that Act's constitutionality. We include the constitutional argument, previously filed by Public Television: as Exhibit A for completeness, but do not here rehash it. We do, however, begin with the constitutional framework to demonstrate how the specific focus of these comments -- the practical impact of non-carriage of multicasting on public television stations -- helps to satisfy the constitutional test for digital must carry.

⁴ APTS, PBS, and CPB, *ex parte* submission, CS Docket No. 98-120, August 12, 2002 (hereinafter "Exhibit A").

I. THE CONSTITUTIONAL FRAMEWORK

In the *Turner* cases, the Court held that the Commission's must carry regulations were content-neutral regulations of speech subject to the balancing test set forth in *United States v. O'Brien*.⁵ Pursuant to the *O'Brien* balancing test, a regulation will be upheld if it advances important governmental interests and does not burden substantially more speech than necessary to further those interests.⁶ Significantly, the Court rejected the cable operators' argument that the Commission must choose "the least intrusive means of achieving the desired ends," because "[t]his less-restrictive-alternotive analysis . . . has never been a part of the inquiry into the validity of content-neutral regulations of speech."⁷

The Court in the *Turner* cases identified three interests that analog must carry was designed to serve, each of which the Court deemed to be an "important governmental interest."⁸ The interests are: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."⁹

Congress had feared that "stations dropped or denied camage [by cable systems] would be at a 'serious risk of financial difficulty'" and as a result, would "either *deteriorate to a substantial degree* or fail altogether."¹⁰ Looking at these Congressional concerns, the Court

⁵ *Turner I*, 512 U.S. at 661-62. See *United States v. O'Brien*, 391 U.S. 367 (1968). For a full discussion of the constitutional framework, see Exhibit A.

⁶ See *Turner II*, 520 U.S. at 189.

⁷ *Id.* at 217 (alterations in original) (internal quotations omitted).

⁸ *Id.* at 189-90; *Turner I*, 512 U.S. at 662-63.

⁹ *Turner II*, 520 U.S. at 189 (quoting *Turner I*, 512 U.S. at 662).

¹⁰ *Id.* at 208 (quoting *Turner I*, 512 U.S. at 667).

¹¹ *Id.* at 195 (emphasis added).

found that “protecting noncable households from loss of regular television broadcasting service” is an important federal interest.¹² The loss the Court identified was the loss due to the substantial deterioration or failure of broadcast stations resulting from lack of cable carriage. That is the standard -- substantial deterioration or failure -- that the Commission should apply in considering the legality of digital multicast must carry. The evidence submitted here bears out the conviction of Public Television that, in the absence of mandatory cable transmission of public broadcast stations’ multicast programming, these stations will indeed substantially deteriorate or fail altogether, thereby depriving noncable households of important television broadcasting service.

II. ABSENT MUST CARRY OF MULTICAST DIGITAL PROGRAMMING, THE BENEFITS OF PUBLIC TELEVISION WILL NOT BE PRESERVED, AND PUBLIC TELEVISION STATIONS WILL DETERIORATE TO A SUBSTANTIAL DEGREE.

A. Public Television Plans To Use Multicasting To Deliver A Wide Variety Of Important Public Interest Programming

Executives of public television stations throughout the nation have announced their intentions to use their digital channels to multicast during some portions of the day and to broadcast HDTV either alone or along with a standard definition program stream during other parts of the day.¹³ Many public television stations are already multicasting.¹⁴ Many more will do so as the digital transition progresses, so that the inaugural multicast programming of today, if permitted to reach enough viewers, will develop into an even richer array of programming,

More than 95% of public television stations have committed to carry at least one multicast channel dedicated to educational programming. Several stations are partnering with

¹² *Id.* at 190 (internal quotations omitted).

¹³ Shuman Decl. ¶ 2; Christopherson Decl. ¶ 2; Garcia Decl. ¶ 2

¹⁴ Christopherson Decl. ¶ 7; Conway Decl. ¶ 5.

state departments of education to develop educational programming. Stations' educational programming will emphasize some combination of adult continuing education, K-12 instructional programming, workforce development and job training, and college telecourses -- almost all of which is programming not available today. WMEC (**Macomb, IL**), for instance, will work with **the** Illinois Board of Higher Education and five local colleges and universities to **develop** college credit and non-credit courses, as well as continuing education and job training courses. South Dakota Public Broadcasting has plans for a daytime and prime time channel **dedicated** to broadcasting children's **programs**. WNET (**New York, NY**) is already multicasting a children's channel.

But multicasting services go far **beyond** educational programming. Other multicast programming channels being planned or already being aired by public television stations will consist of new services not **currently** available on television at all. These channels will make this programming **content** newly available to the public. For example, many public stations also **intend** to, or already do, multicast a digital channel dedicated to local issues and public **affairs**. These multicast channels will cover state legislatures, local town meetings and **debates**, and highlight local business, lifestyle, and political issues.¹⁵ Other multicast plans include **targeting** broadcasts at traditionally underserved communities. For instance, several public stations will broadcast foreign language programming. Many public stations are also considering channels for the senior community. The New Jersey Network is developing plans for a workforce development channel, a **cultural** channel, a tourism channel, and a **civic** channel,

¹⁵ Christopherson Decl. ¶ 4.

as well as an educational channel.¹⁶ South Dakota Public Broadcasting plans to broadcast four streams of programming -- one channel to PBS broadcasts, a second to children's shows, a third to education, and a fourth to local programming. The attached declarations describe more fully the programming plans of other public television stations.¹⁷ This evidence demonstrates how multicasting will bring new services to the public that could not be made available under the constraints of a single analog program stream.

B. Cable Carriage Is Necessary To Preserve The Benefits Of Free Broadcast Service And To Prevent The Deterioration Of Public Television To A Substantial Degree.

Public television station service will deteriorate to a substantial degree, or even fail, if stations' multicast programming is not carried on cable. First, without mandatory cable carriage, existing multicast programming and plans for future multicast programming will likely be aborted due to lack of viewer access and the resulting evaporation of financial support. The extinction of multicasting as a viable business model for public television stations will result in the loss of this enriched regular broadcast service to both cable and non-cable homes. That loss plainly will constitute a substantial deterioration of the public television service. Second, and more important, the loss of multicasting services threatens the loss of public television service of any kind. Exhibits B1 through B6 show that those closest to the market for public television services and best positioned to assess the highest and best use of the public broadcast resources are convinced that a successful multicast strategy is essential to the economic viability of public television stations

¹⁶ Christopherson Decl. ¶ 7.

¹⁷ Shuman Decl. ¶ 3; Christopherson Decl. ¶ 7; Garcia Decl. ¶¶ 3,4

1. **Multicast programming is an essential part of the future of public television.**

Public television stations across the nation have determined that, in a multi-channel media environment in which public television must compete with commercial cable and broadcast channels that can re-purposc content, launch targeted programming services, and cross-sell to advertisers, a multicast programming strategy is essential to the survival of public television. Public television stations do indeed need to “compete” and to “market.”

Increasingly, public television stations **must** appeal to corporate marketing departments, rather than to **corporate chantabl departments**. These marketing departments look at underwriting opportunities as another way of communicating with the public.¹⁸ Given the severe budget pressures that public television faces and stations’ increasing reliance on corporate funds for support, public television stations must engage **effectively** in the marketplace to attract these lunds.¹⁹ The economic realities facing public television are of course relevant to the constitutional analysis of digital must carry hecausc these realities determine what will and will not inflict substantial harm on the service provided by public broadcast stations,

Executives of public television stations have explained in their attached declarations that, to remain viable, their stations need to employ a strategy of new multicast programming targeted to niche audiences.” Television audiences have become increasingly

¹⁸ Conway Decl. ¶ 9

¹⁹ Public television stations also have to contend with the overall decline in advertising rcvncue for broadcast television, The FCC has observed that advertising revenue for broadcast programming dropped from \$40.8 billion in 2000 to \$35.9 billion in 2001, while nan-broadcast programming has **experienced** a growth in advertising revenue from \$10.3 billion in 2000 to \$10.7 billion in 2001. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report, FCC 02-338 (rel. Dec. 31, 2002)*, ¶ 79.

²⁰ See *generally* Shuman Dccl.; Christopherson Decl.; Garcia Decl

splintered in recent years as new and proliferating cable program services have targeted specific audiences -- often audiences that have traditionally supported public television.²¹ Public television stations have concluded that a robust multicast programming strategy is necessary to enable them to compete in this marketplace of expanding digital television content.

In the opinion of public television leaders responsible for responding to the public's interests, the ambitious multicast strategies described above (and described in greater detail in the attached declarations) are necessary to the continued viability of public television stations. Multicast programming will help public television stations to strengthen their membership, attract more viewers and foundation support, and improve their ability to attract state and local funding.** Further, multicast programming will attract corporate underwriters both by targeting underwriters interested in particular programming (e.g., local programming) and by packaging underwriting opportunities across a range of programming aimed at diverse viewers.²³ Public television leaders -- those in the best position to assess public demand for programming services -- clearly believe that, absent a multicast strategy, the viability of public television stations is in jeopardy in the multi-channel digital world.²⁴

State legislatures and other funders are also convinced that public television stations' bold initiative to attract and keep a variety of niche audiences can be successful. The prospect of increased viability that state legislatures and community supporters believe will come

²¹ Shuman Decl. ¶ 5; Christopherson Decl. ¶ 3.

²² Shuman Decl. ¶ 5; Christopherson ¶ 3, 6; Garcia Decl. ¶ 2.

²³ *Id.*

²⁴ Shuman Decl. ¶ 6, 8-9; Christopherson Decl. ¶ 9-10.

from a successful multicasting plan has convinced them to provide over \$700 million in capital investment to convert public television stations to digital.²⁵

2. If multicast programming is not transmitted to cable households, non-cable households will also lose public television services.

If cable systems do not carry public television stations' multicast programming, this programming will not survive.” Public television stations rely heavily on underwriters to support their programming and operations. Underwriters' contributions account for roughly 20% of the budget for producing national programming aired on public stations, with the remainder coming from such sources as foundations, government funding, CPB, and individual donations.²⁷ Local programming is supported by the same sources.²⁸ Since the producing budgets of public television programs are usually done on a “break-even” basis, any loss in underwriting would jeopardize the viability of the programming.²⁹

Underwriters of national public television programming often have a threshold requirement that the shows they underwrite will be available to at least 70% of all viewers nationally.³⁰ Public television stations face similar requirements in seeking underwriting on a local basis. With cable penetration levels at roughly 70% nationally, programs not carried on cable can never reach more than 30% of the potential market.” As noted above, underwriting

²⁵ Public Broadcasting estimates the conversion to digital will cost \$1.8 billion. Despite the high capital expenditures needed, 26% of public television stations are currently broadcasting in digital.

²⁶ Lawson Decl. ¶ 6.

²⁷ Conway Decl. ¶ 8

²⁸ *Id.*

²⁹ *Id.*

³⁰ Ozier Decl. ¶ 8.

³¹ Non-carriage by satellite services is a further impediment.

support has become more difficult to obtain in recent years and, accordingly, public television stations have had to look increasingly to corporate marketing departments instead of foundations.³² In turn, underwriters have become much more interested in the number and demographic profile of viewers of the programs the underwriters are supporting.³³ Without support from underwriters, for which cable carriage is essential, public television stations will not be able to maintain their multicast programming.

The relationship between multicasting and underwriting support goes to an even more fundamental point. Multicasting has the potential to reverse the erosion of public television's funding base. In recent years, public television stations have seen their market shares decline. This -- along with the downturn in the economy, a shift in marketing from broadcast to cable, and the relatively flat federal funding support (now amounting to only 17% of public television's operating revenues) -- has made it imperative for public television stations to innovate and create new strategies to attract underwriting, as well as viewers, members, and local and state government support.

Multicast programming provides public television stations with two opportunities to enhance their ability to raise underwriting revenue. One strategy is to take advantage of the wider array of programming to attract corporate underwriters interested in particular types or genres of programming.³⁴ A second strategy is to provide corporations with a range of sponsorship opportunities that enables corporations to underwrite packages of programming

³² *Id.* ¶ 9.

³³ Conway Decl. ¶ 9; Ozier Decl. ¶ 10.

³⁴ Conway Decl. ¶ 11; Ozier Decl. ¶ 10.

targeted to different niche audiences.³⁵ This is a method successfully employed by cable programmers that offer advertising packages over several cable channels. Public television stations broadcasting high quality multicast programming targeted at niche audiences would be able to use the same strategy to attract underwriting support, but only if the multicasting is carried on cable thereby reaching enough potential viewers.³⁶

3. **Experience demonstrates that the marketplace will not provide cable carriage of public broadcasting's multicast services.**

More than three years of vigorous negotiations with cable MSOs that have yielded only limited success demonstrate how hard it is to obtain voluntary carriage for public television stations' DTV signals. Consistent with the urging of the Commission and at significant cost, public television has engaged in an aggressive negotiation strategy that has resulted in only two national agreements with cable operators (Time Warner and Insight Cable) that cover a little over 20% of the cable households in this country. In addition, a few cable systems have cherry picked public television by entering carriage arrangements with a single public station in a market, e.g., Comcast has an agreement to carry WNET, the New York City public television station in New Jersey, but does not carry the New Jersey Network on its New Jersey systems. Some cable MSOs have resisted providing carriage of public television's multicast signals despite the fact that those signals consume comparable capacity to a single HDTV signal.³⁷ Even those stations that have managed to negotiate private transitional carriage deals have no guarantee that the cable systems will continue to carry their multicast services at the end of the transition.

³⁵ Conway Decl. ¶ 11.

³⁶ Conway Decl. ¶ 10-11

³⁷ See Exhibit A at 2.

C. The Commission Has The Authority To Prevent Prospective Harms.

Although the future harms to public television if must carry is not applied to multicasting cannot be delineated precisely and in great factual detail, that should not deter the Commission from making decisions now about multicast carriage in the new digital regime. The Supreme Court has long upheld the Commission's authority to act prospectively to avoid future results that would not be in the public interest.³⁸ The Commission has broad discretion to exercise its judgment and make predictions concerning the policies necessary to promote the public interest because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."

When Congress passed the Cable Act, it had before it both studies and anecdotal evidence that "cable operators had already dropped, refused to carry, or adversely repositioned significant numbers of local broadcasters."⁴⁰ The Court in *Turner II* had before it even more specific "evidence that adverse carriage actions decrease broadcasters' revenues by reducing audience levels, and evidence that the invalidation of the FCC's prior must carry regulations had contributed to declining growth in the broadcast industry."

It is not possible for the Commission to have the same **kind** of record before it in this proceeding as Congress and the courts had before them in enacting and upholding the Cable Act. The Commission does not have, and could not have, the record of television stations and multicast streams that have already failed as a result of not obtaining cable carriage because we

³⁸ See *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 77.5, 814 (1978)

³⁹ *Id.* (quoted in *Turner II*, 520 U.S. at 196).

⁴⁰ *Turner II*, 520 U.S. at 187 (quoting *Turner Broad. v. FCC*, 910 F. Supp. 734, 742 (D.D.C.1995))

⁴¹ *Id.* at 188 (internal citations omitted)

are still very early in the transition to digital. But to take action, the Commission need not wait for stations to falter or fail. The Commission may make predictive judgments if those judgments are supported by substantial evidence in the record.

The record before the Commission in the proceeding now contains substantial evidence from which the Commission can determine that: (a) without required carriage of multicast programming cable systems will not carry the multicast streams: (b) most multicast programming will therefore not survive, in contravention of Congress' important interest in preserving the benefits of over-the-air programming: and (c) without multicast programming, public television stations will substantially deteriorate because they will not be able to maintain and enhance sufficient audience support to attract underwriters and other sources of necessary financial support. The Commission has the substantial evidence that it needs to act to protect the important governmental interests identified by Congress and the Court.

111. REQUIRING CARRIAGE OF MULTICAST PROGRAMMING WILL NOT BURDEN SUBSTANTIALLY MORE SPEECH THAN NECESSARY.

Public Television further submits that mandatory carriage passes the second prong of the *O'Brien* test: mandatory carriage does not burden substantially more speech than necessary to further the important governmental interests.⁴² The Court in *Turner II* specifically held that this prong of *O'Brien* does *not* require a less-restrictive-alternative analysis.⁴³ The Court went on to say that it would "not invalidate the preferred remedial scheme because some

⁴² *Turner II*, 520 U.S. at 189.

⁴³ *Turner II*, 520 U.S. at 217.

alternative solution is marginally less intrusive . . . [s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest."⁴⁴

As explained in detail in Exhibit A, mandating multicast carriage would impose no greater burden on cable operators, and arguably a smaller burden, than that upheld in the *Turner* cases.⁴⁵ The digital broadcast streams will take up the same capacity on a cable operator's system regardless of whether one or multiple streams are broadcast within the 6 MHz of spectrum.⁴⁶ The digital streams occupy less cable capacity than the analog signals *Turner II* held the Commission could require cable systems to carry.⁴⁷ Additionally, as a result of increased cable capacity, the actual burden imposed by mandatory carriage is significantly less than the burden upheld in *Turner II*.

IV. CONCLUSION

Requiring cable carriage of multicast broadcasting is constitutional under the *Turner* cases. Mandatory carriage is content neutral and promotes important governmental interests. Specifically, carriage of multicast programming is necessary to ensure that public television stations do not substantially deteriorate. Without cable carriage, multicast programming will never be able to reach more than 30% of the national audience -- not enough to attract corporate underwriters either on a national level, where underwriters require an

⁴⁴ *Id.* at 217-18

⁴⁵ Due to the substantial increase in cable capacity and the efficiency of a digital signal, even a dual carriage requirement during the transition can be fashioned so that it would fall well below the ceiling of one-third of cable system's capacity that was upheld in *Turner*. See Exh. A at 10, n. 35. See Letter to Chairman Powell (February 27, 2003) with attached Public Television's Transitional Digital Carriage Proposal, *ex parte* submission, CS Docket Nos. 98-120,00-96, and 00-2.

⁴⁶ Exh. A at 2

⁴⁷ *Id.*

audience reach of at least 70%, or on a local level to attract other sources of financial support. Loss of multicast programming, both programming currently on the air and planned for future broadcasting, is a substantial deterioration of the over-the-air broadcast service that the Cable Act intended to protect.

But the effects of non-carriage would be much more severe. The public television station community has concluded that successful multicast programming is the key to attracting additional viewers and underwriters -- which they have determined is essential to their future viability. Multicast programming permits public television stations to attract and keep new niche audiences which, as the television audience has splintered in recent years, has become essential.

Respectfully submitted,

_____/s/ Marilyn Mohrman-Gillis
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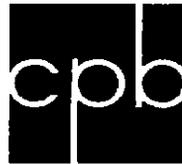
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March 20, 2003

EXHIBIT A

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

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

Re: **Written Ex Parte Submission to CS Docket No. 98-120**

Dear Ms. Dortch:

On July 9, 2002, the National Cable & Telecommunications Association ("NCTA") submitted an *ex parte* filing in the above-captioned docket that included a paper by Professor Laurence Tribe arguing that interpreting the term "primary video" to require carriage of all, rather than part, of a broadcaster's free, over-the-air programming would raise serious constitutional questions under the First and Fifth Amendments.¹ The Association of Public Television Stations ("APTS"), the Public Broadcasting Service ("PBS") and the Corporation for Public Broadcasting ("CPB," and collectively, "Public Television") submit this *ex parte* letter to respond to the claims in the NCTA Paper.

The Paper's conclusions are based on a flawed analysis of digital cable technology, a misunderstanding of Congress's intent in adopting must carry requirements, and a selective reading of the Supreme Court's *Turner* opinions, which upheld the cable must carry rules.² As demonstrated below, requiring carriage of all of a broadcaster's free, over-the-air

¹ See Letter From Daniel L. Brenner, Senior Vice President, Law & Regulatory Policy, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 9, 2002), enclosing a paper by Laurence H. Tribe entitled "Why the Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obligation" ("NCTA Paper").

² See *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

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