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

In the Matter of	)	
	)	
Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television	)	MB Docket No. 03-15 RM 9832
	)	
Public Interest Obligations of TV Broadcast Licensees	)	MM Docket No. 99-360
	)	
Children's Television Obligations of Digital Television Broadcasters	)	MM Docket No. 00-167
	)	
Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations	)	MM Docket No. 00-168

REPLY COMMENTS OF A&E TELEVISION NETWORKS

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EXECUTIVE SUMMARY

The Commission should not re-open the issue of whether cable operators must carry a television broadcaster's multicast transmissions which when it previously addressed, it concluded that a broadcaster's " primary video" entitled to compulsory carriage means only a single program stream. The few comments that even address this issue demonstrate that mandatory carriage is not a critical issue in the digital transition. Commenters agree that many other significant issues need to be resolved before the DTV transition can be successfully completed. The GAO also found hat must carry will play, at best, a tangential role in the digital transition.

Rather than being an impediment to the digital television rollout, the cable industry is making the DTV transition happen. Through significant investments to deploy digital technology, cable operators now offer high definition television programming in most of the top television markets, passing more than 45 million households. Since the most severe problems slowing the widespread adoption of DTV are caused by the broadcasters themselves, the focus should be shifted to making rapid progress in providing affordable equipment to make over-the-air digital broadcast signals available for viewing.

The 1992 Cable Act provides no support for requiring multicast must carry. Congress did not contemplate multicast must carry when it enacted the law and the Act provides that a cable operator must carry only a broadcaster's " primary video" signal, which was not intended to require cable carriage of

material in the VBI or other enhancements of the primary signal. In an *ex parte* letter recently filed with the Commission, Paxson misstates the goals of must carry, makes unsupported assertions that multicast carriage will further those goals, and fails to properly analyze the constitutional bases of the *Turner* decisions.

Commenters generally provide little or no analysis of the *Turner* decisions regarding analog carriage, but based on the *Turner* rationale and narrow holdings, there is little chance the Court's holdings would extend to multicast must carry. When the *Turner* court narrowly upheld analog must carry, it did so on based on its belief that must carry was " a content-neutral regulation," but the broadcasters' own arguments in favor of expanded must carry make clear that the new rights they seek are deeply rooted in content preferences. The reasons presented for multicast must carry also have nothing to do with the interests Congress defined, and on which the Supreme Court relied, in finding analog must carry constitutional. Further, Paxson's letter demonstrates broadcasters' utter failure to recognize the significant burdens that would be imposed by requiring multicast must carry, ignoring the severe impact that must carry imposes on cable operators' ability to choose the appropriate programming to carry on their cable systems. It is absurd for Paxson to suggest that the Commission somehow owes broadcasters must carry rights for their multicast signals.

Finally, by permitting broadcasters to offer multicast transmissions using their digital spectrum, the Commission gave television broadcasters a new business

opportunity that did not previously exist that is unrelated to carriage requirements. The U.S. Court of Appeals recently affirmed this right, recognizing that multicasting is not the "primary use" of broadcast channels, thus supporting the conclusion that multicasting services do not constitute traditional broadcasting. Pro-must carry commenters provide no basis for extending additional regulatory favors in the form of carriage requirements.

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REPLY COMMENTS OF A&E TELEVISION NETWORKS

A&E Television Networks ("AETN"), by its attorneys, hereby files its reply comments in the above-captioned proceeding.[1/]

INTRODUCTION

In its opening comments, AETN discussed those aspects of the Commission's NPRM that appear to re-open the issue of whether cable operators must carry a television broadcaster's multicast transmissions, even though the Commission reach initial conclusions on this issue years ago.[2/] AETN noted that the attempt by some commenters to refocus the must carry debate from dual carriage to multicast must carry does not change the First

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1/ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 1962 (2003) ("NPRM").

2/ *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, ¶¶ 12, 57 (2001) ("*Digital Must Carry Order*").

Amendment analysis that led the Commission to reject dual carriage as overburdening cable operator speech.

In its comments in both the digital must carry proceeding and herein, AETN has described the disconnect between the goal of accelerating the digital transition and the purposes underlying the adoption of must carry in the 1992 Cable Act. Quite simply, multicast must carry would not advance any of the interests on which the Supreme Court relied in upholding analog must carry: (1) preserving free over-the-air local broadcasting, (2) promoting widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"). AETN explained that the NPRM in this proceeding, as well as a recent report by the General Accounting Office ("GAO") underscore that must carry will play no more than a tangential role in the digital transition and that many issues other than digital must carry must first be resolved, before the DTV service can hope to succeed.

The Commission correctly decided that a broadcaster's "primary video" entitled to compulsory carriage means only a single program stream. Multicast must carry would present insurmountable constitutional hurdles because it does not further any relevant government interest such as preserving over-the-air broadcasting, nor would it promote a multiplicity of video programming sources. Finally, multicast must carry would burden more speech than is acceptable under the applicable constitutional test.

DISCUSSION

I. THE COMMISSION HAS PREVIOUSLY AND CORRECTLY DECIDED AGAINST REQUIRING MUST CARRY OF MULTICAST SIGNALS

No comments filed in this proceeding overcome the views expressed by AETN. Indeed, the paucity of comments in this proceeding even addressing the issue of multicast must carry demonstrates that mandatory carriage is not a critical issue in the digital transition. The Commission correctly decided this issue in the *Digital Must Carry Order* when it concluded that a broadcaster's "primary video" means a single program stream, even if a digital broadcast allotment is used for multicasting rather than HDTV service. *Digital Must Carry Order*, 16 FCC Rcd 2598, ¶ 57.

A. Must Carry Is Not the Critical Issue In the Digital Transition

The comments filed in this proceeding confirm the breadth of issues that need to be resolved before the DTV transition can be successfully completed. For example, Sinclair Broadcast Group identifies the most significant obstacles to the DTV transition as follows: obtaining the grant of pending FCC applications, the need to strengthen antenna towers, and FCC rules prohibiting broadcasters from co-locating their analog and digital transmitters on common towers. Comments of Sinclair Broadcasting Group, Inc. at 5-6. Moreover, the Consumer Electronics Association ("CEA") claims that the most significant problems hindering the transition are as follows: television stations currently broadcast on only half of their allotted DTV channels, many stations provide DTV signals at far less than authorized

power levels, over-the-air digital programming is inadequately promoted, and the Commission has not approved a plug-and-play cable retransmission standard. CEA at 7-13. Only after identifying all of these issues does the CEA even mention must carry of digital signals, in a brief paragraph concluding its discussion of impediments to DTV acceptance. *Id.* at 14.

These observations mirror the conclusions drawn by the GAO which, as AETN has explained, found that must carry will play, at best, a tangential role in the digital transition. *Additional Federal Efforts Could Help Advance Digital Television Transition* at 22-23 (November 2002) ("GAO Second Report"). The GAO Second Report also described how public acceptance will perhaps be the most significant hurdle in the DTV transition, suggesting that the Commission must (i) work to increase public awareness of the transition and what it means to consumers, (ii) consider strengthened digital-tuner mandates to "prime the pump," and (iii) assess the merit of establishing a date-certain for cable systems to switch from analog to digital carriage. *Id.* at 39-40.

This Commission expressed the same conclusion in its NPRM in this proceeding, noting the importance of consumer awareness, the widespread consumer availability of DTV equipment, and improved marketing in the digital transition. NPRM, ¶¶ 22, 95. Similarly, comments filed by the National Cable & Telecommunications Association ("NCTA") discussed a survey conducted by the Cable & Telecommunications Association for Marketing which indicates that many consumers remain confused about how to receive high definition programming and, in any

case, will not be interested in purchasing high definition receivers until prices drop significantly. NCTA at 15. *See also* American Cable Association ("ACA") Comments, at 4-10 (identifying the most significant obstacles for DTV transition for smaller cable systems as the current cost of DTV headend equipment and set-top boxes, bandwidth limitations, the unavailability of DTV signals in small markets, and extremely low DTV adoption rates in small communities).

B. The Cable Industry Is Making the Digital Transition Happen

Cable operators are not an impediment to the digital television rollout. Rather, contrary to the image that broadcast interests attempt to portray, the cable industry is making the DTV transition happen. As NCTA points out, the cable television industry is in fact leading the way in deploying digital technology and in hastening widespread adoption of DTV service. Cable operators have invested over $70 billion in upgrading their facilities to enable the carriage of digital broadcast services. NCTA at 5-6. As of March, 2003, at least one cable operator was offering high definition television programming in 103 television markets, including in 73 of the top 100 markets, passing more than 45 million households. *Id.* The current growth rate is also impressive, with the number of television households served by a cable operator offering high definition programming growing by 20 percent during January and February, 2003. *Id.* As ACA also notes, many of the country's smaller cable operators are also

providing digital cable services to their subscribers. ACA at 3-4.

As CEA's comments explain, the most severe problems slowing the widespread adoption of DTV are caused by the broadcasters themselves. CEA at 7-10. Furthermore, as NCTA points out, cable carriage of broadcasters' digital signals will not complete the digital transition as long as non-cable television households lack the means available for viewing those signals. NCTA at 3. Since research indicates non-cable households are likely to be the last consumers to purchase new digital television sets, rapid progress must be made in providing affordable equipment to make over-the-air digital broadcast signals available for viewing on existing television receivers. *Id.*

Contrary to Paxson's accusations in an *ex parte* letter filed on May 13, 2003,[3/] AETN is hardly engaging in a " diatribe against the must carry scheme," nor did its comments fail to address " issues for which the Commission actually sought comment." *Id.* at 1. To the contrary, AETN's filings in this proceeding are focused directly on an issue which Paxson focused on in its own extensive comments, as did other commenters in this proceeding: whether the digital transition would be materially advanced by the Commission revisiting the issue of requiring cable carriage of a broadcaster's multicast signals. *See* Paxson Comments at 4, 10-14. For Paxson to suggest AETN lacks the right to address

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3/ Letter to Hon. Michael K. Powell from Lowell W. Paxson, May 13, 2002, in CS Docket No. 98-120 (" Paxson Letter").

this matter issues, after Paxson itself placed them at issue in this proceeding,[4/] is patently absurd and should be summarily rejected.

II. MULTICAST MUST CARRY IS LEGALLY UNSUPPORTABLE

A. Multicast Must Carry Is Not Supported By the 1992 Cable Act

In light of the comments filed in this proceeding indicating that mandatory cable carriage is hardly the issue which will determine the success or failure of the digital transition, and significant legal impediments to multicast must carry, there is no basis for the Commission to revisit the issue of requiring cable carriage of multicast broadcast signals. First, as discussed above, the evidence demonstrates that market mechanisms and broadcasters' own efforts are far more important in speeding the adoption of DTV services. Moreover, the law simply cannot justify requiring carriage of multicast broadcast signals.

Contrary to the claims of some broadcasters, *e.g.*, Paxson at 11-14, who offer strained interpretations of the 1992 Cable Act, that law provides no support for requiring multicast must carry.

Given that the concept of a single broadcaster providing multiple video broadcast streams over its allotted spectrum was unheard of in 1992, Paxson cannot reasonably claim that by requiring cable carriage of "all" local broadcast signals, Congress had any intention of requiring multicast must carry.

4/ *See*, *e.g.*, Letter to Hon. Jonathan S. Adelstein from Lowell W. Paxson, December 23, 2002, in CS Docket No. 98-120.

Id. at 12. Moreover, Paxson ignores the requirement in the 1992 Act that a cable operator must carry only a broadcaster's "primary video, accompanying audio, and line 21 closed captioning transmission … and to the extent technically feasible, any program-related material transmitted on the vertical blanking interval [VBI] or on subcarriers." 47 U.S.C. § 534(b)(3)(A). As explained in a Joint Agreement between the broadcast and cable industries which Congress essentially adopted in crafting the "primary video" language, this term did not require cable carriage of material in the VBI or other enhancements of the primary audio and video signal (including multi-channel sound, teletext, and material on subcarriers). *See*, *e.g.*, H.Rep. No. 628, 102nd Cong., 2nd Sess. 1992, at 49; S. Rep. 102-92, 102nd Cong., 1st Sess. 1991, reprinted in 1992 U.S.C.C.A.N. 1133, 1196. Accordingly, based on the closest analogy to multicast carriage at the time the 1992 Act was enacted, Congress did not intend the must carry provisions to require multicast carriage.

The Paxson Letter makes a meager but unsuccessful effort to show that multicast must carry would further the purposes of the 1992 Cable Act. Paxson Letter at 3. First, it misstates the goals of must carry as established in the Act by transforming the interest in "promoting fair competition" into a complaint that the companies that produce the most compelling programming are able to secure carriage for it. But this is exactly the way "fair competition" is supposed to work. Paxson also makes the unsupported statement that requiring multicast must carry will advance each of Congress's interests, claiming that multicast

must carry will "add immeasurably to diversity and localism – that is, the very goals cited by the Supreme Court." *Id.* It is hard to perceive how multicast must carry furthers any diversity goals, however, given that it requires carriage of multiple signals provided by a *single broadcaster*. More importantly, such an interest is not properly part of any constitutional analysis of the must carry rules. To the extent the Supreme Court addressed diversity in *Turner*, it did so in the context of ensuring that non-cable households would have continued access to broadcast transmissions; it did not in any way suggest that cable households should receive multiple channels provided by a single broadcaster. *Turner II*, 520 U.S. at 215-16.

B. Multicast Must Carry Is Not Supported By the *Turner* Decisions

None of the comments filed in this proceeding overcome the legal analysis in AETN's comments, which demonstrates that neither dual carriage of analog and digital signals nor mandatory carriage of multicast digital signals can survive a First Amendment challenge. The scant legal analyses provided by the few commenters that address multicast must carry hardly mention the *Turner v. FCC* Supreme Court decisions which upheld the constitutionality of analog must carry. In fact, other than a brief reference in the Paxson Letter, the only comments that even acknowledge the *Turner* requirements are those of the Association of Public Television Stations, Corporation for Public Broadcasting and Public Broadcasting Service ("Public Broadcasters"), which only list the *Turner* criteria and, without

providing further analysis, assert that they are met " without question." Public Broadcasters at 19-20.

As AETN discussed in its opening comments, the *Turner* rationale and narrow holdings indicate there is little chance the Court's analysis would extend to or support multicast must carry. As a threshold matter, the comments demonstrate the " 'chicken and egg' problem" that arises from that fact that " [u]ntil the FCC knows what multicasting will consist of, it cannot determine what interests, if any, cable carriage of multicast broadcast signals will serve, if any of those interest are relevant … and " what burdens such carriage would entail." *See* Court TV at 8-9. Notably, none of the comments by must carry's supporters provide any justification for the constitutionality of multicast carriage requirements, and it is impossible, as shown below, to conceive of any scenario where multicast must carry could be constitutionally justified.

As the Supreme Court explained, under any must carry regime, " [b]roadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994) (" *Turner I*"). Therefore, any digital must carry obligation must materially advance important government interests unrelated to suppressing speech – specifically, preserving free over-the-air broadcasting, facilitating dissemination of information from a multiplicity of sources, and promoting fair competition – while not burdening substantially more speech than necessary to further those interests. *Turner II*, 520 U.S. at 189.

As the comments filed in this proceeding confirm, dual carriage and multicast must carry fail to advance these interests. As an initial matter, broadcasters' demands to expand must carry in this manner are clearly content-based. When the *Turner* court narrowly upheld analog must carry, it did so on based on its belief that must carry was "a content-neutral regulation."[5/] However, the broadcasters' own arguments in favor of expanded must carry make clear that the new rights they seek are deeply rooted in content preferences. For example, Paxson boasts that multicasting will enable broadcasters to offer "unique access to minority, religious and special interest groups." Paxson. at 8. Moreover, Paxson also claims that it needs greater must carry rights to offer "a much needed alternative to the steady stream of sex, violence, and vulgarity…offered by many other programmers." *Id*. at 2. Remarks such as these make it clear that content is undeniably a primary motivation behind Paxson's argument.

However, the Supreme Court has already rejected this type of content-based motivation as raising serious constitutional issues. In *Turner II*, the Court recognized that must carry "interferes with … cable operators [ability] to choose their own programming," and that it "prevents displaced cable program providers from obtaining an audience," and "prevents some cable viewers from watching … their preferred set of programs." 520

5/ *Turner II*, 520 U.S. at 186 (citing *Turner Broad. Sys., Inc. v.* FCC, 512 U.S. 622, 643, 649 (1994) ("*Turner I*")) (internal quotation omitted).

U.S. at 226. The Court stressed that if this displacement of cable operator editorial control and "disfavored" programming were content based, the rules could not survive constitutional scrutiny. *Id.* at 225 (Stevens, J. concurring) ("If this [must carry] statute regulated the content of speech … our task would be quite different."). Since the only basis broadcasters can claim to support their desire for expanded must carry rights stems from the content of multicasting that they may offer, multicast must carry cannot survive constitutional scrutiny.

Moreover, the reasons underlying broadcasters' desire for dual carriage and/or multicast must carry have nothing to do with the interests Congress defined, and on which the Supreme Court relied, in finding must carry constitutional. *See Turner II*, 520 U.S. at 189. The Supreme Court has previously struck down efforts to "supplant the precise interests put forward by the State" in considering the constitutionality of government regulation of protected speech. *E.g.*, *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Accordingly, in the case of expanding must carry rights, the broadcasters' case is fatally flawed.[6/]

Advocates of dual carriage and multicast must carry make clear their position is not based on preserving free over-the-air broadcasting, facilitating dissemination of ideas from a multi-

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6/ *See also Turner II*, 520 U.S. at 190-191 (refusing to include in constitutional review any rationale "inconsistent with Congress' stated interests in enacting must carry"); *cf.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (refusing to sanction must carry absent congressional findings).

plicity of sources, or promoting fair competition. Rather, Paxson explains that its must carry proposals are based on its desire to "expand current levels of over-the-air service," to offer "subscription services such as datacasting and video on demand," "launch exciting new program offerings," and to "gain access to the eyeballs necessary to launch new services." Paxson at 4, 8, 13.

These interests are quite different from the must carry interests identified in the *Turner* decisions and therefore cannot withstand constitutional scrutiny. For example, one of the critical issues in the *Turner* decisions was the finding that the Act's must carry provisions were intended to "preserve the *existing* structure of the Nation's broadcast television medium" based on its "tradition and use for decades." [7/] However, multi-casting and dual carriage are novel business concepts and entirely new opportunities previously unknown to broadcasters. Since expanded must carry cannot be necessary to preserve any existing or traditional aspect of broadcast operations, the rationale of the *Turner* decisions cannot be used to justify expanding must carry to include multicast or dual carriage.

The Paxson Letter further demonstrates broadcaster failures to recognize the significant burdens that would be imposed by requiring multicast must carry. The technical challenges imposed by must carry, which largely reduce to capacity issues, are not

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7/ *Turner II* 520 U.S. at 193-94 (citing *Turner I*, 512 U.S. at 652-653, 661) (emphasis added).

dispositive as to whether cable operators should be required to carry a broadcasters' multicast signals. Rather, any technical burdens of requiring carriage of broadcaster's digital versus analog signal are dwarfed by the impact such forced carriage imposes on the operator's First Amendment rights. Paxson ignores the severe impact that must carry imposes on cable operators' ability to choose the appropriate programming to carry on their cable systems by focusing instead on technical issues. Even if the technical issue were a touchstone for the constitutional analysis, the comments make clear that capacity limits still pose a significant hurdle. *See*, *e.g.*, ACA at 6 (reporting that " [r]etransmission consent tying arrangements lock up … bandwidth … even on upgraded systems," and that some cable operators are thus " especially threatened by broadcasters' continuing call for mandated dual must-carry").

These justifications for multicast must carry requirements are nothing more than an attempt to compete before regulatory agencies, not in the marketplace. Paxson makes little effort to conceal its motivation when it states:

> Broadcasters cannot be expected to invest the considerable resources necessary to exploit the multicast opportunities made possible by DTV technology if the vast majority of their audiences will not have access to their multicast cable offerings.

Paxson Letter at 2. After broadcasters have already received free spectrum for DTV programming, then been afforded the additional financial opportunity, not originally contemplated in the DTV rules, of allowing them to provide multicast transmissions, Paxson still has the audacity to suggest that the

Commission somehow owes them must carry rights for their multicast signals in order for broadcasters to realize the full potential from multicasting. If Paxson wishes to maximize the value of its newfound channels, it may do so in the same way in which non-broadcast cable programmers succeed: by providing programming that viewers want to watch and by proving the value of such channels in the video marketplace. Nothing in the history of the analog must carry rules or judicial review thereof remotely suggests broadcasters are now owed mandatory carriage for multicast transmissions.

C. The Commission Already Affords Broadcasters a Significant Benefit By Allowing Multicast Transmissions

By permitting broadcasters to offer multicast transmissions using their digital spectrum, the Commission gave broadcasters a new business opportunity that did not previously exist, and did not simply seek to enhance the traditional programming toward which the analog must carry rules were directed. This benefit, which goes far beyond purposes originally contemplated for digital spectrum given to broadcasters, allows them to offer ancillary services provided that such services do not interfere with the provision of broadcast television as the primary use of the spectrum. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, ¶ 29 (1997). The United States Court of Appeals for the D.C. Circuit recently affirmed this right, in the context of the FCC decision to allow noncommercial digital broadcasters to offer subscription services, including advertiser supported subscription services, on their excess digital capacity. *United Church of Christ v.*

FCC, __ F.3d ___, 2003 WL 21032901 (D.C. Cir. May 10, 2003). In that decision, the court confirmed that "ancillary and supplemental services such as subscription television" enabled by the right to multicast, allows for entirely "new … opportunities" wholly different from the "primary operation of … free over-the-air television broadcast service." *Id.* *1, *6, *7.

The court recognized that multicasting goes beyond the "primary use" of broadcast channels, *id.* at *1, and accordingly removed any doubt whether such operation constitutes traditional broadcasting that Congress intended must carry to protect, as opposed to something wholly new and different that has same opportunity to succeed in the market as other program offerings. Affording broadcasters the potentially lucrative opportunity to transmit using multiple video streams does not mean that the multiple channels also are entitled to be carried on cable systems. Quite the opposite. The must carry right broadcasters already possess for their primary video signal consisting of one program stream ensures that they are not harmed by any alleged "bottleneck" power cable operators may possess,[8/] by guaranteeing broadcasters a presence on at least one channel in the cable line-up.

By granting broadcasters the ability to multicast, and to derive revenue from those additional channels of video

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8/ *Turner I*, 512 U.S. at 661 ("must-carry provisions … are justified by … bottleneck monopoly power exercised by cable operators").

programming, the Commission provided a subsidy different from the one secured by existing must carry rights. Specifically, multicasting gives broadcasters the ability to garner additional viewership, and associated advertiser dollars,[9/] *without* having to resort to government mandates that intrude on the editorial control and carriage opportunities of other industry participants.[10/] Must carry was imposed on the cable industry, and narrowly upheld by the Supreme Court, based on the notion that, if a broadcaster lost access to all viewers who had switched to cable, providing service to the remaining households would not be profitable enough to support that service. *See Turner I*, 512 U.S. at 646-47. By allowing multicasting, however, the FCC has given broadcasters a new opportunity to obtain additional revenues – through advertiser-supported programming, subscription service, or datacasting and other non-video offerings – that can (i) subsidize service on the primary video channel, and (ii) help ensure that the broadcaster can produce compelling programming that will build viewer demand that will garner carriage. Because multicasting provides this subsidy and frees broadcasters from having to rely on mandatory carriage rights, multicast must carry is unjustifiable as a

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9/ *See* Paxson at 6, 12 (referencing "advertising revenue" arising from broadcast signals and the need to "gain access to eyeballs necessary to launch" multicasting).

10/ *See Turner II*, 520 U.S. at 226 (all must carry "extracts a serious First Amendment price" by "interfering with the protected interests of cable operators to choose their own programming; [preventing] displaced cable program providers from obtaining an audience; and [preventing] some cable viewers from watching … their preferred set of programs").

constitutional matter, and would also only add unnecessarily to the regulatory largesse broadcasters already enjoy. [11/]

CONCLUSION

For the reasons discussed herein and in AETN's initial comments in this proceeding, if the Commission addresses must carry at all in this proceeding, it should reaffirm the conclusion in the *Digital Must Carry Order* declining to require the carriage of multicast must carry signals.

Respectfully submitted,

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11/ *See* Court TV at 20 (discussing broadcaster receipt of free spectrum with no set return date, guaranteed carriage of either a broadcaster's analog or digital channel with preferential channel placement, retransmission consent rights that can be used to create leverage for carriage of multiple program services, absence of high definition obligations, and ability to engage in flexible use of spectrum for innovative, for-profit ventures).