



STAMP & RETURN

Lowell W. Paxson / Chairman

June 27, 2003

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Federal Communication Commission
Bureau / Office

VIA HAND DELIVERY

Kenneth Ferree
Media Bureau
Federal Communications Commission
445 12th St. SW
Washington, D.C. 20554

Re: Paxson Communications Corporation Response to FCC Request for DTV
Information

Dear Mr. Ferree:

On behalf of Paxson Communications Commission ("PCC") and its owned and operated stations, I transmit to you herewith responses to the FCC's request for information regarding the progress of the PAXTV network and the PCC stations in the transition to DTV broadcasting. In analyzing this information, PCC believes that the Commission should focus on the remarkable progress that the PCC stations – and indeed, all broadcasters – have made in furthering the DTV transition despite the fact that, due to a lack of mandatory cable carriage, few viewers are able to see the digital offerings of television stations. The Commission should act now to bring the full promise of DTV – including multicast as well as HDTV offerings – to all Americans by requiring cable operators to carry all broadcasters' free-over-the-air digital video program offerings and directly related program material.

PCC believes that for many broadcasters, the digital future will turn on their ability to exploit the multicasting opportunity created by digital technology. Many broadcasters, particularly emerging networks like PAXTV and independents, do not air programming whose appeal will benefit greatly from the improved picture quality of HDTV. Such broadcasters, including PCC, will, however, benefit greatly from the ability to offer additional new program streams, thereby providing new and expanded choices for the American viewing public. This will greatly increase program diversity in every market, create new voices and work to strengthen localism throughout the country. As PCC has described in the past, multicasting gives broadcasters the opportunity both to contribute more programming to cable viewers and to compete with the cable industry on its own turf by offering viewers a new multichannel programming service – one for which they don't have to pay.

Before Americans can begin to reap the benefits of multicast DTV, however, a critical mass of viewers must be able to receive it. Because a substantial portion of viewers receive



broadcast television programming via cable, that critical mass can only be provided if all of the program streams of DTV stations are carried on cable. As the attached information demonstrates, however, no cable operators currently are carrying PCC's digital or multicast program streams. PCC understands that the story is the same throughout the industry. The familiar refrain from cable operators is that they do not have sufficient bandwidth to carry DTV signals in addition to analog stations. This argument is an obvious canard. Cable operators know that compression technologies now enable them to carry additional broadcast programming within existing and anticipated cable bandwidth. PCC's full digital multicast must-carry plan, for example, would enable broadcasters to gain full carriage of their digital offerings utilizing less cable spectrum than they otherwise would at the end of the transition. Nonetheless, cable operators continue to conjure misleading pictures of broadcasters' requests for "dual carriage," when all broadcasters are trying to accomplish is Congress's consistent mandate that viewers – whether they receive service over-the-air or via cable – have access to broadcasters' free over-the-air television services.

Cable operators also fall back on their long-discredited argument that must-carry infringes on their First Amendment rights. This argument was unfortunately not refuted by the Commission's misguided tentative conclusion in 2001 that DTV must-carry created too great a burden on cable operators. The unintended effect of the Commission's DTV must-carry ruling has been to encourage cable operators to discriminate against broadcast DTV in favor of launching their own digital program services – ensuring that when Americans think of digital television, they think only of cable television. Cable operators' assertion that the fact that they carry their own digital programming is proof that they are willing to carry "compelling" content is both transparent and disingenuous. Two years after the Commission's preliminary DTV must-carry decision, the evidence continues to show that cable operators will not carry digital broadcast services unless they are required to do so.

From this freedom to act anti-competitively, cable operators have gained two distinct competitive advantages: first, they have been able to immediately realize revenue from their digital services; and second, they have ensured that broadcasters interested in reaching their audiences will refrain from making any more investment in DTV services than that absolutely necessary to comply with the Commission's rules. Thus, the cable industry has used the First Amendment to seize digital television's present and its future. It is hard to imagine a more thorough misapplication of the First Amendment than to allow the cable industry to use it to hold hostage the future of over-the-air broadcasting, particularly when broadcasting is an industry which both Congress and the courts have found provides a great service to the American people and is worthy of special protection.

Congress and the Supreme Court already have balanced cable operators' free speech rights against the public benefits of free over-the-air broadcasting and concluded that up to one-third of cable spectrum should be made available for the preservation of the essential over-the-air service that cable's growth threatened. No DTV must-carry plan currently proposed would exceed that cap. Moreover, at the end of the transition, the burden on cable operators will be greatly reduced due to digital compression technologies. Quite simply, there is no foundation in



existing law for cable operators' belief that must-carry requirements that do not exceed the one-third limit violate their First Amendment rights.

Once upon a time, Congress and the courts allowed cable operators to build an empire upon their "right" to carry broadcast stations without broadcasters' consent. Over-the-air broadcasting was weakened by the emergence of cable, but, by and large, broadcasters stayed on the air and consumers benefited from the increased choices cable offered. Having forgotten this history of essentially government-sponsored growth, cable operators now recoil at any suggestion that they should fairly treat their broadcast competitors by carrying their multicast programming in lieu of yet another cable-operator owned programming service. So far, the Commission has acceded to this argument, to the detriment of both the present and future of over-the-air broadcasting and the many, many citizens who still receive television service over the air. If the Commission permits cable operators to continue promoting their own digital programming while suppressing DTV broadcast offerings, it will actively undermine the over-the-air broadcast service that it has been charged to protect. In this instance, inaction is the equivalent of actively undermining the nascent DTV broadcast industry.

It is not too late for the Commission to correct its initial misjudgment of the DTV must-carry issue. **Full digital multicast must-carry remains the most powerful lever to accelerate the DTV transition and to fulfill the Commission's duty to protect the future of free over-the-air television.** The information the Commission will find in PCC's and other broadcasters' responses to this inquiry will show that broadcasters are on the air and ready to offer their communities the real benefits of DTV. It will further show that the only missing element is cable carriage. For good or for bad, cable's success has made it the fastest and surest way to get broadcast DTV services into the largest number of households as quickly as possible. Thus, by ordering full digital multicast must-carry, the Commission can accelerate the DTV transition, vastly expand the number of programming choices available to consumers, increase localism and program diversity, and impose only a minimal increase in the burden on cable operators. The Commission should not hesitate to achieve these ends and it should not fear that its actions will be struck down since *Turner Broadcasting* is the law of the land.

In its current deliberation on DTV must-carry, the FCC has received comments from hundreds of organizations and from all of the parties to the *Turner Broadcasting* case. These comments included a full briefing of the legal and constitutional issues and convincingly demonstrated that full digital multicast must carry, like analog must-carry, is constitutional and in full accord with the decisions of the Supreme Court. There never has been a legal issue so thoroughly briefed before the FCC and so thoroughly one-sided. **The plain fact is that full digital multicast must-carry is legal – and, it's good policy.** Delaying resolution of this issue now is significantly delaying the DTV transition. Accordingly, full digital multicast must-carry must be adopted now. The following points should guide the Commission's decision in this matter:

- **THERE IS NO REASON FOR FURTHER DELAY**



The FCC released its initial DTV must-carry decision more than 29 months ago. All parties have since filed voluminous factual documents and extensive legal arguments with the FCC on all the issues related to multicast must-carry. The record before the Commission could not be more complete.

- **FULL DIGITAL MULTICAST MUST-CARRY IS CONSISTENT WITH THE 1992 CABLE ACT**

The FCC need not concern itself with being the final arbiter of the constitutionality of full digital must-carry. In the 1997 *Turner Broadcasting* decision, the Supreme Court ruled that must-carry is constitutional. In this proceeding, the National Association of Broadcasters and the Association of Public Television Stations, together with a multitude of other parties, have carefully and diligently outlined the legal basis for full digital must-carry. This legal analysis, by the successful parties in the *Turner Broadcasting* litigation is compelling legal support for the FCC's adoption of full digital multicast must-carry.

- **THE FCC'S DELAY IS HARMING THE DTV TRANSITION**

The FCC's adoption of full digital multicast must-carry is crucial to accelerating the DTV transition. Free, over-the-air digital broadcast television weakens as the transition gets longer and immediate and comprehensive FCC action is needed. As the Commission is aware, the Supreme Court has recognized that preserving free over-the-air television is a vital government interest, and prolonging the transition sabotages that goal.

- **IT IS THE FCC'S DUTY TO ISSUE ITS DECISION**

The law, the court decisions, and the FCC record compel the FCC to order full digital multicast must-carry. Even if the Commission believes this is a difficult choice from a public policy standpoint, it must accept its duty to act upon the law and the record before it. Further delay is unacceptable.

PCC urges the Commission to recognize that broadcasters can't make this transition alone, and that there is much that the Commission must do to guarantee that every industry is doing its part to ensure that the promise of free over-the-air television continues to be fulfilled.

Sincerely,

Lowell W. Paxson
Chairman and Chief Executive Officer
Paxson Communications Corporation