



September 11, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Presentation, CS Docket No. 98-120

Dear Ms. Dortch:

The Association of Public Television Stations (“APTS”), the Public Broadcasting Service (“PBS”) and the Corporation for Public Broadcasting (“CPB”), hereby notify the Commission of the following *ex parte* meeting in the above captioned proceeding. On September 10, 2003, Lonna Thompson, Vice President and General Counsel for APTS, Andrew Cotlar, Senior Staff Attorney for APTS, Paul Greco, Senior Vice President and General Counsel for PBS, and Donna Gregg, Vice President and General Counsel for CPB, met with Jane Mago and Erin Boone of the Office of Strategic Planning and Policy Analysis and Maureen McLaughlin, Chief of Staff. The participants discussed the importance of multicast carriage to public television stations and Public Television’s position regarding the proper interpretation of the statutory phrase, “primary video,” as set forth in the attached documents, which were distributed at the meeting.

Sincerely,

/s/Andrew D. Cotlar

Senior Staff Attorney



Carriage of Multicast Digital Services
Position of Public Television
September 10, 2003

Public Television supports an interpretation of “primary video” that:

- Is consistent with the plain language of the governing statute, common English usage and legislative presumptions;
- Reflects the statutory and factual context of the applicable federal law;
- Minimizes conflict with federal copyright law; and
- Implements the Commission’s own telecommunications policy of encouraging technological flexibility.

- ***Plain Language, Common English Usage and Legislative Presumptions***
 - The adjective “primary” can modify either a plural noun (*e.g.*, “primary colors”) or a collective noun functioning as a plural (*e.g.*, “primary evidence”).
 - Like the word “evidence,” “video” is a collective noun, referring in this context to the plurality of visual elements constituting the entire programming stream that a station broadcasts each day.
 - While it may be possible as a matter of grammar to construe the word “video” as singular, the legislative presumption created by the Dictionary Act (1 U.S.C. §1) directs that, in construing federal statutes, “words importing the singular” shall be construed to “include and apply to several persons, parties or things” in the absence of evidence to the contrary.
 - The evidence demonstrates that in this circumstance the word functions as a collective plural.

- ***Statutory and Factual Context***
 - In both analog and digital, there is a real distinction between primary and secondary video.

- In analog, the primary video is what the public ordinarily sees, while a secondary analog video stream is carried on the analog VBI and various subcarriers (e.g. PBS National Datacast).
- Similarly, in the digital context, “primary” video service should be understood to refer to the entire package of free, over-the-air digital programming that a broadcaster provides to the public over a single broadcast transmission, while “secondary” video should be construed rationally to refer to non-program-related ancillary and supplementary audio-visual services that need not be carried by cable systems.
- ***Consistency with Federal Copyright Law***
 - The Commission should ensure consistency with federal copyright law.
 - Federal must carry requirements and the cable compulsory copyright license established in the Copyright Act of 1976, represent a single, integrated federal policy of balancing cable carriage rights and obligations, a balance that was restored in 1992 to address the nullification of FCC must-carry rules in the 1980’s.
 - Restricting cable carriage obligations to a single programming stream would sever this critical connection in direct conflict with Congressional intent by allowing cable systems to benefit from an expansive compulsory copyright license (authorizing retransmission of all digital programming transmitted by a local broadcaster) while requiring disproportionately narrow corresponding carriage obligations (applying only to a small portion of a local broadcaster’s overall digital programming).
 - The Commission’s current interpretation allows a cable system to strip out multicast channels from a digital broadcast signal, thus significantly altering the basic nature of the cable retransmission service and conflicting with the pass-through requirement of the cable compulsory license, which prohibits cable systems from willfully altering the broadcast content through “changes, deletions, or additions.” 17 U.S.C. § 111(c)(3).
- ***FCC Policy Encouraging Technological Flexibility***
 - The Commission’s current interpretation of “primary video” also unnecessarily forecloses a technologically innovative means of using the digital television spectrum, an action that wholly contradicts the Commission’s policy of encouraging flexible spectrum use.
 - The Commission’s “primary video” decision effectively enacts a *de facto* preference for high definition programming by severely restricting the distribution of – and thereby the support for— standard definition multicast programming.

- This resultant preference contradicts the previous Commission decision refusing to require a minimum amount of high definition programming in order to encourage technological development and determining that it was prudent to defer to broadcasters' the editorial discretion regarding the appropriate mix of programming, services and formats that they would provide to their communities (Fifth R&O, ¶¶ 41-42).
- ***Passing Constitutional Muster***
 - While it is a principle of statutory interpretation that statutes should be interpreted, if it is fairly possible, in a way that avoids serious constitutional questions, this “avoidance principle” applies only to serious constitutional issues. It may not be deployed to influence statutory interpretation “simply through fear of a constitutional difficulty that, upon analysis, will evaporate.” Almandarez-Torres v. United States, 523 U.S. 224, 238 (1998).
 - Any alleged burden on cable capacity would be the same, regardless of whether a broadcast station is transmitting high definition programming or multiple standard definition programs on its allotted frequency. The Commission has concluded that HD carriage is constitutional, and carriage of the same amount of bandwidth as required for HD (albeit split into separate SD program streams) is no more of a burden on the cable system’s constitutional speech rights.
 - Further, the governmental interest in preserving public television is great. Without full carriage of their entire digital signal on cable, public television stations will be unable to adequately address the need to provide educational programming to multiple audiences and to serve underserved audiences, in accordance with their statutory mandate. Public stations will inevitably face declining underwriting and membership and government support, resulting in a deterioration or failure of service to their communities.



September 10, 2003

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Communication, CS Docket 98-120

Dear Chairman Powell:

The Association of Public Television Stations, the Corporation for Public Broadcasting, and the Public Broadcasting Service (collectively "Public Television") are aware that the National Cable & Telecommunications Association ("NCTA"), Comcast, and other cable interests have recently met with FCC Commissioners and Commission staff regarding the definition of "primary video" in the context of cable carriage of digital television signals. As the Commission knows, in the two and a half years since the Commission expressed its initial view of how the term "primary video" should be interpreted, Public Television has provided extensive comments demonstrating that the definition of primary video can and should encompass all of a television station's free over-the-air digital programming streams. Public Television hereby responds to supplement the record and to provide further detailed support for the Commission to modify its 2001 "primary video" interpretation.

Public Television supports an interpretation of "primary video" that is consistent with the plain language of the governing statute, common English usage and legislative presumptions; that reflects the statutory and factual context of the applicable federal law; that minimizes conflict with federal copyright law; and that implements the Commission's own telecommunications policy of encouraging technological flexibility. Arguments proffered by the cable interests meet none of these tenets and should be rejected.

Plain Language, Common English Usage and Legislative Presumptions. Public Television's interpretation of the statutory phrase, "primary video," contained in Section 615 of the Communications Act (47 U.S.C. § 535) best comports with the statute's plain

language and common English usage.¹ As Public Television has observed, the adjective “primary” can modify either a plural noun (e.g., “primary colors”) or a collective noun functioning as a plural (e.g., “primary evidence”). Like the word “evidence,” “video” is a collective noun, referring in this context to the plurality of visual elements constituting the entire programming stream that a station broadcasts each day.² Although cable interests *presume* that the word “video” is a singular noun,³ the legislative presumption created by 1 U.S.C. §1 directs that, in construing federal statutes, “words importing the singular” shall be construed to “include and apply to several persons, parties or things” in the absence of evidence to the contrary.⁴ Thus, while it may be possible as a matter of grammar to construe the word “video” as singular, in this circumstance, the word functions as a collective plural, and precedent and common usage hold it should be construed as such.

Statutory and Factual Context. Public Television’s interpretation of the term “primary video” as applied to digital technology is also consistent with how that term has been understood and applied to analog technology. In analog, the primary video is what the public ordinarily sees, while a secondary analog video stream may be, and has been, carried on the analog VBI and various subcarriers for some time now.⁵ Similarly, in the

¹ See, e.g., Joint Petition for Reconsideration of the Association of Public Television Stations, the Public Broadcasting Service and the Corporation for Public Broadcasting in CS Docket 98-120, (April 25, 2001).

² The use of “video” as a collective noun modified by an adjective to denote a class of items is not unusual. For instance, there are a number of similar cases where a collective noun can be treated either as a singular or plural depending on the context. Francis v. Clark Equip. Co. 993 F.2d 545, 556 (6th Cir. 1993) (“collective nouns are sometimes treated as plural”). For specific examples, see e.g. Kaeser v. Zoning Bd. of Appeals, 218 Conn. 438,439, 441, 589 A.2d 1229 (Ct. 1991); Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary, 93 F.3d 103, 109 (3d Cir. 1996); South Chicago Coal & Dock Co. v. Bassett, 104 F.2d 522, 527 (7th Cir. 1939); De Wald v. Baltimore & O. R. Co., 71 F.2d 810, 813 (4th Cir. 1934); Cubic Automatic Revenue Collection Group v. Septa, 95 U.S. Dist. LEXIS 5905, 14 (E.D. Pa. 1995); Wood v. Wood, 78 Ore. 181, 186, 151 P. 969 (Or. 1915).

³ See ex parte letter of Bloomberg Television, filed June 5, 2002, p. 5.

⁴ “Common usage in the English language does not scrupulously observe a difference between singular and plural word forms. This is especially true when speaking in the abstract, as in legislation prescribing a general rule for future application. In recognition of this, it is well established, by statute and by judicial decision, that legislative terms which are singular in form may apply to multiple subject or objects.” Sutherland Stat. Const. § 47:34 (6thed.) (collecting cases). See also Barr v. United States, 324 U.S. 83, 91 (1945) and First National Bank in St. Louis v. Missouri, 263 U.S. 640, 657 (1924).

⁵ At the time Section 615 was being considered, there were various secondary forms of analog broadcast television transmission, including but was not limited to, a form of teletext carried on the VBI that could contain audio-visual works as defined by federal copyright law. Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. 102-628, 102nd Cong., 2nd Sess, (June 29, 1992), pp. 92-93. See also WGN Continental Broadcasting Co., et al v. United Video, Inc., 693 F.2d 622, 627-629 (7th Cir. 1982); and 17 U.S.C. §101 (definition of “audiovisual works”). Currently, a for-profit subsidiary of the Public Broadcasting Service, National Datacast, Inc., transmits a variety of secondary data and video services using the VBI and subcarriers of the analog broadcast signal. See <http://www.pbsnationaldatacast.com/>.

digital context, “primary” video service should be understood to refer to the entire package of free, over-the-air digital programming that a broadcaster provides to the public over a single broadcast transmission, while “secondary” video can reasonably be construed to refer to non-program-related ancillary and supplementary audio-visual services that need not be carried by cable systems.⁶

Consistency with Federal Copyright Law. In addition, by adopting Public Television’s interpretation of the term “primary video,” the Commission will ensure consistency with other federal laws.⁷ As Public Television has demonstrated,⁸ federal must carry requirements and the cable compulsory copyright license established in the Copyright Act of 1976, as amended, (17 U.S.C. §111), represent a single, integrated federal policy of balancing cable carriage rights and obligations. In 1976, when cable was still an emerging industry, Congress affirmatively supported cable’s development by allowing it to retransmit locally originated programming and a mix of regional and national programming through a compulsory copyright license, while leaving in place the Commission’s must carry rules that had been in effect since 1966.⁹ After the Commission’s must carry rules were invalidated by the D.C. Circuit in 1985 and again in 1987,¹⁰ the Commission observed that the Court’s decisions had created a critical, unintended imbalance between broadcasters and cable because as a result of these decisions, cable enjoyed the benefit of the cable compulsory copyright license without

⁶ Examples of ancillary and supplementary services that could have a “video” component include subscription television services (including subscription-based college courses), video conferencing services, animated data programs, and video segments downloaded to schools via subscription for integration into lesson plans.

⁷ It is an established principle of statutory construction that statutes on the same subject should be construed to be in harmony if reasonably possible. See Sutherland Stat. Const. § 51.02 (6thed.) (collecting cases), and Sanford v. Commissioner of Internal Revenue, 308 U.S. 39, 42-44 (1939).

⁸ Supplemental Memorandum of the Association of America’s Public Television Stations, the Public Broadcasting Service and the Corporation for Public Broadcasting Supporting Digital Carriage Regulations, Docket No, 98-120 (February 10, 2000).

⁹ The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2550, Title I, § 101(Oct 19, 1976) (codified at 17 U.S.C. § 111), and In the Matter of Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Service, Report 1990 FCC LEXIS 4103, 67 Rad. Reg. 2d (P&F) 1771, ¶ 147 (1990) (relating the history of the cable copyright compulsory license). See also Quincy Cable TV, Inc. v. FCC, 768 F. 2d 1434, 1440, n. 11 (D. C. Cir. 1985), and Rules re Microwave-Served CATV, First Report and Order, 38 FCC 683 (1965), and CATV, Second Report and Order, 2 FCC 2d 725 (1966).

¹⁰ See Quincy Cable TV, Inc. v. FCC, 768 F. 2d 1434 (D. C. Cir. 1985), and Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987).

bearing the burden of the related must-carry obligations.¹¹ In 1992, Congress addressed the Commission’s concerns with new cable carriage provisions that restored the balance between the benefits of the compulsory license and the obligations of must-carry, explicitly finding “that the must carry rules are part and parcel of the Congressionally-mandated compulsory copyright license for cable operators.”¹² Restricting cable carriage obligations to a single programming stream would sever this critical connection and thereby violate Congressional intent. Such a restriction would allow cable systems to benefit from an expansive compulsory copyright license (authorizing retransmission of all digital programming transmitted by a local broadcaster) while imposing corresponding carriage obligations that would be disproportionately narrow (applying only to a small portion of a local broadcaster’s overall digital programming).

The Commission’s current interpretation would also interfere with the pass-through provisions of the compulsory license itself. Under the terms of the license, cable operators are prohibited from willfully altering the broadcast content through “changes, deletions, or additions.”¹³ A Commission interpretation allowing a cable system to strip out multicast channels from a digital broadcast signal, however, “significantly alters the basic nature of the cable retransmission service” and conflicts with the pass-through requirement of the cable compulsory license, as cable systems would be changing or deleting portions of the broadcast signal.¹⁴ By construing the term “primary video” to include all multicast program streams, the Commission can ensure consistency with this aspect of the copyright compulsory license.¹⁵

FCC Policy Encouraging Technological Flexibility. The Commission’s current interpretation of “primary video” also unnecessarily forecloses a technologically innovative means of using the digital television spectrum, an action that wholly

¹¹ In the Matter of Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Service, Report 1990 FCC LEXIS 4103, 67 Rad. Reg. 2d (P&F) 1771, ¶ 147 (1990).

¹² S. Rep. No. 102-92, 102nd Cong., 1st Sess. 41 (1991).

¹³ 17 U.S.C. § 111(c)(3). *See e.g., WGN Continental Broadcasting Company, et al v. United Video, Inc.*, 693 F.2d 622, 624-625 (7th Cir. 1982).

¹⁴ H. Rep. No. 94-1476, 94th Cong., 2d Sess. 93 (1976).

¹⁵ While it is true that under some provisions of the Communications Act, cable systems are required to carry neither non-program related material nor ancillary and supplementary material that is transmitted with the broadcast station’s signal, these are limited and specific exceptions that appear in the Communications Act. This only supports Public Television’s argument, for the U.S. Supreme Court has observed that where a statute contains specific exceptions no other exceptions are to be implied. *Sutherland Stat. Const.* § 45.11 (6thed.) (collecting cases) and Andrus v. Glover Constr. Co., 446 U.S. 608, 616-617 (1980). Had Congress intended to exempt further kinds of program material from the compulsory license, it would have done so explicitly.

contradicts the Commission’s policy of encouraging flexible spectrum use.¹⁶ The Commission’s “primary video” decision effectively enacts a *de facto* preference for high definition programming by severely limiting the distribution of – and thereby the support for— standard definition multicast programming.¹⁷ However, six years ago, the Commission specifically refused to require a minimum amount of high definition programming in order to encourage technological development, determining that it was prudent to defer to broadcasters’ the editorial discretion regarding the appropriate mix of programming, services and formats that they would provide to their communities.¹⁸ The Commission’s “primary video” ruling should be reconsidered and modified because it hinders technological development by favoring of one type of digital programming (high definition) over others (multicast standard definition) and represents an unwarranted departure from past Commission policy favoring flexible spectrum use of DTV allocations.¹⁹

Conclusion. In light of the above, Public Television supports an interpretation of “primary video” that is consistent with the plain language of the governing statute, common English usage and relevant legislative presumptions; that reflects the statutory and factual context of Section 615; that minimizes conflict with federal copyright law; and that implements the Commission’s own policy of encouraging technological flexibility. For these reasons, Public Television urges the Commission to revisit and modify its interpretation of “primary video” accordingly.

Respectfully submitted,

/s/ Lonna M. Thompson
Lonna M. Thompson

/s/ Donna Coleman Gregg
Donna Coleman Gregg

¹⁶ As Chairman Powell and Commissioner Abernathy have stated, “The Commission was once in the business of requiring spectrum holders to provide a certain type of service. That approach failed because government is a very bad predictor of technology and markets—both of which move a lot faster than government. Over the past decade or so, the Commission has adopted more flexible service rules that bound a service based largely on interference limitations and its allocation (fixed or mobile, terrestrial or satellite).” Joint Statement of Chairman Michael Powell and Commissioner Kathleen Q. Abernathy, Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, FCC 02-116, ET Docket No. 98-206 p.1 (rel. May 23, 2002).

¹⁷ If broadcasters find that their multicast programming is not going to be carried on cable and will not reach over 70 percent of their intended audience, there will be an inevitable chilling effect on the production of such programming. See *Ex Parte* Comments of Public Television, Docket 98-120 (March 20, 2003).

¹⁸ Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, Fifth Report & Order, FCC 97-116, 12 FCC Rcd 12809, ¶¶ 41-42 (1997).

¹⁹ See 5 U.S.C. §706(2)(A).

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