



September 30, 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, Vice President and Deputy General Counsel for PBS, and Robert Winteringham, Senior Staff Attorney for CPB, met with FCC General Counsel John Rogovin and the following individuals from the FCC Office of General Counsel: Joel Kaufman, Jeffrey Dygert and Linda Kinney. 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 document, which was distributed at the meeting. The participants also distributed publicly available copies of previous filings with the Commission in the above referenced docket that were filed on Sept 10, 2003 and on March 20, 2003.

Sincerely,

/s/Andrew D. Cotlar

Senior Staff Attorney



Carriage of Multicast Digital Services
Position of Public Television
September 29, 2003

A court could uphold a decision to require carriage of multicasting streams because it:

- Is consistent with the plain language of the 1992 Cable Act, common English usage and legislative presumptions;
- Reflects the statutory and factual context of the applicable federal law;
- Reflects consistency with federal copyright law and FCC policy; and
- Passes Constitutional examination

Plain Language, Common English Usage and Legislative Presumptions

The 1992 Cable Act does not mandate one stream.

If you need to deconstruct the sentence, “primary” can modify collective nouns such as “evidence” or “video”.

1 U.S.C. §1 creates a legislative presumption that singular words may be construed in the plural, and vice versa.

Statutory and Factual Context

In both analog and digital, there is a distinction between primary and secondary video. In analog, the primary video is what the public ordinarily sees. Similarly, in the digital context, “primary” video may 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.

In legislative history, Congress never stated that “primary video” means one programming stream. Page 93 of the House Report states that “[t]he Committee does not intend that this provision be used to require carriage of secondary uses of the broadcast transmission, including the lease or sale of time on subcarriers or the vertical blanking interval for the creation or distribution of material by persons or entities other than the broadcast licensee.” This language means that Congress did not intend must carry to cover all parts of the transmission.

Consistency

Federal must carry requirements and the cable compulsory copyright license represent a single, integrated policy of balancing cable rights and obligations. Restricting cable carriage obligations to a single programming stream would sever this critical connection. 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.

A decision allowing for multicasting has the added benefit of consistency with the Commission's own policy of encouraging technological flexibility.

Passing Constitutional Muster

Turner cases set the constitutional framework. In the *Turner* cases, the court ruled that pursuant to the *O'Brien* balancing test, a government regulation will be upheld if it advances an important government interest and does not burden substantially more speech than necessary to further those interests.

The governmental interests in this case are great and the same as in *Turner*: preserving the benefits of free, over-the-air broadcasting, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming.

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.

Public stations will inevitably face declining underwriting, membership and government support, resulting in a deterioration or failure of a local service.

The burden on cable free speech rights is minimal. Cable systems have admitted they have the capacity to carry digital signals. Any burden on cable capacity is the same, regardless of whether a broadcast station is transmitting high definition programming or multiple standard definition programs.

Cable systems have admitted that they are devoting capacity to high-speed data service and telephony. They are therefore voluntarily limiting cable capacity that could otherwise be used to carry local broadcast channels and fully within a cable system's power to reduce any alleged burden on free expression.

A principal of statutory interpretation is that a statute should be interpreted, if it is fairly possible, to avoid serious constitutional questions. None arise here.