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September 23, 2003

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Marlene H Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C 20554

SEP 24 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Notification of *Ex Parte* Communication
CS Docket No 98-120

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the FCC's rules, this letter reports that on September 16, 2003, Lowell W Paxson, Chairman and CEO of Paxson Communications Corporation, met with Commissioner Kathleen Q. Abernathy and her Mass Media Legal Advisor, Stacy Fuller, to discuss the issue of digital multicast must-carry for television stations. The enclosed handouts, which reflect the substance of Mr. Paxson's remarks, were distributed at the meeting.

As required by the Commission's rules, an original and one copy of this letter are being submitted

Very truly yours,



William L. Watson
Vice President

Enclosures
cc (w/o encl.).

The Honorable Kathleen Q. Abernathy
Stacy Fuller, Esquire

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FEDERAL COMMUNICATIONS COMMISSION
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FULL DIGITAL MULTICAST MUST CARRY

It is now more imperative than ever that the FCC adopt full digital multicast must carry for the health of the television industry, the benefit of the viewing public and the success of the digital transition

- **Multicasting Is The Future For Broadcasters In The Digital World.** It is now clear that most, if not all, television broadcasters will be multicasting in the digital world and that such multicasting is an essential part of their business plans.
- **Multicast Must Carry Is Therefore An Essential Element Of The Digital Transition.** Clearly, broadcasters both large and small, commercial and noncommercial, will be multicasting in a digital world and all of those multicast signals must be carried by cable or the viewers will be disenfranchised.
- **Without Full Digital Multicast Must Carry, There Will Be No DTV Transition.** As you are aware, broadcasters have invested hundreds of millions of dollars in building their digital television stations. PCC alone has constructed 28 DTV facilities and expects to launch 10 more DTV stations in the next six months. Hundreds of digital television stations are operating throughout the country **but there are no viewers**. This is explained to a large extent because cable penetration throughout the country ranges as high as 75% in a market and those cable viewers today cannot watch any of the digital stations currently on the air.
- **It has also been well documented that efforts to negotiate satisfactory carriage agreements with cable operators for digital broadcast signals have not been successful.** Negotiations have not worked and full digital multicast must carry could help to stimulate such negotiations.
- **Full Digital Multicast Must Carry is consistent with the terms of the 1992 Cable Act**
- **Full Digital Multicast Must Carry can be implemented by the FCC without Congressional action.**
- **Full Digital Multicast Must Carry is defensible in court and will withstand constitutional review.**
- **The 1992 Cable Act directed the FCC to establish whatever technical changes are necessary to ensure full cable carriage of local broadcasters digital television signals.** The PAX Proposal does just this and a summary is attached.

Attachment

THE PAX FULL DIGITAL MULTICAST MUST CARRY PROPOSAL

1. Television stations may elect to have their analog signals removed from the cable systems and replaced with their digital signals before the end of the digital transition. For the carriage of a digital signals, the main programming would be downconverted by the cable operator to analog and carried on the analog portion of the cable system on the same channel as the analog signal was carried. The remaining free multicast programming portion of the station's digital signal would be carried on the digital portion of the cable system served by the set-top digital boxes and would be used to deliver additional channels of free programming services only, compressed by cable operators into 3 or less MHz. All broadcast station signals should be contiguous to each other.
2. The station's primary digital signal when downconverted to the analog portion of the cable system will utilize 6 MHz of cable analog capacity. The remaining portion of the station's digital signal would be placed on the digital tier of the cable system and would require no more than 3 MHz of cable digital capacity. When a cable operator's digital set-top box penetration reaches 95% of its subscribers, the system could carry all of the broadcast station's signals on the digital tier only. Thus, a DTV station would only require, in the future, 3 or less MHz of a cable operator's digital capacity.
3. This digital must carry election would be applicable to cable systems with 750 MHz of capacity provided that the systems have installed digital head-ends and have digital set-top boxes. The downconverted digital signal (carried on the analog portion of the system) and the multicast digital signals (carried on the digital portion of the system) would be provided as part of the basic cable services provided to all analog cable subscribers and (for the multicast signals) to all basic subscribers with digital boxes. Thus, as digital set-top boxes are deployed by the cable operator, full digital must carry would occur.
4. This digital must carry option would be available on a first-come, first-served basis within the Communication Act's existing 33% cap on the use of cable systems activated channels for must carry purposes. A 750 MHz cable system is required by the 1992 Cable Act

to devote 250 MHz to local television signals. Under the PAX Full Digital Multicast Must Carry Proposal, such cable system operating even in a market with 20 television stations would devote 120 MHz for the analog portion of the system and another 3 MHz per station ($20 \times 3 = 60$ MHz) on the digital tier for a total of 180 MHz – far below what the 1992 Cable Act requires be devoted to the carriage of such signals. The average market with 10 television stations would require only 90 MHz of a cable system's spectrum leaving 160 MHz, set aside by the FCC for broadcasters, to revert to cable for its own use.

5. All other aspects of the 1992 Cable Act, as it relates to must carry, would apply. Congress directed the FCC only to establish whatever technical changes are necessary in the carriage provisions of the 1992 Cable Act to ensure full cable carriage of broadcasters digital signals. Everything else the FCC has attempted to change in the must carry requests goes beyond this Congressional mandate. The PAX Full Digital Multicast Must Carry Proposal accomplishes what Congress intended and is faithful to the 1992 Cable Act as implemented by the FCC.

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Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 24 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)
)
Annual Assessment of the Status of) MB Docket No. 03-172
Competition in the Market for the)
Delivery of Video Programming)

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation
601 Clearwater Park Road
West Palm Beach, FL 33401

Dated: September 11, 2003

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SUMMARY

This Tenth Annual Review of the status of the video competition marketplace is a great opportunity for the Commission to reaffirm the importance of fair competition between broadcasters and multichannel video providers. To do so, however, the Commission must recognize that until cable operators are required to carry broadcasters' free over-the-air DTV offerings, broadcasters will be forced to operate at a substantial competitive handicap. Given the increasing power of cable operators in the video programming market, forcing broadcasters to compete indefinitely with this handicap cannot lead to a healthy marketplace. More likely, retention of the status quo will lead to market imbalances as multichannel providers' power waxes and that of over-the-air broadcast television wanes.

The Commission can solve these problems by ordering full digital multicast must-carry without further delay. A clear requirement of digital carriage would negate cable operators' refusal to negotiate carriage of broadcasters' digital signals and would give the lie to their red-herring refrain about the dearth of available cable capacity available for mandatory carriage. As cable operators know, full digital multicast must-carry would require less bandwidth than is already dedicated to analog must-carry, and nowhere near the 33% of capacity that cable operators are required to set aside under the 1992 Cable Act.

The Commission is at a crossroads in the development of the video programming market and it faces the choice of enhancing competition, diversity, and localism or allowing the further concentration of cable power, with its unregulated and offensive programming, including pornography. The situation is as follows:

- Over-the-air broadcasting is at risk because multichannel video providers dominate
- Full digital multicast must-carry is essential to the survival of free television service
- Full digital multicast must-carry will increase localism and diversity
- Full digital multicast must-carry is required by the 1992 Cable Act
- Full digital multicast must-carry would provide more free programming choices that – unlike cable choices – do not require viewers to pay increasing subscriber fees
- Full digital multicast must-carry will help significantly to keep down the rising costs of cable and DBS
- Cable operators will not negotiate the carriage of broadcasters' DTV offerings
- Cable capacity is not a problem

The Commission should use this proceeding to recognize that the only legitimate response to these issues is to pursue the increases in competition, localism and diversity that multicast must-carry is sure to bring

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)
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Annual Assessment of the Status of) MB Docket No. 03-172
Competition in the Market for the)
Delivery of Video Programming)

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("PCC") hereby submits these comments in response to the Commission's *Notice of Inquiry* in the above-captioned proceeding.¹ PCC, directly and through wholly owned subsidiaries, owns and operates 58 full-power television stations. Through this network of stations, its non-owned affiliates, and its cable-direct affiliates, PCC also distributes programming to approximately 88% of America's television households – or 93 million American homes – via the PAXTV network, one of several emerging over-the-air broadcasting networks that is increasing competition in the video delivery marketplace while augmenting the viewing choices available to all television households, whether they receive their television over the air, through cable, or by satellite.

This Tenth Annual Review comes at a crucial time for both the television industry and for American television viewers, because over the next several months, nothing less than the future of free over-the-air television service will be determined. It is critical that the Commission use this proceeding to get an accurate picture of the competitive

¹ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Notice of Inquiry*, MB Docket No. 03-172, FCC 03-185 (rel. July 30, 2003) (the "*NOI*")

position of broadcast television so that it can make informed decisions about the important DTV transition issues that it will decide. As it has been for the past several years, the central DTV transitional issue the Commission will face will be multicast must-carry. The Commission must decide whether it will choose (1) to follow tradition and the will of Congress and make certain that all free over-the-air television programming continues to be made available to all Americans, or (2) to allow a very few massive cable operators – most of whom have interests in non-broadcast cable networks that compete directly with broadcasters – to exercise their bottleneck control over what television channels viewers receive.

PCC believes that DTV must-carry and video competition are inextricably linked. Any objective evaluation of the current video delivery marketplace cannot avoid the fact that the future of free over-the-air television service is at risk. So that the Commission can fulfill its duty to American television viewers by protecting broadcast service, PCC offers these comments to demonstrate that DTV – particularly multicast DTV – holds remarkable promise for improving broadcast service to consumers, for increasing localism and diversity, and for returning broadcasting to its community roots. The market for DTV television, however, is failing due to the intransigence of cable operators who hoard channels for pay-per-view programming, which mostly consists of R- and X-rated movies. These comments also will show why full digital multicast must-carry is the most direct, most certain, and the only way to both ensure robust competition in the video delivery market and safeguard the over-the-air broadcast service for future generations.

I. THE TRANSITION TO DTV OFFERS AN UNPRECEDENTED OPPORTUNITY TO INCREASE COMPETITION IN THE VIDEO DELIVERY MARKETPLACE WHILE IMPROVING TELEVISION SERVICE TO ALL AMERICANS.

The Commission has properly focused this inquiry on examining the quality and quantity of service that different segments of the video program delivery industry are providing to the public.² Broadcasters are unique among the participants in the video delivery industry in that they are required to serve the interests of their local communities as a condition of their license to use the public airwaves, whereas cable does not have this requirement. PCC is proud to be a part of the long tradition of local broadcast public service that stretches back to the Commission's very beginnings. Neither cable nor DBS operate under this local mandate and neither operates under the watchful eye of the FCC, as far a programming satisfying community standards.

Nonetheless, issues of competition and the quality of programming are closely linked, as has been noted by those that have joined PCC in condemning the "race to the bottom" that currently seems to be afflicting the video delivery marketplace.³ As PCC has pointed out in the past, much of the genesis of this debasement of programming standards can be attributed to broadcasters' concern that cable operators are gaining viewers by airing programming that would not be deemed appropriate for a broadcast network has caused them to lower the standards of broadcast programming in an effort to maintain market share.

² See, e.g., *NOI* at ¶¶ 7, 14.

³ See, e.g., Commissioner Michael J. Copps Calls For Re-Examination Of Fcc's Indecency Definition, Analysis Of Link Between Media Consolidation And "Race To The Bottom," *Press Release*, dated November 21, 2002.

A. Multicasting Will Improve the Quality of Local Television Service to the Public.

PCC believes that by increasing broadcasters' opportunities to distribute diverse types of programming, this "race to the bottom" can be slowed if not halted. By offering its family-friendly, values-oriented programming, PCC believes that it has shown broadcasters that they don't have to descend into the gutter to make broadcasting profitable. Giving broadcasters additional air time to program would reduce the pressure to make every program competitive with course cable programming. Thus, by endorsing multicasting through full digital multicast must-carry, the Commission could greatly expand broadcasters' ability to provide service to their local communities, to increase diversity, and to expand political discourse.

Under a full digital multicast must-carry regime, quality of service to all Americans would improve in at least the four following ways. First, all television viewers – over-the-air and MVPD alike – will have a greater number of programming choices, and broadcasters will be free to dedicate substantial periods of time to local public interest programming without compromising their competitive position by foregoing premium content to do so. For example, the types of disputes described in the Network Affiliated Stations Alliance Petition for Inquiry Into Network Practices, such as CBS's refusal to allow affiliates to air significant segments of local content during *The Early Show*, would be a thing of the past because affiliates would be capable of airing local content on a multicast channel simultaneously with the network content.⁴

⁴ See Network Affiliated Stations Alliance, *Petition for Inquiry Into Network Practices*, filed March 8, 2001, at 14-15.

Second, with the potential for up to six multicast channels where once there was one, not only will viewers receive more diverse programming from more different sources, broadcasters will be both able and required to find compelling content directed towards their local communities to fill those channels. This cannot help but provide an outlet for increasing the amounts of local programming and programming aimed at currently underserved markets, including markets for foreign language, faith-based, and local, community-oriented programming.

Third, by creating a free over-the-air multichannel competitor to cable and DBS's pay services, multicast must-carry would exert a significant downward pressure on cable and DBS rates. For example, in a five station market, if each multicasts to its full potential, 30 channels would be available over-the-air. Given studies that show that viewers regularly watch only 15 television stations, the availability of as many as 30 channels of free over-the-air programming would apply significant competitive pressure to cable operators and DBS providers. Consequently, cable operators would no longer be free to pass every single cost increase onto consumers or pander to a few viewers' most prurient interests because viewers would have the ability to turn to a free multichannel competitor.

Fourth, multicasting is sure to raise the moral standards and the level of political discourse by giving broadcasters the ability to air programming that is designed to do more than simply keep up with the increasingly less decent programming available on cable. Multicasting will be a positive programming force because it will give the many broadcasters trying to restore broadcast decency even more opportunities to do so and to fully engage their local and regional political and civic leaders. Equally important, it

would give those broadcasters that now respond to the pressure exerted by cable and DBS by airing increasingly indecent programming additional opportunities to seek to provide alternative programming to the many viewers that have turned away from television in disgust

B. Improved Quality of Broadcast programming Would Lead to Increased Competition in the Video Delivery Industry if Viewers Are Given Access to Broadcasters' Multicast Offerings.

Such a vast improvement in the quality of the over-the-air broadcasting service cannot help but enhance competition in the video delivery industry. The buzz that multicasting would create likely would lead many viewers to again discover over-the-air broadcast television as something other than just another channel on their cable systems. If viewers are assured access to a rich mixture of high definition "event" programming as well as broadcasters' multicast program streams, then broadcast television will again have the ability to challenge cable and satellite in both as a delivery platform and will retain its ability to challenge cable as a programming competitor.

American television viewers would be the chief beneficiaries of this increased competition. If the majority of television broadcasters implement their multicast business plans, consumers buying digital television sets with over-the-air tuning capability will then be able to view new local programs, additional minority and faith-based programming, more hours of informational and institutional programming and added sports and entertainment, and much of it with a local focus. *A whole new world of localism in television will be possible and available to the digital television viewer and*

a five television station market can be transformed into as many as 30 channels of local programming⁵

To ensure that broadcasters' multicast services will develop, however, full digital multicast must-carry is a necessity. Over-the-air television broadcasting still exclusively serves a significant portion of the population – at least 15% of households and at least 30% of televisions in service – which the Commission cannot legally ignore. In the modern video delivery marketplace, however, that audience is too small to support the widespread introduction of innovative new services like multicasting. If these services are to become available, they must be made available over the cable and satellite platforms reaches the other 85% of households.

The vision of over-the-air broadcasting as a competitive force in the video delivery marketplace is not a vision concocted by PCC, it is the vision of the 1992 Cable Act and its mandatory carriage provisions.⁶ Congress created the flexible must-carry tool to shore up the competitive position of over-the-air broadcast television against the anti-competitive tendencies of cable operators. Multicast must-carry is only the logical extension of that sound policy of encouraging strong competitors in the video delivery market, which Congress envisioned and the courts held was a legitimate and substantial government interest

⁵ Studies show that even when they have fully upgraded cable systems offering more than 100 channels, viewers tend to watch no more than 15 of those channels on a regular basis. If a significant number of broadcasters begin multicasting, there will be far more than 15 channels available over-the-air in most markets. As over-the-air broadcasting becomes a more formidable competitor to cable and DBS, consumers will benefit again by the downward pressure on cable rates that will occur due to the increased competition.

⁶ 47 U.S.C. § 534.

Multicast must-carry is needed to bring about increased programming quality and competition in the marketplace because cable operators are again engaging in exactly the type of anticompetitive behavior that led to the original must-carry provisions of the Cable Act. Most notably, this conduct has manifested itself in cable operators' refusal to negotiate carriage agreements for broadcasters' multicast signals and its constant complaints about the imposition must-carry would place on cable bandwidth, including threats of new litigation if any form of DTV must-carry is ordered.

II. CABLE OPERATORS' REFUSAL TO NEGOTIATE CABLE CARRIAGE OF BROADCASTERS' DIGITAL OFFERINGS IS THE GREATEST THREAT FACING OVER-THE-AIR BROADCASTERS TODAY.

As the Commission has learned in other proceedings over the past few years, cable operators and satellite programmers continue to steadfastly resist negotiating carriage of broadcasters' multicast DTV offerings. Indeed, cable operators' failure to negotiate carriage is a compelling argument in favor of full digital multicast must-carry. Often cable operators argue that they have built out enhanced cable systems at great cost and that they should not be required to dedicate any of this bandwidth to the carriage of broadcast stations.

This claim is breathtaking in light of the Cable Act's requirement that cable operators make one-third of their channel capacity available for must-carry signals. There is no basis in the Communications Act's text or legislative history or the court cases considering the must-carry provisions for cable operators' argument that their *upgraded bandwidth* should somehow be exempted from Section 614's one-third requirement. Nonetheless, broadcasters never have required cable operators to dedicate to local broadcast signals anything like the one-third potentially required by the Communications Act. In order for cable operators with 750 MHz systems to be required

to dedicate the 250 MHz that could theoretically be required for must-carry, they would need to be carrying 41 6-MHz broadcast signals. Obviously in the vast majority of markets, cable operators are carrying considerably less than half that many signals and would be doing so even if they were required to carry both broadcasters' analog and digital signals. Moreover, as will be described more fully below,⁷ due to modern compression technologies, DTV signals, regardless of the number of multicast streams delivered, actually will use only about half the cable bandwidth currently required for carriage of analog signals. That is to say, each broadcast DTV signal, even if divided into 6 multicast channels, will take only 3 MHz of cable capacity. Therefore, after the transition, a 750 MHz cable system could be required to dedicate enough bandwidth to carry 83 broadcast stations in a given market. Of course, there is no market with even a third as many television stations as that, so cable operators will never be required to donate the amount of bandwidth that Congress approved and the Supreme Court upheld. Thus, there is no basis in law or equity for the idea that DTV will place impermissible burdens on cable bandwidth.

Cable operators' argument that they are entitled to use all their upgraded bandwidth as they see fit also conveniently omits several other key details that reveal how disingenuous the cable operators' argument really is

A. The DTV Transition Requires Broadcasters To Make Great Expenditures With No Certain Return, While Cable and Satellite Operators' Digital Upgrades Immediately Enhance Their Profits.

For cable operators and DBS providers, transitioning to digital has been an optional endeavor that they have pursued mainly to increase their profits. The more

⁷ See *infra* at 14

channels they can deliver, the higher the rates they can charge. Increased bandwidth gives them the opportunity to offer new services like high speed internet, pay-per-view, and video on demand, which provide new revenue streams. These services unquestionably provide benefits to the public, but if the profit markings don't make sense, cable operators could pull the plug on them tomorrow. There is nothing wrong with any of this. In some respects cable operators are admirable entrepreneurs. At the same time though, it takes a lot of nerve for cable operators to compare their "digital transition" to that undertaken by broadcasters. At its base, cable operators freely undertaken digital upgrades have strengthened the cable industry while broadcasters' government-mandated DTV transition has done nothing so far but weaken the over-the-air broadcasting industry.

Unlike cable operators, broadcasters have not been permitted to build out DTV operations as the market demands it, but rather have been required to go out and create a market for digital broadcast services. They have been required to do so even though the regulatory environment has encouraged consumers to rely more and more on MVPDs and less and less on over-the-air transmissions for the delivery of broadcast programming. They have been required to do so even though all parties acknowledge that only a handful of households in each market can view digital television signals and that even fewer can access those signals over-the-air. To be blunt, even though broadcast DTV currently doesn't make financial sense, broadcasters still must continue to broadcast because they are obligated to serve the Commission's view of the public interest.

And PCC wouldn't have it any other way. PCC is proud to serve the public; proud to provide viewers with wholesome viewing choices; and proud to be a leader in the DTV transition. Nonetheless, cable operators' excuses for why they won't share the sacrifice of the DTV transition with broadcasters until broadcasters spend more time educating the public about DTV and producing higher-quality programming look more like opportunistic posturing and less like responsible industry participation with every passing month.

B. Cable Operators Are Not Negotiating DTV Carriage With Most Broadcasters.

Cable Operators' refusal to negotiate carriage of most broadcasters' DTV signals is not news to the Commission. Both public and commercial broadcasters have informed the Commission of cable and satellite operators' intransigence on this issue for some time. Nonetheless, this proceeding addressing competition in the market for video programming is a particularly appropriate place to review cable operators' abysmal DTV carry record

To begin with, PCC has had no success convincing cable operators to carry its multicast offerings. No cable operator has even agreed to negotiate, let alone carry PAXTV's or its affiliates' digital signals. This is hardly an uncommon experience. The National Association of Broadcasters accurately summed up cable operators' sorry record of DTV non-carriage in its comments in the recent DTV Biennial Review proceeding.⁸

⁸ Second Periodic Review of the Commission's Rules and Policies Affecting the Transition to Digital Television, *Notice of Proposed Rulemaking*, MB Docket No. 03-15, FCC 03-8 (rel. January 27, 2003).

[O]nly approximately one-eighth of the digital stations in operation “were being carried as of April 7, 2003.”⁹ Even when digital signals are carried, the cable operators often do not carry all of the digital content in those signals. As these facts illustrate, the cable industry has resisted voluntary carriage of the great majority of over-the-air digital broadcast signals currently on the air, resulting in great uncertainty regarding the public’s ability to access the digital services offered by local television stations.¹⁰

As NAB went on to point out, the effect of cable operators’ intransigence is to make it all but impossible to actually initiate new and innovative DTV services.

An even more telling experience was recounted earlier this year by the nation’s public broadcasters, who have been trying to gain cable carriage for nearly four years. In a February *ex parte* proposal, the Association of Public Television Stations recounted its fruitless quest for cable carriage

We heeded [the Commission’s] call to try to resolve [the must-carry] issue in private negotiations with the cable industry . . . [O]ver three years ago we began, on a high priority basis, to devote substantial resources to seeking national carriage agreements with cable MSOs. Our efforts have included strenuous overtures to MSOs, visits to cable company headquarters, meetings with NCTA representatives and preparing and presenting draft proposals and agreements. However, as we reported in our meeting with you on September 4, 2002, we have succeeded only with Time Warner Cable and Insight, which cover slightly more than 20% of the country’s cable subscribers. 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 in New Jersey but not New Jersey Network.¹¹

⁹ See Reply Comments of the National Association of Broadcasters, MB Docket No. 03-15 at 29 (citing *Cable World, Skirmish in the Desert Over DTV*, April 14, 2003).

¹⁰ See *id.* at 28-29.

¹¹ See Letter from Marilyn Mohrman-Gillis, counsel for the Association of Public Television Stations, Donna Gregg, counsel for the Corporation for Public Broadcasting, and Katherine Lauderdale, counsel for the Public Broadcasting Service to Chairman Michael K. Powell, dated February 27, 2003.

As PCC's experience and NAB's comments show, the cable industry's refusal to consider carriage of public broadcasters' DTV offerings has been played out on an individual scale in market after market with commercial broadcasters throughout the country.

C. Cable Operators' Refusal to Carry Broadcasters' Digital Offerings Threatens the Long-Term Viability of Over-the-Air Broadcasting.

PCC and the Commission have heard these stories before about repeated broadcaster requests for carriage, repeated refusal of those requests, and "cherry picking" of desirable signals. All these anti-competitive tactics were either on display or reasonably anticipated when Congress enacted the 1992 Cable Act and again when the Supreme court considered the mandatory carriage provisions in the *Turner* cases.¹² Broadcasters' experience with seeking carriage of their DTV signals has been just another episode in the cable's industry's exercise of its bottleneck control over what programming reaches viewers. This Tenth Annual Review occurs almost six years after the Supreme Court upheld must-carry in *Turner II*, but apparently, cable operators will continue this conduct so long as they can get away with them.

Just as Congress and the Supreme Court found then, these practices have the potential to strangle over-the-air broadcasting and diminish, if not eliminate, the multiplicity of diverse and local sources of broadcast television programming.¹³ What is worse, cable operators now have a clear-cut motive and incentive for engaging in this anti-competitive conduct: protection of their own wholly owned cable channels. Weaker

¹² *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-63 (1984) ("*Turner I*"); *Turner Broadcasting System v. FCC*, 520 U.S. 180, 185-86 (1997) ("*Turner II*").

broadcasters offering weaker product will make for a better competitive position for cable operators' programming operations

Moreover, the weaker broadcasters are, the easier it will be to force the migration of expensive premium content from broadcast to cable television. This is no small problem. Broadcasters currently are required by law to have built and to operate a DTV station that very few households can watch. These diverted resources cannot help but weaken broadcasters' ability to program their stations with high-quality content. A review of the cable operators comments in the ongoing Biennial DTV Review demonstrates that cable operators are perfectly happy with this state of affairs.¹⁴ Why? Weaker broadcasters are good business for cable.

If the Commission allows this conduct to continue, the United States will end up with either no free over-the air television service or one that is severely reduced. The Supreme Court recognized in *Turner II* that Congress expected the Commission to use the must-carry statute to do much more than just preserve a decimated free over-the-air broadcast system¹⁵ Even if that were a permissible goal for the Commission, however, allowing broadcast television to further atrophy would be a massive blow to the competitive market for video delivery because without broadcast – even if the broadcast networks survive as cable programmers – only two options for delivery of television programming will remain. By far the better alternative is to ensure a healthy broadcast

¹³ See H.R. Rep. No. 628, 102 Cong., 2d Sess. 50-57 (1992); Sen. Rep. No. 92, 102d Cong., 1st Sess. 43-44 (1991), *Turner II*, 520 E.S. 196-97.

¹⁴ See, e.g., Comments of the National Cable and Telecommunications Association at 11-17

¹⁵ See *Turner II*, 520 U.S. at 192

system and give it a chance to compete with cable and satellite on equal terms. Only full digital multicast must-carry can accomplish that goal.

III. CABLE OPERATORS' COMPLAINTS ABOUT BANDWIDTH CONSTRAINTS ARE FRIVOLOUS.

Cable operators' most common complaint about the prospect of DTV must-carry is that it would soak up too much of their bandwidth when they have spent millions of dollars over the past several years upgrading their cable plant to provide more channels. The *NOI*, however, properly focuses the cable bandwidth discussion where it belongs: on the requirements of the 1992 Cable Act. Of course, Sections 613 and 614 of the Act say nothing about cable operators' investments in their physical plant, but it does say that cable operators are required to make up to one-third of their channel capacity available for local television signals.¹⁶ Until cable operators do so, they have absolutely no legitimate complaint about undue imposition on their bandwidth.¹⁷

¹⁶ 47 U.S.C. § 614(b)(1)(B)

¹⁷ One of cable operators' favorite rhetorical tropes is to characterize must-carry as a taking of their property under the Fifth and Fourteenth Amendments to the Constitution. See e.g. *Brunson Communications, Inc., WXTV License Partnership, Inc., Order on Reconsideration*, 15 FCC Rcd 3308 ¶ 30 (2000). This argument has all the same defects today that led cable operators to abandon it during the *Turner* litigation. See *Turner Broadcasting, Inc. v. FCC*, 910 F.Supp.734 (D.D.C. 1995) (opinion of Sporkin, J). But the argument also has at least one additional decisive defect that has arisen since *Turner I* was decided. In *Lucas* the Supreme Court expanded the Takings Clause to embrace regulatory takings whereby an owner's use of his property is significantly curtailed and its value thereby severely reduced by government regulation. See *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1031 (1992). A key consideration in the Supreme Court's takings analysis, however, is whether the property owner had notice of the potential for regulation based on the law in place at the time he acquired the property. See *id.* In the case of must-carry, cable operators were fully aware that up to one-third of their channel capacity could be required for must-carry purposes before they began upgrading their systems. Accordingly, cable operators cannot claim that they were unaware that their new bandwidth could be regulated and their takings claim never could satisfy the Supreme Court's test.

Of course, cable operators are not dedicating anything near one-third of their channel capacity to must-carry signals. Since the 1992 Cable Act was passed, cable bandwidth has exploded due to system upgrades and compression technologies, but there has been no similar explosion of must-carry channels. Indeed, the Commission can be confident that cable operators never have utilized one-third of their channels to provide carriage to must-carry signals and that they most likely dedicate a smaller amount of their capacity to that purpose now than they ever have before.

If cable operators were dedicating anywhere near one-third of their bandwidth to must-carry, the Commission can be certain that cable operators would be reminding them of that fact at every opportunity. Cable operators are strangely silent on this point, however. It's not hard to see why. Whatever remains of cable operators' bandwidth complaints following the explosion of their channel capacity is clearly mitigated by modern compression technology. As described above, today's compression techniques will allow cable operators to squeeze broadcasters entire 6 MHz over-the-air DTV signal into 3 MHz of digital cable bandwidth, regardless of whether stations multicast or broadcast in HDTV or both. That means that even in a station with 20 stations, cable operators will eventually be required to dedicate only 60 MHz of bandwidth to carry DTV stations. That is only half of the 120 MHz that currently would be required to carry those stations analog signals and less than one-quarter of the 250 MHz that could be required under Section 614 for a 750 MHz system. Because in the long-run, DTV *broadcasting clearly will significantly decrease the amount of cable bandwidth required* for carriage of broadcast stations, the only reasonable interpretation of cable operators'

opposition to multicast must-carry is anticompetitive desire to ensure that broadcasters have no incentive to multicast.

In any case, the bandwidth question is moot because broadcasters concede, as they must, that cable operators can be required to offer no more than one-third of their channel capacity for must-carry. If cable operators can show that they are doing so, then the DTV must-carry debate would become largely academic until analog broadcasting ceases. Until cable operators make that showing, however, the Commission should give cable operators' complaints about imposition on their bandwidth only the limited attention they deserve.

As a practical matter, refraining from ordering DTV must-carry due to cable bandwidth complaints is bad for competition in the video delivery market. As described above, full digital multicast must-carry would increase competition between broadcasters and cable operators and would balance the competitive playing field between broadcasters and cable operators' affiliated cable channels. Moreover, under PCC's full digital multicast must-carry plan, each must-carry station's cable bandwidth requirements would only slightly increase.¹⁸ Under PCC's plan, television stations would have the right to elect to have their analog signals removed from a cable system and replaced with one of their multicast digital signals which would be down-converted to analog and carried on the analog portion of the cable system. This replacement carriage would be to the same number of cable homes and on the same channel as the basis analog carriage. In addition, television stations choosing to allow cable systems

¹⁸ See Letter from Lowell W. Paxson, Chairman, PCC, to Commissioner Abernathy, MM Docket No. 98-120, dated March 5, 2002.

to remove their analog signals in favor of their digital signals would have their HDTV or digital multicast signals carried on the digital portion of the cable system, equipped with digital boxes, subject to certain limitations regarding set-top box penetration. All digital signals offered free over-the-air and carried on a cable system would be provided as part of the basic cable services provided to all analog cable subscribers and to all subscribers with digital boxes¹⁹

The key virtue of this plan is that it permits for the safety and growth of over-the-air DTV broadcasting without inhibiting the competitiveness of cable operators who would be required to dedicate only slightly more bandwidth to multicast must-carry than they do now to analog must-carry. To breed new competition without handicapping any of the competitors is what encouraging competition is all about, and the Commission should use this proceeding to recognize that fact.

IV. CONCLUSION

PCC believes that the future of the video programming market can be a bright one, fueled by vigorous competition and filled with new and diverse choices and increased localism for American television viewers. That future, however, will not come on its own. As these comments have described, the Commission faces a stark choice between preserving a vibrant free over-the-air broadcasting system for all Americans, or allowing that system to be replaced by a pay-only television service that leaves those who do not subscribe with inferior access to programming, news, and other important information about the world they live in. The Commission can either embrace competition by enabling broadcasters to take full advantage of the potential of DTV, or it

¹⁹ See *id.*

can allow cable operators to systematically eliminate competition by continuing its pattern of refusing to carry most broadcasters' DTV offerings. The right choice is to preserve over-the-air broadcasting and to promote the full flowering of broadcast DTV's innovative possibilities.

This course starts with accelerating the DTV transition. To accomplish this, the Commission must ensure that all those programming services offered by broadcasters free over-the-air will be carried by cable operators and, to the extent possible, by satellite television providers as well. This course will ensure the highest level of both competition and service to the public, accomplishing both of the Commission's most important roles.

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