

October 17, 2003

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

*Ex Parte Notice*

Re: Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120  
(also CS Docket Nos. 00-96 and 00-2)

Dear Ms. Dortch:

On October 16, representatives of Comcast Corporation met with Jane Mago, Maureen McLaughlin, and Erin Boone, all of the Office of Strategic Planning and Policy Analysis, to discuss the above-captioned proceeding. Comcast was represented by James R. Coltharp, Chief Policy Advisor, FCC & Regulatory Policy, and the undersigned.

The substance of our presentation covered some of the matters described in previous Comcast submissions in this docket. In addition, we discussed the letter sent to Ms. Mago on September 12, 2003, by the Association of Public Television Stations, the Corporation for Public Broadcasting, and the Public Broadcasting Service (collectively, "Public Broadcasters"), describing "examples of multicasting services that public television stations provide, or plan to provide, to their communities."

As an initial matter, it is important to emphasize that the lack of a digital multicast must-carry requirement does *not* mean that public broadcasters will not be able to secure cable carriage for their programming through voluntary commercial negotiations with cable operators. Comcast has met with numerous local public television stations and found that many have concrete digital programming plans, including multicast programming plans, that it believes will be of value to its multichannel video service customers. As a result, Comcast and those public broadcasters have reached carriage agreements that, to varying degrees -- based on individual broadcasters' plans and assessments of local cable systems' circumstances -- ensure carriage of multicast television programming. *In fact, Comcast has reached such agreements in virtually every single market in which it has launched HDTV service.* Comcast expects to reach more such agreements in the future as the company continues to expand HDTV to new markets.

Independent of the foregoing, however, the Public Broadcasters' letter is of no significance to any decision pending before the Commission. This is so for several reasons.

First and foremost, the question pending before the Commission is not whether any given broadcaster, or broadcasters in general, plan to use their broadcast licenses to provide valuable services over the public airwaves; rather, it is whether the government can and should further constrain cable operators from making their own editorial judgments about the programming to be carried on their private cable systems. To answer that question requires an analysis of the agency's statutory authority -- as informed by full consideration for the First and Fifth Amendment rights of cable operators. If constitutional and statutory considerations prevent the Commission from further infringing on the prerogatives of cable operators, as the record clearly shows they do, that should be the end of the inquiry.

Second, the Commission should be extremely cautious about making any content-based judgments regarding the value of the programming that some such broadcasters may, or "plan to," provide.<sup>1</sup> There are extraordinary constitutional ramifications, to say nothing of practical difficulties, in having the FCC decide, for example, that public broadcasters' plans to offer programming for "workforce development" or "addressing underserved communities" represent a better use of a cable operator's bandwidth than do the news, science, sports, or entertainment channels that will have been displaced by such a government decision. The decision about what a given noncommercial broadcaster transmits over the airwaves ought to be made by that broadcaster, not the government. By the same token, the decision about whether a particular programming stream should be carried over a given cable system should be made by the cable operator, not by the government. To attempt to justify any abridgement of the free speech and free press rights of cable operators on the basis of the content of the programming that public broadcasters will offer is to ensure that such abridgement will be reviewed by the courts under the exacting standard of "strict scrutiny,"<sup>2</sup> a standard that clearly dooms the effort to failure.

Third, even if the Commission felt it had the constitutional authority and the expertise to decide that *all* of the programming that *every* public broadcaster will offer is by some measure "superior" to *all* of the programming that a cable operator would have chosen to carry absent governmental coercion, that *still* would provide no reason to adopt the expansive must-carry rights that Public Broadcasters are advocating. This is because the statutory must-carry provision that the Commission

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<sup>1</sup> As a subsidiary point, it should be noted that the programming plans of individual public broadcasting stations cannot be evaluated on the basis of generalized representations by the national organizations comprising "Public Broadcasters." Each television broadcasting licensee must make its own programming decisions, based on its assessment of the communities it serves, just as cable operators similarly make many of their carriage decisions on a localized basis.

<sup>2</sup> See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."), citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 125-26 (1991); see also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) ("[A] content-based speech restriction . . . can stand only if it satisfies strict scrutiny."), citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

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must interpret is one that applies equally to commercial and noncommercial broadcasters alike, and the expansive interpretation that Public Broadcasters are advocating would extend not just to their members but also to those whose idea of serving the public interest is quite different. In so noting, we do not mean to suggest that the Commission should make value judgments in this area. Value judgments *should* be made, but they must be made by service providers and by consumers, not by government.

Comcast is proud of the agreements it has forged to date with public broadcasters and looks forward to additional discussions. But, for all the reasons stated above, the considerable value of the programming that many public broadcasters offer is *not* a relevant factor in the current rulemaking.

This letter is filed pursuant to Section 1.1206(b)(2) of the Commission's rules. Please let me know if you have any questions.

Respectfully submitted,

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cc: Jane Mago  
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