

November 10, 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:

Our client, Comcast Corporation (“Comcast”), has filed several recent letters addressing legal issues relating to digital must-carry proposals. Although Comcast believes that these issues ought to be dispositive of proposals to expand broadcasters’ must-carry rights, Comcast recognizes that other considerations may enter into the analysis. One such consideration is the Commission’s often-stated goal of completing the “digital television transition” (“DTV transition”). If the DTV transition were faltering or stalled, it might be understandable (though not legally defensible¹) that the agency would consider adopting expanded must-carry requirements that entail serious litigation risks (to say the least). If, however, the DTV transition is in fact proceeding successfully, then pursuing a course that will surely lead to years of litigation and likely judicial reversal would seem counterproductive. Thus, it is pertinent and timely to ask: How is the DTV transition going?

In Comcast’s view, the transition to advanced television is on track and gathering momentum. Cable operators and DBS providers in particular are rolling out HDTV services, a growing amount of quality HDTV programming (from broadcast and cable networks alike) is becoming available, the prices for HDTV receivers and display devices are continuing to decline, and consumer acceptance of HDTV service is continuing to grow. A process that began almost 20 years ago has now, at last, kicked into high gear, and by all reports the pace of the transition is accelerating.

On April 4, 2002, Chairman Powell announced a sweeping proposal for voluntary industry actions to speed the DTV transition. He encouraged various undertakings on the part of broadcast and premium cable networks, broadcast licensees, cable operators, DBS providers, and equipment

¹ “Advancing the DTV transition” is not one of the governmental interests that was identified in the *Turner* cases as a basis for infringing on the free speech and free press rights of cable operators.

manufacturers and retailers.² Three months later, the Chairman was able to report that “[v]irtually every industry – cable, broadcast and satellite – has either fully embraced my plan, or made real commitments to advance the transition. . . . As a result of these commitments, many of the key elements of the digital television transition are beginning to fall into place.”³

And so subsequent events have proved. The cable and DBS industries have responded by making HDTV services widely available, and by continuing to expand the inventory of HDTV choices available to consumers.⁴ Comcast in particular has been aggressive in offering HDTV services to consumers.⁵ Broadcast networks have increased their HDTV program offerings, and the one major network that had previously planned to use an ATSC signal format (480i) that is not classified as true HDTV has now committed to commence broadcasting in HDTV.⁶ Broadcast stations have also accepted Chairman Powell’s proposal,⁷ and are making progress in meeting their commitments.⁸

² See Michael Powell, Chairman, FCC, *Proposal for Voluntary Industry Actions to Speed the Digital Television Transition* (Apr. 4, 2002), at http://www.fcc.gov/commissioners/powell/mkp_proposal_to_speed_dtv_transition.pdf.

³ News Release, FCC, *Statement by FCC Chairman Michael K. Powell: DTV Plan Update -- Progress for Consumers* (July 11, 2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-224218A1.pdf. For the industries’ responses to the Powell plan, see <http://www.fcc.gov/dtv/industryletters.pdf>.

⁴ See Letter from Robert Sachs, President & CEO, NCTA, to Michael Powell, Chairman, FCC (May 1, 2002), available at <http://www.fcc.gov/dtv/industryletters.pdf>; Letter from Andrew Wright, President, Satellite Broad. & Communications Ass’n, to Michael Powell, Chairman, FCC (July 1, 2002), available at <http://www.fcc.gov/dtv/industryletters.pdf>. As the Consumer Electronics Association (“CEA”) recently noted, “cable and DBS are providing substantially more HDTV programming to consumers than [are] broadcasters.” Comments of the CEA, filed in MB Docket No. 03-172, at 6-7 (Sep. 11, 2003) (“*CEA Video Competition Comments*”).

⁵ As of this writing, Comcast has now rolled out HDTV services in 36 major markets. Although Chairman Powell proposed that cable operators offer “up to five” HDTV signals, in a typical market Comcast actually planned to offer eight, and today the company typically offers 11. As a result of Comcast’s rapid rebuilds of the systems acquired from AT&T Broadband just one year ago (with nearly 43,000 miles upgraded by September 30, 2003), Comcast has already reached its previously announced year-end goal of having HDTV available to 65% of the company’s subscribers; the goal now is to make HDTV available to nearly 75% of the company’s subscribers by year-end. See Press Release, Comcast Corporation, *Comcast Reports Third Quarter 2003 Results* 3 (Oct. 30, 2003).

⁶ See Ken Kerschbaumer, *Fox Says Yes to High-Def*, Broad. & Cable, June 30, 2003 (noting that Fox announced that it will broadcast 50% of its primetime programming in 720p HDTV as opposed to the lower quality 480i DTV), available at <http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA308210>.

⁷ See Letter from Edward O. Fritts, President & CEO, NAB, to Michael Powell, Chairman, FCC (June 20, 2002), available at <http://www.fcc.gov/dtv/industryletters.pdf>.

⁸ See News Release, FCC, *DTV Transition Moving Forward: FCC Says More Than 80% of Commercial DTV Stations Are on the Air* (Oct. 16, 2003) (noting that “the transition to digital television is moving forward as 1,061 TV stations, representing 81 percent of all commercial stations, are currently on the air with a DTV signal”). *But see* John Eggerton, *FCC Admonishes DTV Stragglers*, Broad. & Cable, Oct. 20, 2003 (“The FCC last week denied DTV build-out extensions to seven stations, admonishing them for failing to get a digital signal up and running and for offering up dog-ate-my-digital-homework excuses.”); Ted Hearn, *60 TV Stations Better Act Fast*, Multichannel News, Apr. 4, 2003 (noting that 70% of commercial broadcast stations did not meet the Commission’s deadline for commencement of digital broadcasting), available at <http://www.multichannel.com/index.asp?layout=articlePrint&articleID=CA293328>; *CEA Video Competition Comments* at 3 (noting that “only about 30 percent of broadcast stations are transmitting at their full allotted power, according to the Commission’s own figures”).

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Finally, the consumer electronics industry has responded to consumer demand by offering over 600 new and innovative products that consumers are buying by the millions, and sales are escalating rapidly.⁹ CEA projects that, after sales of only two million DTV units in 2002, four million DTV units will be sold this year, more than five million will be sold in 2004, eight million in 2005, and over 10 million in 2006.¹⁰ Moreover, with the Commission's approval of the cable industry and consumer electronics industry's Plug-and-Play agreement, and the recent issuance of the broadcast flag order, it is clear that the future shines brightly for completing the digital transition.

These marketplace developments make it clear the DTV transition is well under way. As CEA notes: "When you get your new HDTV home, you'll have an amazing palette of digital entertainment from which to choose -- right in your living room. No matter if you love soap operas, prime-time favorites from network TV and premium cable networks, Hollywood blockbusters or almost every sport you can imagine, you'll likely find sparkling HDTV versions available today."¹¹

This is a marketplace success in the making. Without question, pursuing expanded must-carry obligations would jeopardize this progress; protracted litigation is a certainty and judicial reversal is highly probable.¹² Although the Commission does not need any additional reasons to decline to adopt expanded must-carry requirements, the negative consequences that such requirements would have for the DTV transition ought to remove any doubt.

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

Respectfully submitted,

James L. Casserly

Ryan G. Wallach

⁹ Consumer Electronics Ass'n, *HDTV Guide: The Resource for Information on the Analog to Digital Transition 2* (Fall 2003) ("*CEA HDTV Guide*"), available at http://www.ce.org/publications/books_references/dtv_guide/HDTV_Guide_Fall03.pdf.

¹⁰ Consumer Electronics Ass'n, *CEA Projections: DTV Sales 2002-2006*, available at http://www.ce.org/shared_files/initiatives_attachments/207ProjectedSales02-06.pdf (last visited Nov. 7, 2003). In fact, CEA recently increased its projections for sales in 2003 and future years. See *CEA HDTV Guide* at 2. Although Comcast has no views concerning the FCC's and the CEA's dispute over the DTV tuner mandate, that litigation has now been resolved and the mandate is in place, and, as a result, TV sets with DTV tuners will presumably become more widely available. This, particularly when coupled with the Commission's preemption of state laws and regulations and restrictive covenants that impair the installation and maintenance of antennas designed to receive television signals, see 47 C.F.R. § 1.4000, will make it easier for consumers to receive television signals over-the-air -- even if they also choose to subscribe to cable, DBS, or some other multichannel video programming distributor.

¹¹ Consumer Electronics Ass'n, *HDTV: A Consumer's Guide to the Wonderful World of HDTV 4* (2003), at http://www.ce.org/shared_files/resources/HDTV_Brochure_Final.pdf (last visited Nov. 5, 2003).

¹² Litigation of the analog must-carry rules started in 1992 and was not finalized until 1997. With a new court challenge to digital must-carry rules, litigation would likely extend for another several years.