HARRIS,
WILTSHIRE &
GRANNIS LLP

1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

January 7, 2004

Ex Parte – Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: Carriage of Digital Television Broadcast Signals,
CC Docket Nos. 98-120, 00-96, and 00-2

Dear Ms. Dortch:

On January 6, 2004, Don Baer and Alexa Verveer of Discovery Communications, Inc., and I met with John Rogovin, Linda Kinney, Jeff Dygert, and Joel Kaufman of the Office of General Counsel. We discussed the attached presentation, focusing on the legal issues highlighted in that presentation and the attached letter. In particular, we noted that the constitutional defects of a multicast must-carry rule and the Commission's prior determination that only the "primary video" is entitled to carriage independently support the conclusion that a multicast must-carry requirement is unlawful.

In accordance with the Commission's rules, a copy of this letter is being filed electronically in these dockets.

Sincerely,

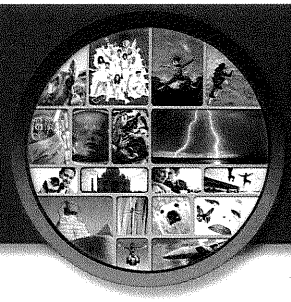
/s/

Christopher J. Wright

Discovery COMMUNICATIONS®

Discovery Communications, Inc.

Must Carry Presentation
Fall 2003



Discovery COMMUNICATIONS®

Discovery CHANNEL

TLC®

Animal Planet™

Discovery Health CHANNEL®

Travel CHANNEL™

NETWORKS OF DISCOVERY COMMUNICATIONS, INC.

Discovery Times CHANNEL™

Discovery HOME & LEISURE CHANNEL™

Discovery KIDS™

THE SCIENCE CHANNEL

Discovery WINGS™ CHANNEL

Discovery EN ESPAÑOL

Discovery HD THEATER™ YOUR WINDOW ON THE WORLD™

Discovery ON DEMAND SVOD™

CHOICE 10 Discovery FREE ON DEMAND VIDEOS™

Multicast Must Carry Will Destroy Discovery's Investment in its Digital Services

Discovery COMMUNICATIONS

Discovery is a pioneer of the digital era, having already invested more than $450 million in digital channels.

- In 1996, without any government assurances of success, Discovery began launching digital networks targeted to particular audiences.

Discovery Times CHANNEL · Discovery HOME & LEISURE CHANNEL · Discovery KIDS · THE SCIENCE CHANNEL · Discovery WINGS CHANNEL · Discovery EN ESPAÑOL

- In 2002, Discovery heeded Chairman Powell's call for high-definition programming, creating the first 24-hour, seven-day-a-week high-definition channel.

Discovery HD THEATER YOUR WINDOW ON THE WORLD

Multicast Must Carry Will Destroy Discovery's Incentive to Build its Digital Services

Discovery COMMUNICATIONS

- If broadcasters launch channels that compete with Discovery's digital networks and operators must carry the broadcast channels, regardless of quality, Discovery's digital networks face a substantial risk of being dropped.

- Consumers potentially will lose highly valued programming services, which will be replaced with marginal broadcast offerings.

Broadcasters are Entitled Only to the Amount of Spectrum Necessary to Transmit in High Definition

Discovery COMMUNICATIONS

- Broadcasters were given 6 MHz of spectrum in 1996 because, at the time, 6 MHz were necessary to transmit in high definition.

- Today, a high-definition transmission requires less than 3 MHz.

- Given the original intent and purpose of the 1996 legislation is met with a continued grant of less than half the original allocation, allowing each broadcaster access to the full 6 MHz is fundamentally unfair and against the clear interests of consumers.

Multicast Must Carry is Bad Public Policy

Discovery COMMUNICATIONS

Multicast must carry will not promote high-definition television.

- Under multicast must carry, the 1996, $70 billion spectrum grant originally intended to promote high-definition television instead will mandate cable carriage of thousands of standard-definition broadcast channels, none of which will have competed for distribution.

Multicast must carry will not promote high quality programming.

- If operators "must carry" more than a single stream of digital broadcast programming, broadcasters will not have to compete for carriage and therefore will have no incentive to create compelling programming.

Multicast Must Carry is Bad Public Policy

Discovery COMMUNICATIONS

The pay television marketplace is far more competitive today than when the U.S. Supreme Court handed down the must carry decision in 1997.

- The Supreme Court relied on evidence that operators had considerable and growing market power, with cable market penetration projected to grow beyond 70 percent. Current cable market penetration is below 70 percent and falling.

The inequities of multicast must carry will only grow over time.

- Improvements in compression technology over time will result in progressively more marginal broadcast channels being squeezed into a given amount of shelf space.

Multicast must carry burdens speech without advancing important government interests.

- In narrowly upholding analog must carry, the Turner II Court recognized the important government interest in ensuring the public's access to "a multiplicity of information sources." Multicast must carry multiplies the speech of broadcasters that already have guaranteed access to viewers at the expense of independent programmers. As such, a multicasting rule will **restrict** the number of "information sources" accessible to the vast majority of Americans.

Multicast must carry burdens speech more than necessary to advance important government interests.

- The Turner II Court also recognized the important government interest in **preserving** broadcast television and preventing the **loss of existing** viewing options. A rule requiring operators to carry a single channel of broadcast programming achieves those interests. Multicast must carry will **expand** broadcast television, thereby burdening more speech than necessary to advance those interests.

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WILTSHIRE &
GRANNIS LLP

1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

18 November 2003

Ex Parte

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Carriage of Digital Television Broadcast Signals, CS Docket Nos. 98-120, 00-96, and 00-2

Dear Chairman Powell and Commissioners:

Discovery Communications, Inc. is one of the nation's premier cable programmers, producing channels that are among the best recognized, most watched and highly valued by consumers. And Discovery has already invested more than $450 million to develop digital programming. Nevertheless, it is unable to obtain carriage for all of its channels on many cable systems. Indeed, while Discovery's flagship channel is available to more than 80 million households, seven of Discovery's channels are even today available to fewer than 35 million households.

If the Commission imposes a multicast must-carry requirement on cable companies (*i.e.*, a requirement that cable operators carry all the digital channels broadcasters can fit into their 6 MHz of spectrum), either during or after the digital transition, it will – *by government mandate* – thwart Discovery's attempts to make its programming available more widely. Indeed, it will cause Discovery programming to be dropped because broadcasting programmers will have a government-sponsored advantage in competing for the limited amount of space that cable companies can make available to the kinds of targeted channels (*e.g.*, Discovery Kids) that Discovery produces. In fact, some non-broadcasters have announced that they will develop such targeted programming and pay broadcasters for the right to use the broadcasters' anticipated multicasting must-carry rights to force their programming onto cable systems.[1] Because a multicasting must-carry requirement will burden Discovery's ability to make its programming available, and indeed will force it to reconsider further investment in digital programming, the imposition of such a requirement on cable companies will violate the First Amendment and will not survive judicial scrutiny.

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1 See *Broadcasting & Cable Magazine* (November 10, 2003) at 3.

A multicast must-carry requirement would violate the First Amendment. A multicast must-carry requirement would likely be struck down as violating the First Amendment because it would burden speech without advancing the important government interests on which the Supreme Court relied when it upheld the analog must-carry rule in *Turner Broadcasting System, Inc. v. FCC.*[2] As the Supreme Court said in *Turner Broadcasting*, "Congress enacted must-carry to '***preserve*** the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television.'"[3] But a multicast must-carry requirement would expand, not preserve, broadcast television.

In upholding the analog must-carry rule, the Supreme Court made clear it was primarily concerned about preventing the *loss* of existing viewing options: it spoke of Congress' concern about the possible "loss of regular television broadcasting service," whether broadcast services would "be reduced to a significant extent," whether merely "a rump broadcasting industry" would survive, and whether there would be "a reduction in the number of media voices available."[4] But there is no doubt that a rule requiring cable companies to carry a single channel of broadcast programming would prevent the loss of *existing* viewing options. A multicasting requirement is simply not needed to achieve the goal that Congress had in mind in enacting the analog must-carry rule and that the Supreme Court emphasized in upholding it.

The *Turner Broadcasting* Court also recognized the important governmental interest "in ensuring public access to 'a multiplicity of information sources.'"[5] But a multicast must-carry rule would not advance that goal either. To the contrary, rather than provide access to a multiplicity of speakers, it would multiply the speech of broadcasters that already have guaranteed access to viewers at the expense of independent programmers like Discovery. That is, a must-carry rule that encouraged broadcasters to multicast would arguably benefit the 15 percent of households that do not subscribe to cable or DBS (down from 40 percent when *Turner Broadcasting* was decided)[6] by giving them access to more shows from the same broadcasters – while the 85 percent of households that do subscribe to cable or DBS would have access to fewer sources of information. In short, a multicasting rule would restrict the number of "information sources" for the vast majority of Americans.

Importantly, the *Turner Broadcasting* Court acknowledged that any must-carry requirement implicates the First Amendment interests both of cable operators and of cable programmers like Discovery. The Court specifically noted that even the analog must-carry rule would " 'render it more difficult for cable programmers to compete for carriage on the limited channels

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2 *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

3 *Id.* at 193, *quoting Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (emphasis added).

4 *Turner Broadcasting*, 520 U.S. at 190, 192, 192, and 193 (internal quotations omitted).

5 *Turner Broadcasting*, 520 U.S. at 190, *quoting* 512 U.S. at 663.

6 *Turner Broadcasting*, 520 U.S. at 190.

remaining.'"[7] Justice Breyer, who provided the critical fifth vote to uphold the analog must-carry rule, recognized that analog must-carry "prevents displaced cable program providers from obtaining an audience" and thus analog must-carry "amounts to a 'suppression of speech.'"[8] He nevertheless concluded that, because cable systems "would likely carry fewer over-the-air stations" in the absence of analog must-carry, "the serious First Amendment price" was outweighed by the benefits of analog must-carry.[9] Because the burden of a multicast must-carry requirement would be greater than necessary to advance Congress's goal of preserving the existing structure of broadcast television, it is very doubtful that a multicast must-carry rule would be found constitutional.

Some have argued that a multicast must-carry requirement would be permissible because it requires a cable operator to devote 6 MHz to carriage and in this sense is no worse than analog must-carry. But this focus on spectrum simply misapprehends the required constitutional analysis. The First Amendment forbids the government from placing *any* burden on speech unless that burden "[a]dvances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[10] From a constitutional perspective, it simply does not matter whether the rule at issue today affects the same amount of spectrum – or even the same amount of an independent programmer's speech – as the rule upheld by the Supreme Court in 1997. The issue is whether it imposes *any* burden on speech and, if so, whether it imposes *any greater burden than necessary* to preserve the availability of free, over-the-air broadcasting and advance the important First Amendment goal of making programming available from a wider array of sources, such as Discovery. A multicasting must-carry requirement would indeed burden Discovery's speech by giving an enormous advantage in the market of ideas and entertainment to broadcasters, and this burden is not required to preserve free over-the-air television even for the 15 percent of our population that still relies on it.

A multicast must-carry requirement would be struck down on statutory grounds. In any event, a reviewing court likely would strike down an order imposing a multicast must-carry requirement without even reaching the constitutional issue. As the Commission recognized in the Report and Order accompanying the Notice of Proposed Rulemaking, in section 614(b)(3) Congress required cable operators to carry only a broadcaster's "primary video."[11] The Commission correctly concluded that "if a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of those streams is considered primary and entitled to mandatory carriage."[12] Especially in light of the serious constitutional issue that would be posed by construing section 614(b)(3) to require multicast

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7 *Id.* at 214, *quoting* 512 U.S. at 637.

8 *Id.* at 226 (concurring opinion).

9 *Id.* at 228, 226 (concurring opinion).

10 *Id.* at 388.

11 47 U.S.C. § 534(b)(3).

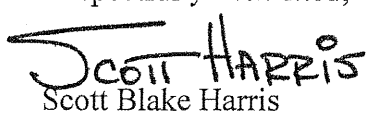
12 *In the Matter of Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 01-22, ¶ 57 (2001).

must-carry, it is virtually certain that a new interpretation of section 614(b)(3) construing "primary video" to mean "multiple video" would not be upheld. In *Turner Broadcasting*, the Court noted, "Congress took steps to confine the breadth and burden of the regulatory scheme."[13] Although the "primary video" limitation of section 614(b)(3) was not at issue in *Turner Broadcasting*, that provision clearly shows that Congress intended to limit the burden it was placing on cable programmers and operators. There is no basis to construe section 614(b)(3), contrary to the straightforward reading the Commission gave it previously, to expand the breadth and burden of the regulatory scheme.

Moreover, any attempt by this Commission to increase the burdens that the regulatory regime places on speech would obviously *not* be entitled to the "additional measure of deference" that the Supreme Court accorded Congress in *Turner Broadcasting* "out of respect for [Congress'] authority to exercise the legislative power."[14] The Court there emphasized "'Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.'"[15] The Commission, of course, *is* required to support its decisions by evidence in a record compiled to determine the impact of proposed rules. In short, a *regulatory* multicast must-carry requirement imposed by this Commission would – particularly in the face of the inhospitable statutory language quoted above – face far more exacting judicial scrutiny than did the *congressional* mandate at issue in *Turner Broadcasting*.

This letter is filed pursuant to section 1.1206(b)(2) of the Commission's rules.

Respectfully submitted,



Scott Blake Harris
Christopher J. Wright

cc: John Rogovin

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13 *Turner Broadcasting*, 520 U.S. at 216.

14 *Id.* at 196.

15 *Id.* at 213, *quoting* 512 U.S. at 666 (plurality opinion).