January 22, 2004

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

Re: *Ex Parte*: **In the Matter of Carriage of Digital Television Broadcast Signals, CS Dkt. Nos. 98-120, 00-96.**

Dear Ms. Dortch:

Home Box Office ("HBO") is writing to urge the Commission to affirm the dual must-carry and "primary video" decisions in the *Digital Must-Carry Order.*[1] In particular, the Commission should reject broadcasters' proposals: (1) to guarantee cable carriage of both their analog and digital services during the digital transition (similarly, the Commission should reject the "either-or" must-carry proposal); and (2) to expand their carriage rights after the transition to include multiple program streams. This approach is consistent with the Commission's policy of encouraging the development of digital programming and stimulating the advance of the digital transition.[2]

I. There Is Simply No Basis For Expanding Broadcasters' Privileged Status Over Non-Broadcast Programmers Like HBO That Are Delivering High-Quality Programming.

HBO has invested billions of dollars developing a wide range of programming services, including innovative original series (*The Sopranos*, *Six Feet Under*), provocative documentaries (*Pandemic: Facing Aids*, *Children in War*), and original movies (*The Gathering Storm*, *Path to War*, *And the Band Played On*), as well as concert events, blockbuster movies, and championship sporting events. These services have received widespread critical acclaim and commercial success. Over the years, HBO has received over 200 Primetime Emmys, 53 Golden Globes, 45 Peabody Awards, and 15

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[1] *See In the Matter of Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd. 2598 (2001) ("*Digital Must-Carry Order*").

[2] This approach is also compelled by the Constitution and the plain language Communications Act. *See* NCTA *Ex Parte*, filed in CS Dkt. No. 98-120 (November 24, 2003) (constitutional analysis by Professor Laurence Tribe); Comcast *Ex Parte*, filed in CS Dkt. No. 98-120 (Oct. 16, 2003); Bloomberg/TechTV, filed in CS Dkt. No. 98-120 (Oct. 23, 2003). *See also* NCTA *Ex Parte*, filed in CS Dkt. No. 98-120 (July 9, 2002).

Home Box Office, Inc.
1100 Avenue of the Americas, New York, NY 10036-6737
(212) 512-1000

Oscars. Last year HBO received 18 Primetime Emmy Awards, the most of any network, broadcast or non-broadcast.

Other non-broadcast programmers have also invested vast sums to produce popular, high quality programming devoted to national and local news, public affairs, children, the arts, sports, minorities, music, science, women, and history.[3] The amount and quality of non-broadcast programming available to consumers today is unprecedented.

HBO believes that in this environment, where high quality programming on virtually any topic is readily available to all consumers, there is no valid justification for *any* government guaranteed carriage right for broadcasters. There certainly is no credible argument that broadcasters deserve *expanded* digital must-carry rights because they provide uniquely important programming. Indeed, it has been non-broadcast programmers, *not* the broadcasters, that have led the way in developing new and innovative digital content and applications. For example, during 2002, HBO provided more HDTV programming in any given week than all of the broadcast networks combined.[4] Likewise, HBO was one of the first programmers to develop an on-demand service that enables subscribers to choose at any time from more than 100 hours of HBO programming, with the ability to fast-forward, rewind, and pause.

Meanwhile, many broadcasters have yet to formulate a coherent business plan for the digital spectrum they were given over six years ago at no cost by the government. Over two-thirds of commercial broadcast stations missed the Commission's May 2002 deadline to begin transmitting their digital signals, and one in five stations are still not on-air with digital signals.[5] Likewise, while broadcasters have argued in this docket that must-carry rights for their multicast services are critical to the future viability of the broadcast industry,[6] they have emphasized in other Commission proceedings "the speculative nature of the economic viability of multicasting services at this time."[7] The

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[3] The cable industry as a whole has spent over $39 billion on original programming and program acquisition over the last five years. *See Cable Pricing, Value and Costs*, NCTA White Paper (May 2003), *available at* http://www.ncta.com/pdf_files/wp_valueandcosts.pdf.

[4] *See Cable & Telecommunications Industry Overview 2003 Mid*-Year, NCTA, at 6 (June 2003), *available at* http://www.ncta.com/pdf_files/Mid03overview.pdf. HBO currently offers approximately 70 percent of its programming in HDTV.

[5] *See* "DTV Stations Authorized To Be On The Air," *available at* http://www.fcc.gov/mb/video/files/dtvonairsum.html (last visited Jan. 23, 2004).

[6] *See, e.g.*, Paxson *Ex Parte*, filed in CS Dkt. No. 98-120, at 1 (Sept. 24, 2003) ("Multicasting is the future for broadcasters in the digital world.").

[7] NAB *Ex Parte*, filed in CS Dkt. No. 99-360, at 6 (Apr. 21, 2003) (also noting that "[b]roadcasters may ultimately choose not to multicast at all").

broadcasters do not have a digital transition record that justifies *continuation* of a special carriage privilege, let alone *expansion* of that privilege.

Similarly, the Commission should reject the "either-or" must-carry proposal now being floated by the broadcasters. Aside from the statutory and constitutional infirmities of the proposal,[8] either-or must-carry would be tantamount to dual must-carry. Consider, for example, a broadcaster that has relatively weak digital programming and therefore chooses must-carry for its digital signal. As a practical matter, the cable operator would have to carry the broadcaster's analog signal as well in order to satisfy the roughly two-thirds of its customers whose households are equipped *only* to receive analog signals. In effect, the broadcaster's carriage rights have been greatly expanded in a way that would not have occurred but for the government's imposition of either-or must carry. And, the either-or proposal would do nothing to advance the digital transition since it would guarantee that a broadcaster could get carriage of its digital programming *regardless* of the quality of that programming.

II. Granting Broadcasters Expanded Must-Carry Rights Will Hamper The Ability Of Non-Broadcast Programmers To Launch New And Innovative Services.

Broadcasters are fond of saying that cable capacity is unlimited and that cable operators will have no problem accommodating an extra dose of broadcast must-carry services.[9] While it is true that cable operators have made substantial investments upgrading their systems in recent years, demands on that capacity have kept pace. As the Commission has noted, there are over 390 national and regional program services today,[10] and dozens more are in the planning stages.[11] The capacity needs of these services are increasing. HBO, for example, now offers the primary feeds of HBO and its sister service, Cinemax, in HDTV. In the future, HBO will in all likelihood offer its digital multiplex services in HDTV format, as well.[12] Such a business model makes perfect sense as more and more consumers

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[8] *See* Comcast *Ex Parte*, filed in CS Dkt. No. 98-120 (Nov. 10, 2003) (discussing constitutional problems with "either-or"); Bloomberg/TechTV *Ex Parte*, filed in CS Dkt. No. 98-120 (Oct. 22, 2003) (noting that "either-or" would violate Section 614(b)(4)(B) of the Communications Act).

[9] *See, e.g.*, NBC *Ex Parte*, filed in CS Dkt. No. 98-120 (Nov. 7, 2003); Paxson *Ex Parte*, filed in CS Dkt. No. 98-120, at 3 (Oct. 1, 2003).

[10] *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd. 26901, ¶ 14 (2002).

[11] *See* National Cable & Telecommunications Association, "Planned Services," *available at* http://www.ncta.com/industry_overview/programlist.cfm (last visited November 18, 2003).

[12] HBO's multiplex services include: HBO2, HBO Signature, HBO Family, HBO Comedy, HBO Zone, and HBO Latino.

purchase high-definition television sets[13] and subscribe to cable and satellite HDTV service.[14] Moreover, as the popularity of video-on-demand ("VOD") grows, more cable capacity will be needed to accommodate that consumer demand, particularly as cable operators begin to offer HDTV programming as part of their VOD service.[15]

Cable operators are also increasingly using their systems' channel capacity to deliver a broader array of new non-video services, such as high-speed Internet and telephony services. For example, the cable industry today offers high-speed Internet service to more than 90 million homes and has over 15 million customers.[16] Cable also has approximately 2.7 million residential telephony customers.[17] These customer numbers are expected to increase significantly in the near future.

In short, there are ever-increasing demands on cable system capacity, and the more capacity cable operators are required to set aside for broadcast services, the less capacity will be available for competing non-broadcast programmers. Indeed, the plans for new non-broadcast services, as well as the plans to expand HDTV and VOD for existing non-broadcast services, could be jeopardized -- to the detriment of consumers -- if the Commission accedes to the broadcasters' expanded must-carry proposals. HBO believes there is absolutely no justification for the government, in effect, to decide that consumers must get another Paxson infomercial channel rather than an HDTV feed of *Goodnight Moon* on HBO Family or the first season of the *Sopranos* on HBO On Demand.[18]

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[13] The Consumer Electronics Association ("CEA") reports that 4.1 million DTV units will be sold in 2003, and projects that 5.8 million DTV units will be sold this year, 8.3 million in 2005, 11.9 million in 2006, and 16.2 million in 2007. *See* "2003 A Banner Year For DTV: Unit Sales Top Four Million," CEA Press Release (Jan. 12, 2004), *available at* http://www.ce.org/press_room/press_release_detail.asp?id=10396.

[14] As of December 1, 2003, cable operators offering HDTV services passed 70 million TV households. *See* "Cable HDTV Available in 96 of Top 100 U.S. Markets," NCTA Press Release (Dec. 2, 2003), *available at* http://www.ncta.com/press/press.cfm?PRid=414&showArticles=ok. DBS providers offer HDTV programming to all of their customers.

[15] *See* Matt Stump, *HDTV & VOD: A Match Made in Heaven*, Multichannel News (Aug. 4, 2003) (describing bandwidth demands of HDTV VOD offerings).

[16] *See National Cable & Telecommunications Association: 2003 Year-End Industry Overview*, NCTA Report, at 5-8 (Dec. 2003), *available at* http://www.ncta.com/pdf_files/Overview.pdf.

[17] *See* Communications Daily at 6 (Nov. 26, 2003) (citing In-Stat/MDR report on cable telephony).

[18] *See* Paxson *Ex Parte*, filed in CS Dkt. No. 98-120, at 2 (Oct. 1, 2003) (suggesting that the cable industry drop HBO multiplex services in order to accommodate mandatory carriage of multiple digital broadcast services).

III. Expanded Must-Carry Rights Would Actually *Discourage* Broadcasters From Investing In Digital Programming.

There is a fundamental fallacy in the broadcasters' argument that expanded must carry is necessary to spur the digital transition. In fact, HBO believes just the opposite is true.

HBO and other non-broadcast programmers operate in a competitive programming market where a premium is placed on delivering high-value content that consumers will watch and MVPDs will want to carry. In order to succeed in this environment, HBO is continually developing new programming, such as *Carnivale*, *The Wire*, or *Angels in America*.

In contrast, must-carry effectively insulates broadcasters from these competitive pressures by forcing cable operators to carry broadcast programming regardless of its quality. If the Commission adopts the broadcasters' must carry proposal, broadcasters would have little incentive to improve upon the duplicative and infomercial programming that largely populates their digital multicast services today (to the extent such digital services exist at all).[19]

The best way to accelerate the digital transition is to let competition between broadcasters and non-broadcast programmers drive digital carriage decisions, based on consumer choice and demand. Under such a regime, broadcasters, like their non-broadcast competitors, would be forced to develop quality digital content in order to attract viewers and gain carriage.

The broadcasters cannot credibly argue that expanded must-carry is essential to their ability to compete in the video programming marketplace and, more generally, to the very survival of over-the-

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[19] See, e.g., the program listings for the various multicast services of WCPX-DT, the Paxson affiliate in Chicago. *See* http://www.pax.tv/stations/default.cfm?sti_id=14&siteid=50624. Certain broadcasters have recently submitted *ex partes* describing their "plans" for multicast services. *See, e.g.*, NBC Affiliates *Ex Parte*, filed in CS Dkt. No. 98-120 (Jan. 8, 2004). First, these filings are irrelevant, from a First Amendment standpoint, to the Commission's decision on the multicast must-carry issue. The question before the Commission is whether expanded must-carry rights impermissibly burden the First Amendment rights of cable programmers and operators, not whether broadcasters intend to deliver valuable services using their digital spectrum. Second, even to the extent these filings are somehow relevant to the Commission's determination, the broadcasters have failed to make the case that these multicast services are so compelling as to justify granting them preferential treatment over non-broadcast programming services. *See, e.g.*, NCTA *Ex Parte*, filed in CS Dkt. No. 98-120 (Jan. 7, 2004) (noting that one ABC affiliate's multicast services include one channel of repurposed local news programming and a second "weather" channel consisting of "a stationary camera mounted outdoors for some portion of the broadcast day"). Finally, it is important to emphasize that, even in the absence of a multicast must-carry right, broadcasters are free to negotiate for cable carriage of their multicast services, and some have in fact done so. *See* John M. Higgins, *Comcast Makes Deal for CBS Multicasting*, Broadcasting & Cable (Dec. 22, 2003) (noting that recent agreement between Comcast and Viacom includes a provision for carriage of the multicast services of CBS' owned-and-operated broadcast stations).

air broadcasting.[20] Disney (ABC), News Corp. (Fox), GE (NBC), and Viacom (CBS) are multi-billion dollar enterprises that have access to enormous stables of programming and operate highly profitable broadcast and non-broadcast networks.[21] Disney, for example, has ownership interests in 19 programming networks, including the highly lucrative ESPN franchise; Viacom has interests in 18 such networks, including MTV, Nickelodeon, and Showtime, and Fox is the industry leader in regional sports programming services. And notwithstanding the erosion in their ratings in recent years, the broadcast networks continue to be the largest audience available for advertisers,[22] and are expected to remain so.[23]

Likewise, as other commenters have noted, there is simply no basis for broadcasters' contention that the very future of the broadcast industry rides on the Commission's must-carry decision.[24] Broadcasters' existing must-carry rights are unaffected by the current rulemaking. Consequently, the preservation of *all* broadcast stations, including both network and non-network affiliates, is secured through analog must-carry rights today and throughout the DTV transition and must-carry rights for their primary digital signals once their analog spectrum is returned.

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[20] *See, e.g.*, ABC *Ex Parte*, filed in CS Dkt. No. 98-120 (Nov. 20, 2003); NBC *Ex Parte*, filed in CS Dkt. No. 98-120 (Nov. 7, 2003); Capitol Broadcasting Co. *Ex Parte*, filed in CS Dkt. No. 98-120 (Nov. 13, 2003); Belo *Ex Parte*, filed in CS Dkt. No. 98-120 (Feb. 27, 2003).

[21] ABC had over $5 billion in revenues in 2002, *see* Disney 2002 Annual Report at 54; Fox, over $8.1 billion, *see* News Corp. 2002 Form 20-F at 33; NBC, $7.1 billion, *see* GE 2002 Annual Report at 12; and CBS, over $7.3 billion. *See* Viacom 2002 Form 10-K at II-4.

[22] In 2002, the broadcast networks took in $14 billion in advertising, compared to $11 billion for non-broadcast networks. *See* Joe Flint, *As Cable Gains in Prime Time, Broadcasters' Cachet Is at Stake*, Wall St. J., at 1 (May 8, 2003) (noting that "[w]ith the exception of *The Sopranos*, no one cable show has the viewership numbers that approach those of even an unsuccessful network show").

[23] The broadcast networks expect 2004 to be a banner year in terms of advertising sales. *See* Mike Farrell, *Karmazin Bullish on '04 Prospects: Viacom COO Says Ad Sales Will Hit New Highs*, Multichannel News (Oct. 6, 2003) (quoting Viacom President Mel Karmazin and Disney President Robert Iger). *See also* J. Krutnick, et al., *2003/2004 TV Upfront Preview: Setting the Stage*, Smith Barney Citigroup (May 1, 2003) (forecasting prime-time advertising sales of $9 billion in 2004, up from $8.3 billion this year).

[24] *See* Discovery *Ex Parte*, filed in CS Dkt. No. 98-120 (Nov. 19, 2003) ; Landmark *Ex Parte*, filed in CS Dkt. No. 98-120 (Nov. 7, 2003); A&E *Ex Parte*, filed in CS Dkt. No. 98-120 (Nov. 5, 2003); Bloomberg/TechTV *Ex Parte*, filed in CS Dkt. No. 98-120 (Oct. 23, 2003).

In sum, expanded must-carry would cause substantial harms to non-broadcast programmers and would do nothing to advance the digital transition. HBO therefore urges the Commission to affirm its dual must-carry and "primary video" decisions.

Sincerely,

/s/ Eric Kessler
Eric Kessler
President, Sales and Marketing
Home Box Office
1110 Avenue of the Americas
New York, New York 10036