



Lowell W. Paxson / Chairman

January 28, 2004

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

**Re: Notification of *Ex Parte* Communication
CS Docket Nos. 98-120, 00-96, and 00-2**

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the FCC rules, this letter reports that on January 26, 2004, the undersigned had a telephone conference with Jordan Goldstein, Senior Legal Advisor to Commissioner Michael J. Copps, to discuss the issue of digital multicast must-carry for television stations. I delivered to Mr. Goldstein's office and discussed during the telephone conference the enclosed handouts. I noted that the record strongly supports requiring digital multicast must-carry, and the Commission should act promptly to mandate it.

Due to inclement weather and the early closure of the FCC on January 27, 2004, this notification of *ex parte* communication is being filed as timely as possible.

As required by Section 1.1206(b), as modified by the policies applicable to electronic filings, one electronic copy of this letter is being submitted for each of the above-referenced dockets.

Very truly yours,

Lowell W. Paxson,
Chairman & CEO

Enclosures

cc(w/o encl.): Jordan Goldstein, Esquire (via email)

PROPOSED IMPLEMENTATION SCHEDULE
FOR FULL DIGITAL MULTICAST MUST-CARRY

- The Commission's implementation of full digital multicast must-carry pursuant to Section 614 of the 1992 Cable Act should follow the same basic timeframe that was mandated for analog must-carry, *i.e.*, within **180 days** of its decision. Because multicast must-carry is critical to fostering the roll-out of DTV operations in line with Congressionally mandated timetables, and DTV multicasting will help achieve those ends, Paxson Communications Corporation ("PCC") urges the Commission to adopt full digital multicast must-carry before April 2004.
- The Commission would release its implementing regulations as soon as possible following adoption of its decision, and the rules would become effective 30 days after publication in the Federal Register. PCC believes that the rules should include solid dates for (1) broadcasters with existing DTV operations to elect continued carriage of their analog signal or replacement carriage of their digital signals, including multicast programming; and (2) cable operators to begin carrying broadcasters' full digital signals.

The Commission could implement full digital multicast must-carry consistent with the following schedule:

- **March 31, 2004** *FCC Adopts Order Requiring Full Digital Multicast Must Carry.* The Commission's implementing rules would become effective 30 days after publication in the Federal Register.
 - **April 15, 2004**
(approximate) *Federal Register Publication Occurs.*
 - **May 15, 2004**
(or 30 days after
Federal Register
Publication) *Analog Broadcasters with Existing DTV Operations Elect Continued Analog Carriage or Replacement Digital Carriage.* Broadcasters that currently are not broadcasting digital signals would make their election within 30 days of the commencement of DTV operations.
 - **September 27, 2004**
(or 180 days after
initial decision) *Cable Operators Begin Carrying the Multicast Program Streams of Analog Broadcasters with Existing DTV Operations and DTV-Only Broadcasters.*
- The initial must-carry election of analog or digital carriage should last for the remainder of the current must-carry/retransmission consent election cycle, which expires on December 31, 2005.
 - Stations that have existing analog retransmission consent agreements should be permitted to renegotiate those agreements to facilitate digital carriage and may request temporary waiver of the initial election date to facilitate those negotiations, if necessary. If no mutually satisfactory resolution is achieved by September 27, 2004 (or 180 days after the initial decision), the existing analog retransmission consent should remain in force.
 - Existing DTV retransmission agreements should continue for the duration of their current terms.
 - All DTV retransmission agreements that commence after the conclusion of the current election cycle (which ends December 31, 2005) must be required to provide for carriage of a station's multicast signals. To accomplish that end, the Commission should eliminate its transitional rule permitting partial carriage of DTV signals pursuant to retransmission consent agreements. See Carriage of Digital Television Broadcast Signals, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 ¶ 30-31 (2001).



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JAN 16 2004

EX PARTE SUBMISSION

TO: Jane. E. Mago
Federal Communication Commission
Bureau / Office

DATE: January 16, 2004

RE: CS Dockets No. 98-120, 00-96 and 00-2

**Both the Law and the Facts Support and, Indeed,
Now Compel a Definition of "Primary Video" That
Requires Carriage of Broadcasters' Multicast Signals**

- I. **The Commission Has Both the Authority and the Responsibility To Revisit the "Primary Video" Issue.**
- A. Courts always have recognized that an agency may depart from its existing policies and prior decisions as long as it provides a reasoned basis for the departure. *See, e.g., Clinton Memorial Hospital v. Shalala*, 10 F.3d 854 (D.C. Cir. 1993) ("[T]he fact that an agency rule represents a change in course simply requires courts to make sure that 'prior policies are being deliberately changed, not casually ignored.'") (citing *Simmons v. ICC*, 829 F.2d 150, 156 (D.C. Cir. 1987); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).
- B. The U.S. Court of Appeals for the District of Columbia Circuit has consistently affirmed FCC decisions that modified policies adopted earlier in a proceeding, when changed circumstances warranted the change. *See, e.g., PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995 (D.C. Cir. 1999); *Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996); *Florida Cellular Mobil Communications Corp. v. FCC*, 28 F.3d 191 (D.C. Cir. 1994).
- C. When appropriate, the Commission in the past even has altered its construction of statutes on reconsideration without suffering reversal. *See, e.g., Federal-State Joint Board on Universal Service, Fourteenth Order on Reconsideration*, 14 FCC Rcd 20106, 20112(1999) ("After taking a fresh look at the statutory language, and considering the arguments set forth in the record, however, we conclude that the Commission read the statute too narrowly . . ."); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration*, 14 FCC Rcd 18049, 18060-63 (1999).

- D. Paxson Communications Corporation ("PCC") long has maintained that the best interpretation of the 1992 Cable Act's provisions regarding mandatory signal carriage is to construe "primary video" to include all video programming that is broadcast free and over-the-air, including multicast program streams. A fresh look at the statute reveals that the Commission has much more flexibility in interpreting the "primary video" language than it previously has claimed.
1. The "primary video" language appears just once in the statute at a point when the context is clearly directed to mandatory analog carriage. 47 U.S.C. § 534(b)(3)(A) ("A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system..."). This provision's contemplation of analog rather than digital carriage is shown by its references to characteristics of analog transmission, such as line 21 and the vertical blanking interval, which have no relevance to digital carriage or the DTV transmission. *Id.*
 2. Under the express terms of the statutory provision governing DTV must-carry, which appears in an entirely separate statutory subsection, the Commission is directed to adopt such regulations as are necessary to "ensure cable carriage of [] broadcast signals of local commercial television station which have been changed" to conform to the DTV standard. 47 U.S.C. § 534(b)(4)(B).
 3. This subsection of the statute makes no provision for partial carriage of DTV signals. *Id.* Given Congress' silence, the only reasonable interpretation is to make broadcasters' carriage rights for DTV signals include carriage of the entire broadcast transmission, thereby conforming as nearly as possible to the standard for analog signals, *i.e.*, carriage of "the entirety of the program schedule." 47 U.S.C. § 534(b)(3)(B).
 4. The Commission's rules specifically permit and contemplate multicasting, Advanced Television, *Fifth Report and Order*, 12 FCC Rcd at 12809, 12826 (1997), so DTV signals that include multiple program streams that conform to the FCC's DTV broadcasting standard qualify under the § 534(b)(4)(B) as entitled to full carriage.
- E. Thus, it is clear that the Commission has the legal authority to alter its interpretation of the term "primary video" and mandate cable carriage of the entire DTV multicast signal. Such a result is consistent not only with construction of the relevant statutory provisions but, as shown below, essential given changed factual circumstances since the FCC issued its first interpretation of "primary video."

II. Since the Commission's January 2001 Decision, Facts Have Changed Such That Reconsideration of the "Primary Video" Decision Is Required.

- A. Market forces have failed to produce any significant cable distribution of broadcasters' DTV signals.
1. In January 2001, the Commission believed that mandatory carriage of broadcast stations' DTV signals was not necessary because market forces would give broadcasters access to cable carriage of DTV signals and cable operators access to broadcast DTV content. Carriage of Digital Television Broadcast Signals, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2654-55 (2001). That has not materialized.
 2. Instead, despite broadcasters' increased offerings of HDTV and multicast content, cable operators by and large have refused to negotiate carriage of broadcasters' DTV signals. PCC, for example, has not been able to reach multicast carriage agreements with any of the cable operators in its markets.
 3. Market forces have not been sufficiently powerful to force recalcitrant cable operators to conclude digital carriage agreements. Multicast must-carry will not occur unless the FCC mandates it.
- B. Broadcasters have made substantial investments in DTV without realizing any increased revenue.
1. Since the January 2001 decision, broadcasters have continued to expend massive sums of money to bring the vast majority of DTV stations into operation. In January 2001, the Commission presumed that consumer adoption would proceed in a manner that, by now, revenues from DTV broadcasting would be beginning to offset broadcasters' DTV expenditures. Nothing close to Commission expectations has occurred. As the Commission has recognized, the most recent available estimates peg DTV penetration at around one percent. *Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, Second Report and Order and Second Memorandum Opinion and Order*, 17 FCC Rcd 15978, 15994 (2002).
 2. Broadcasters now face not only the prospect of increased expenditures as they upgrade their DTV transmission facilities from low-power to full-power but also the ongoing costs of dual station operation. Without any foreseeable DTV revenue to offset the capital costs and continuing high operational expenses, many stations' financial health is inevitably at severe risk.
 3. With increased expenditures and, at best, stagnant revenues, broadcasters will be unable to generate the high-value content or new services that all parties acknowledge are necessary to propel the broadcast DTV transition to a successful conclusion.

4. These trends cannot help but weaken the system of free over-the-air broadcasting that the Supreme Court found so important in *Turner*.
- C. Since 2001, the deployment of high bandwidth digital cable systems coupled with advances in digital compression technology and statistical multiplexing have continued to accelerate, completely nullifying cable operators' claims of lack of capacity for carriage of DTV multicast signals.
1. In 2001, cable operators reported that 82 percent of cable homes were passed by 550 MHz cable systems and 65 percent were passed by 750 MHz systems. Both 64 and 256 QAM digital compression schemes – which allow cable operators to deliver either 8 or 12 digital channels in the same 6 MHz channel used to deliver a single analog channel – were mostly still on the drawing board, but promised to greatly expand cable channel capacity. Carriage of Digital Broadcast Signals, *First Report and Order*, 16 FCC Rcd 2598, 2631 (2001).
 2. Today, more than 90 percent of homes are passed by cable systems of 550 MHz and over 90 million cable homes are served by 750 MHz systems. National Cable and Telecommunications Association, *2003 Year-End Report* at 2, available at http://www.ncta.com/pdf_files/Overview.pdf. In addition, many cable systems are pushing bandwidth even higher, with recent press reports indicating that Cablevision has completed a system rebuild that upgrades the most populous areas of its New York systems to 860 MHz. *Cablevision: We're 750-MHz Throughout*, MULTICHANNEL NEWS, December 4, 2003, available at <http://www.multichannel.com/article/-CA339959?display=Breaking+News>. In addition, most cable operators have begun utilizing 64 or 256 QAM digital compression techniques to boost channel capacity far beyond what was possible in 2001. Indeed, cable operators are now contemplating adoption of 1024 QAM which will enable them to expand by approximately 30 percent the amount of digital content that can be delivery in a single 6 MHz channel. Karen Brown, *Cable Eyes Boost to 1024 QAM*, MULTICHANNEL NEWS, January 6, 2003 at 27. Moreover, statistical multiplexing, which allows cable operators using 64 and 256 QAM compression to deliver up to 18 programming streams per multiplexed channel, has become commonplace. *Id.*
 3. Nonetheless, cable operators and programmers continue to complain about the bandwidth constraints that would be caused by multicast must-carry and insist that if the Commission requires them to carry the entirety of each broadcasters' DTV signal, important public affairs outlets like C-Span and state and local news channels will have to be dropped from cable systems. *E.g., Ex Parte* Letter from Bruce Collins to Marlene H. Dortch, dated September 26, 20003 (describing lobbying visit by C-Span and several state cable networks and arguing that each faced the risk of decreased carriage under multicast must-carry).

4. Thus, although the potential amount of programming that can be carried on a 750 MHz cable system has roughly tripled since 2001, cable operators still are making the same arguments about bandwidth constraint and the possibility of dropped channels. This despite the fact that there has been no explosion in new cable networks since 2001. In the face of cable operators' vastly expanded – and expanding – cable capacity, their arguments regarding limited space for broadcast channels is absurd.
- D. Despite these technological advances, cable operators have aggressively rolled out digital services while denying broadcasters carriage of their DTV programming.
1. Since the January 2001 decision, cable operators have aggressively rolled out digital services while refusing to carry broadcasters' DTV programming streams.
 2. Unlike broadcasters, cable operators realize immediate revenues from their digital upgrades. These revenues in turn allow them to invest in higher value digital television content and other services.
 3. At this point, cable operators have established a competitive lead in the provision of digital television services that will be very difficult for over-the-air broadcast television to overcome or even approach.
 4. Unless broadcasters are able to tap the revenues that would be generated by multicast must-carry, real danger exists that the migration of high value digital content from free broadcast television to cable – a development Chairman Powell has noted with concern, Michael K. Powell, *New Rules, Old Rhetoric*, THE NEW YORK TIMES, July 28, 2003 at A17 – will only accelerate.
 5. If these developments continue, the competitive balance between broadcasters and cable operators will be irretrievably altered. This result would undermine another of the core government interests that the Court in *Turner* identified as central to the Congress's intent in enacting must-carry.

III. Reconsideration of the "Primary Video" Definition and Institution of Multicast Must-Carry Would Be Consistent with Changes in the Commission's Current DTV Transition Policies Since January 2001.

- A. In January 2001, Commission policy was to rely principally upon market forces alone to drive the DTV transition to a rapid conclusion. In the past eighteen months, the Commission has moved away from that view and has begun to take a more active role in managing the DTV transition. This policy shift has included (1) Chairman Powell's voluntary DTV plan, *Proposal for Voluntary Industry Actions to Speed the Digital Television Transition*, attachment to Letter from Michael K. Powell to the Honorable Ernest F. Hollings, dated April 4, 2002, available at http://www.fcc.gov/commissioners/powell/hollings_dtv_letter-040402.pdf; (2) the DTV tuner mandate, Review of the Commission's Rules and Policies Affecting the

Conversion to Digital Television, 17 FCC Rcd 15978 (2002), (3) allowance of low-power DTV construction and approval of transitional low-power DTV operation, Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Memorandum Opinion and Order On Reconsideration*, 16 FCC Rcd. 20594, 20607-08 (2001); (4) adoption of a sanctions regime for broadcasters that have failed to meet the FCC's build-out schedule, *Remedial Steps For Failure to Comply With Digital Television Construction Schedule, Report and Order and Memorandum Opinion and Order*, 18 FCC Rcd 7174 (2003), and (5) adoption of measures in the plug-and-play and broadcast-flag proceedings to address digital rights concerns. Digital Broadcast Content Protection, *Report and order and Further Notice of Proposed Rulemaking*, MB Docket 02-230, FCC 03-273 (rel. November 4, 2003); Implementation of Section 304 of the Telecommunications Act of 1996, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, CS Docket No. 97-80, PP Docket No. 00-67 FCC 03-225 (rel. October 9, 2003). Accordingly, the January 2001 decision's deference to market forces is now inconsistent with the Commission's increasingly aggressive DTV transition policies. In fact, continued deference to such forces will skew market competition.

- B. It is critical that, at this juncture, the Commission order multicast must-carry so that broadcasters can begin reaching viewers with their full complement of free over-the-air DTV services. The damage that will be done to the interests identified by the Supreme Court in *Turner* if the Commission fails to act now cannot be ignored. See *Turner Broadcasting Systems, Inc. v. F.C.C.*, 520 U.S. 180, 189 (noting financial interests in "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming").
- C. In its January 2001 decision, the FCC recognized that the term "primary video" was susceptible to different interpretations and based its decision on "the record currently before [it]" As noted above, the facts and record before the FCC as well as the legal context are now unmistakably different.

IV. Given the Legal and Factual Changes, Altering the Commission's Interpretation of "Primary Video" Is Not Only Legally Permissible, But a Failure To Do So Would Run Afoul of Administrative Law Principles.

- A. The FCC has a "duty to evaluate its policies over time to ascertain whether they work - that is, whether they actually produce the benefits originally predicted they would." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992). See also *Telocator Networks of Am. v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982). Indeed, courts have upheld changes in the Commission construction of a statute between stages of the same Commission proceeding if the facts and record justify such action. *Consumer Electronics Association v. FCC*, 347 F.3d 291, 295 (2003) ("The Commission acknowledged that it had, in earlier administrative proceedings, rejected calls for a digital tuner mandate, believing that market forces were

sufficient to carry out the DTV transition . . . By 2002, however, with the statutory 2006 deadline fast approaching, the Commission had concluded that “insufficient progress is being made towards bringing to market the equipment consumers need to receive broadcasters['] DTV signals over-the-air.”).

- B. In January 2001, the FCC had before it a very different set of facts, a record that led it to rely on market forces to drive the DTV transition. As shown above, that record has changed. With these changes has come a need for the FCC to reassess and adjust the approach it took in January 2001, the very essence of reasoned decision making.
- C. Among the changes that the FCC has the authority and, indeed, now the legal obligation to make is modification of its “primary video” interpretation. The FCC should do so and mandate cable carriage of DTV multicast signals transmitted by commercial and noncommercial broadcasters alike.

cc: Marlene H. Dortch, Esquire (with two copies for each noted docket number)
The Honorable Michael K. Powell
The Honorable Kathleen Q. Abernathy
The Honorable Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
Bryan N. Tramont, Esquire
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January 26, 2004

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Re: Digital Multicast Must-Carry and the Public Interest
Obligations of DTV Broadcasters (CS Docket No. 98-120)

Dear Johanna and Jordan:

Thank you for having me over to visit with each of you last week. Following up on our meetings, MMTC would like to present a proposal for breaking the impasse that thus far has delayed a Commission decision regarding mandatory cable carriage of broadcasters' over-the-air DTV signals.

As Commissioners Copps and Adelstein declared in their dissenting statement in the broadcast ownership docket (MB 02-277), the Commission has no greater priority than the full participation of all Americans in broadcasting. If we had a broadcasting system that offered opportunity to all, it would assuredly provide democratic values, national cohesiveness and multicultural understanding. Visitors from around the globe would regard our television system as the greatest in the world -- and much of that perception would derive from the racial and social class diversity reflected in programming available nationwide for the first time if multicast DTV is adopted.

Johanna Mikes Shelton, Esq.

Jordan Goldstein, Esq.

January 26, 2004

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We believe that multicast DTV presents a structural, content-neutral way of accomplishing three desirable objectives:

First, multicast DTV would enable the Commission to overcome some of the structural inequities that have so dramatically thinned the ranks of minority owned broadcasters (see MMTC Comments in MB Docket 02-277, Broadcast Ownership, filed January 2, 2003, pp. 35-50). In particular, multicast DTV would enable minority television broadcasters, drawing upon their unique backgrounds, experiences and perspectives, to develop multicultural programs and program channels. Minority broadcasters would distribute this programming using their own DTV channel capacity and that of their fellow broadcasters.

Second, multicast DTV would help counteract the gatekeeper effects that have contributed to the paucity of minority-themed and multicultural programming, whose availability nationwide is far below the level that would have obtained absent these market imperfections. In particular, the vertically and horizontally integrated structure of the cable industry renders it difficult for minorities and other new entrants to successfully launch any new channel, especially one whose viewership includes moderate income families who must receive television over-the-air or on only basic cable. Assurance of cable carriage would deliver the nation a level of multicultural programming that is commensurate with market demand.

Third, multicast DTV would deliver the nation a cornucopia of readily accessible, diverse program service. Such service would provide a market-based incentive for low income consumers, especially minorities, to become early adopters of DTV technology. That, in turn, would accelerate the date by which the industry attains Congress' 85% threshold for the transition from analog to digital, making possible at the earliest practicable date the rollout of high speed digital wireless service in the 700 MHz band (see MMTC Comments in MB Docket 03-15, DTV Conversion, filed April 21, 2003, pp. 17-26).

Multicast must-carry would be premised on a finding that cable operators should carry the entirety of broadcasters' over-the-air DTV signals. Implicit in this finding is the reaffirmation of local DTV broadcasters' traditional obligation to serve the public interest by broadcasting programming addressing the concerns of the local communities they are licensed to serve.

Consequently, MMTC proposes that the Commission require that broadcasters provide, and air between 7 AM and midnight, some reasonable minimum amount per week of locally-produced programming on each digital programming channel that is transmitted and carried.

This local origination requirement could be met with programming broadcasters themselves develop and produce, or by programming produced and developed by a locally based group from the broadcaster's community of license or service area. The Commission should require compliance with this standard within two years of a station's commencement of DTV

Johanna Mikes Shelton, Esq.
Jordan Goldstein, Esq.
January 26, 2004
Page Three.

multicasting. Each DTV station would file an annual report on its satisfaction of this standard. For those broadcasters unable to meet the standard because of financial difficulties, the Commission should adopt an annual waiver procedure and standard akin to a "failing" station or other equally quantifiable approach.

The Commission's adoption of this minimum local programming requirement in conjunction with mandating full digital multicast must-carry would be a major step forward for the DTV transition, allowing the Commission finally to resolve this five-year old DTV must-carry proceeding and significantly advance its four-year old DTV public interest proceeding. Moreover, this requirement would provide precisely the type of objective, easily verifiable standard that would ensure the Commission that DTV broadcasters are using their digital spectrum to serve their communities while still leaving broadcasters free to respond to the programming demands of the markets they serve.

This minimum local programming requirement would not form the entirety of DTV broadcasters' public interest obligations. The Commission should adopt children's programming requirements in some form, and explore other public interest programming and reporting requirements. Nonetheless, MMTC believes that a minimum per-channel local programming standard is a good starting point and a sensible component of multicast must-carry. Broadcasters and viewers need resolution of these issues, and a minimum per-channel local programming requirement would allow the Commission to provide certainty to all concerned, improved service to every viewer, and a structural means of fulfilling the promise of diversity and inclusion in our most influential industry.

Finally, MMTC urges the Commission, at the earliest practicable date, to conclude its work on the long-pending recommendations of the December, 1998 Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters ("DTV Advisory Committee"). The DTV Advisory Committee's recommendations regarding such matters as public interest programming and EEO are well considered and worthy of action. However, such a ruling does not need to be issued simultaneously with the resolution of multicast must-carry as long as the DTV Advisory Committee's work is not allowed to fall off the radar screen. If the Commission is unable to rule on the DTV Advisory Committee's recommendations now, it should state that it will do so before the end of the year.

With kindest regards,

Sincerely,



David Honig
Executive Director

cc: CS Docket No. 98-120 (by ECFS)