



Lowell W. Paxson, Chairman

January 20, 2004

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12th St., S.W.  
Washington, D.C. 20554

Re: Response to Another NCTA Attack on Full Digital Multicast Must Carry  
CS Docket No. 98-120

Dear Chairman Powell:

There they go again. In its most recent attack, NCTA, which presents itself as a tireless champion of *cable operators'* First Amendment rights, now urges the Commission to deny full digital multicast must-carry based on the content of broadcasters' multicast offerings.<sup>1</sup> NCTA is once again trying to focus the Commission's attention on peripheral issues in an effort to distract it from the true legal objectives of this proceeding, which are to ensure carriage of stations' free over-the-air DTV programming and to safeguard the future vibrancy of the American broadcasting system. Paxson Communications Corporation ("PCC") has consistently shown that the way to accomplish these objectives is to adopt full digital multicast must-carry immediately, and NCTA's recent filing only confirms that fact.

The primary purpose of NCTA's attack on the networks' multicast plans is to indefinitely delay action on this issue that is so critical to the future of over-the-air broadcasting in the DTV era. First, NCTA argues that multicast must-carry should not be required because there are too few existing multicast program services currently being offered to justify a must-carry requirement. But multicasting is about the future and existing multicast services are not determinative of the issue from either a practical or a legal standpoint. Practically speaking, the Commission cannot know how many multicast services will be offered five years after it requires full digital multicast must-carry, but it immediately will know that it gave broadcasters and viewers an opportunity to make those enhanced services a reality. Congress did not know whether must-carry would actually save the many ailing television stations around the country in 1992, but the subsequent evidence shows that must-carry improved the over-the-air broadcast service tremendously. Now, 12 years later, the number of television stations on the air has increased by approximately 12% and there are 10 national broadcast networks –

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<sup>1</sup> *Ex Parte* Letter of NCTA, filed January 7, 2004 ("NCTA January 7 *Ex Parte*").

including PAXTV, Univision, Fox, Telemundo, the WB, AztecaAmerica, and UPN – where once there were 3. The Commission's duty is to maximize the opportunities for an improved television broadcast service; only the market will decide whether those services actually materialize. From a legal standpoint, even if there were no multicast programming available today, that would not change the law, which requires cable operators to carry every local broadcaster's entire schedule of free, over-the-air programming. In short, the law requires full digital multicast must-carry.

NCTA focuses its attack on the recently submitted multicasting plans of the ABC, NBC, and Telemundo networks,<sup>2</sup> arguing that those plans only confirm cable operators' assertion that "broadcasters would utilize [] multicast channels for infomercials, paid programming, and other low-budget fare."<sup>3</sup> PCC has warned the Commission in the past that whenever cable operators' start referring to "infomercials," it is a good sign that they are about to start twisting the truth,<sup>4</sup> and this time is no exception. The network plans cited by NCTA actually contain no infomercials or paid programming, but that is only half the problem with their attacks. By assuming that all future multicasting will look like current network plans, NCTA is slyly misstating the issue. As NCTA knows, all broadcasters – not just the networks and their O&Os – need the additional revenue streams that multicast must-carry could bring, just as all viewers would benefit from the additional program opportunities that multicasting would create. If anything, non-network-owned or affiliated stations are more likely to take advantage of the full range of multicasting opportunities to provide rich mix of new locally oriented services because they will not have access to the large quantities of HDTV programming that the networks will produce. It is the emerging networks like PCC, Univision, Telemundo, the WB, UPN, and AztecaAmerica, together with independent and small-market stations, all of which have had their resources drained by the ongoing DTV transition, that will be the chief beneficiaries of multicast must-carry.

NCTA's assertion that there is "a paucity of commercial multicast offerings nationwide" already has been exposed as fantasy in this proceeding.<sup>5</sup> Affiliates of NBC and CBS have submitted over 100 pages of documentation of their local multicast endeavors and experiments.<sup>6</sup> These efforts include a surfeit of new local news, sports, traffic, and weather programming that greatly enhances viewers' access to important local information in many markets. PCC has provided the Commission with evidence regarding its early multicasting efforts and now can proudly say that it is multicasting on

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<sup>2</sup> *Ex Parte* Presentation of the Walt Disney Company, filed December 3, 2003; *Ex Parte* Presentation of NBC/Telemundo, dated November 7, 2003.

<sup>3</sup> NCTA January 7 *Ex Parte* at 4.

<sup>4</sup> *Ex Parte* Letter of Paxson Communications Corporation, filed December 31, 2003, at 2,3.

<sup>5</sup> NCTA January 7 *Ex Parte* at 3.

<sup>6</sup> Special Factual Submission by the CBS Television Network Affiliates Association in Support of Multicast Carriage Requirement, file January 13, 2004; Special Factual Submission in Support of Multicast Carriage by the NBC Television Affiliates Association, filed January 8, 2004.

17 of its digital stations. The fact that so many broadcasters are multicasting even without full digital multicast must-carry and even in the face of the tremendous costs of the DTV transition shows the potential strength of this service. But it can't develop into a viable long-term service until enough viewers receive it to generate advertising revenues that would support new and innovative program offerings. NCTA mocks the local weather efforts of ABC's Fresno affiliate's local weather service, but forgets that C-SPAN was once a stationary camera on the floor of the House of Representatives and people mocked that too. The only reason there appears to be no currently viable business model for multicasting is because so few viewers own DTV receivers and no cable operators will carry most broadcasters' multicast program streams. Granting full digital multicast must-carry would give broadcasters across the country the financial certainty needed to introduce these new services in every market in the nation and to develop them into services that viewers value.

Unable to refute these facts, NCTA turns to obfuscation. For example, NCTA conflates the concept of multicast carriage with that of the Big 4 networks gaining cable carriage of non-broadcast satellite-delivered stations like ABC's Disney Channel.<sup>7</sup> Needless to say, the vast majority of television broadcast licensees and station groups do not own cable programming networks and do not benefit in any way from the major networks' success in the cable programming realm. NCTA also complains about the potential effect of multicast must-carry on retransmission consent negotiations with the Big 4 networks.<sup>8</sup> But, as NCTA knows, must-carry always has been primarily about protecting stations that are vulnerable because they lack the bargaining power to secure carriage independently. Both Congress and the Supreme Court recognized that the most powerful stations would continue to exist in the absence of analog must-carry but their goal was to protect the entire over-the-air broadcasting system, not just those stations that cable operators chose to permit to survive. Consequently, the outcome of digital retransmission consent negotiations between the powerful networks and the powerful cable companies has nothing to do with whether non-Big 4 affiliated stations will thrive in the DTV era without full digital multicast must-carry. By concentrating on network stations and affiliates, NCTA is attempting to evade the plain fact that most broadcasters need full digital multicast must-carry, even if some network owned or affiliated stations are strong enough to gain multicast carriage without it.

At least NCTA refrained from again arguing its old favorite canard – that cable bandwidth is insufficient to permit multicast must-carry without massive dislocation of existing cable services. Nonetheless, some of its statements invite scrutiny of this old charge. One point NCTA stresses is that they've signed agreements to carry the multicast programming of 66 public television stations. Absent from this point, however, is which cable channels operators had to drop to accommodate these additional multicast signals. The reason that information is missing is most likely

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<sup>7</sup> NCTA January 7 *Ex Parte* at 2.

<sup>8</sup> *Id.* at 2-3.



because the cable operators did not drop any programming to accommodate the public stations, because digital compression and statistical multiplexing techniques have advanced to the point where cable bandwidth is all but endless.<sup>9</sup> Indeed, if cable operators still wish to press their "bandwidth scarcity" argument, the real issue is why cable operators are using their bandwidth-rich cable systems to distribute so much hard-core pornography. Cable operators say they will have to drop C-SPAN if full digital multicast must-carry is ordered, but as long as they are carrying the Playboy Channel and The Erotic Network, it is hard to take these claims seriously.

**It now has been 1097 days since the Commission tentatively decided to defer mandatory DTV carriage until after the DTV transition is complete and to restrict post-transition carriage to a single program stream. To put that into perspective, it is only 1077 days until Congress intends that analog signals be turned off and digital-only broadcasting commence.** The Commission must *immediately* start doing everything within its power to begin increasing DTV penetration if it wants to meet Congress's December 31, 2006 deadline in any market, let alone all of them. The Commission knows that the only way to do that at this point is to require full digital multicast must-carry. Any other course will lead to an endless transition, which will progressively suck the life out of the over-the-air broadcasting system – a result neither Congress, nor the Supreme Court, nor the First Amendment could possibly intend.

Sincerely,

Lowell W. Paxson  
Chairman & CEO  
PAXSON COMMUNICATIONS CORPORATION

cc: The Honorable Kathleen Q. Abernathy  
The Honorable Michael J. Copps  
The Honorable Kevin J. Martin  
The Honorable Jonathan S. Adelstein  
Jonathan Cody, Esquire  
Stacy Robinson Fuller, Esquire  
Jordan Goldstein, Esquire  
Catherine Bohigian, Esquire  
Johanna Shelton, Esquire

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<sup>9</sup> Karen Brown, *Cable Eyes Boost to 1024 QAM*, MULTICHANNEL NEWS, January 6, 2003 at 27.