



Written Statement of Lowell W. "Bud" Paxson
Chairman and CEO of Paxson Communications Corporation

Submitted in Connection with Hearing on Television Indecency,
House Subcommittee on Telecommunications and the Internet

Thursday, February 26, 2004

Thank you Mr. Chairman, Mr. Vice-Chairman and distinguished members of the Subcommittee for providing me with the opportunity to address you today. My name is Lowell Bud Paxson, and I am Chairman and Chief Executive Officer of Paxson Communications Corporation. My company operates 61 full power television stations and PAXTV, a full service broadcast television network now in 95 million homes—89% of America's TV homes. Our network is dedicated to providing family television, free from gratuitous violence, explicit sex and foul language. Since 1998 we've worked very hard at PAXTV to show that you can be successful and make money in American television by providing programming that is wholesome and entertaining, and I'm very proud of that. I have been a holder of a radio or television



broadcast license for over 50 years, and let me say that no station under my watch *ever* has broadcast indecent or obscene programming.

This indecency hearing was called in part because of a few seconds of a Super Bowl fiasco and the indecent escapade in St. Patrick's Cathedral in New York. The FCC and Congress say they have authority to regulate indecency on the broadcast airwaves because they belong to the people of the United States of America, and I agree.

Therefore, I give my unqualified support for Chairman Upton's bill, HR 3717.

Now, I have a few observations followed by a question. The Super Bowl fiasco was a matter of seconds. But just two days ago, Tuesday, here in Washington, D. C., cable and satellite providers carried 675 hours of pornography mostly on pay per view channels. Yes, a total of 675 hours of filth in one 24 hour period—and at all hours of the day. Now, here's the point. Cable and satellite use the public satellite orbital positions licensed by the FCC. They use microwave frequencies licensed by the FCC and owned by the people and the right of ways on

streets also owned by the people. Cable and satellite television could not function without the public's right of ways or the public's spectrum.

I'm not attacking HBO, Showtime or the hundred of other cable networks that go further than broadcasters in the area of indecency. I'm talking about 675 hours of pornography in one 24 hour period— Tuesday, here in the nation's capital.

No one sitting in this room can tell me it is in the public interest for cable and satellite providers to use the public spectrum and right of ways to pipe indecent and obscene programming into America's living rooms at all hours of the day without any constraints or limitations. But that is what is happening, day after day.

How to fix this moral decay? Empower the FCC; enact legislation; have an amendment to the Constitution if necessary. You are the lawmakers. You can do it.

Just a note: The Bresnan Cable systems in Colorado, Montana, Wyoming and Utah carry no pornography channels. I salute and praise them. Oh, yes, they're profitable...very profitable.



I've talked with dozens of church clergy, and they would step to this microphone and tell you that the number one family counseling problem is pornography on cable, satellite and the Internet.

If you need voters' names on petitions to do something about this pervasive evil, just tell me how many millions. It will be done.

Please don't say that pornography is okay because it is scrambled. In fact, the people in the home who know how to use a remote control best are the kids, and you only need a remote control to click on a pay per view channel to unscramble those signals.

Finally, the proceeding of Multicast Must Carry for the public's digital TV licenses is over three years old at the FCC. It's the one thing necessary for the DTV transition to work, and it hasn't happened yet. The cable and satellite providers say they have no spectrum for the additional program streams that would provide companies like mine with the ability to offer more family friendly programming, minority oriented programming and faith based programming. Tell cable and satellite to get the pornography off. They've got room for our multicast channels.



The majority of American people have values and morals. The majority of America people do not want what they own to be used for pornography in any way.

Thank you for the opportunity to speak and I'll be happy to address any of your questions.

Attachments:

- Congressional Letters to FCC
- Paxson Letters to FCC

Congressional Letters to FCC

TOM OSBORNE
30 DISTRICT, NEBRASKA

COMMITTEE ON AGRICULTURE

COMMITTEE ON EDUCATION
AND THE WORKFORCE

COMMITTEE ON RESOURCES



Congress of the United States
House of Representatives
Washington, DC 20515-2703
March 10, 2003

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The Honorable Michael K. Powell
Chairman, Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Powell:

I am writing regarding the issue of mandatory cable carriage of digital broadcast signals. It is my understanding that in January of 2001, the Federal Communications Commission (FCC) ruled in CS docket No. 98-120 that cable systems are only required to carry, under "must carry" rules, the primary digital television signal of a broadcaster. I am concerned that this rulemaking will have an increasingly disproportionate effect on local and independent broadcasters, a group that includes many religious and multilingual broadcasters, as cable systems convert from analog to digital and the capacity of their systems expands significantly.

As you know, prior to passage of the "1992 Cable Act," cable offered only limited, discretionary local broadcast station programming choices. In the 1992 Cable Act, Congress balanced public interest needs with industry competitiveness and designed a regulatory structure in which up to one third of a cable operator's channel capacity would be set aside for local broadcast signals. Congress further instructed that must-carry provisions apply to future digital television operations. In 1997, the Supreme Court upheld the constitutionality of the must-carry provisions of the 1992 Cable Act, considering the one-third channel capacity allocation, and citing that the regulations would not be an undue burden on cable. Must-carry provisions have been an essential element in promoting family friendly, spiritual, and local programming.

Given the fact that cable and broadcast providers are increasing channel capacity in correlating increments, the one channel rule should be reconsidered to include cable carriage of any free over-the-air broadcast signals contained in 6 MHz of spectrum based on the intent of the 1992 Cable Act to provide an adequate voice for small, independent, and local voices. Cable carriage would be predicated on the broadcaster meeting FCC licensing requirements for serving the public interest, and occupying up to only one third of a cable operator's capacity.

Thank you for your attention to this matter. I look forward to your response.

Best Wishes,

TOM OSBORNE
Member of Congress

MAC COLLINS

8TH DISTRICT, GEORGIA

COMMITTEE ON WAYS AND MEANS

PERMANENT SELECT
COMMITTEE ON INTELLIGENCE

DEPUTY WHIP

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UNITED STATES
HOUSE OF REPRESENTATIVES

March 5, 2003

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The Honorable Michael K. Powell
Chairman, Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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As they convert to digital broadcasting I understand that many of these local and independent broadcasters plan to "multicast" by offering several digital programming options to viewers in the 6 MHz of spectrum currently used to broadcast a "primary" analog signal, rather than one high definition signal. I am worried that unless these local and independent broadcasters are permitted to continue to broadcast in the full 6 MHz of spectrum, then the constructive and positive programming which they offer will be highly diluted as a percentage of the total channels available on digital cable systems.

"Must carry" was established by Congress under the 1992 Cable Act, and the provisions of the 1992 Act requiring that up to one third of a cable operator's channel capacity must be set aside for the carriage of local broadcast signals was upheld by the Supreme Court in 1997. This beneficial policy has been a key factor in fostering the availability of local, family friendly, and spiritual programming to cable television viewers. The "must carry" policy has insured that news, sports, and wholesome programming of local and regional interest is available on cable systems, and I believe that thoughtful consideration of this issue is necessary in order to ensure that such important programming will flourish and grow as the capacity of cable systems expands.

I would appreciate hearing from you with your thoughts on this matter, particularly with regard to any action you believe might be necessary from a legislative or regulatory standpoint in order to ensure that the objectives of the current "must carry" policy are carried forward as the transition to digital television continues.

Sincerely,

Mac Collins
Member of Congress

J. GRESHAM BARRETT
THIRD DISTRICT, SOUTH CAROLINA

ASSISTANT MAJORITY WHIP

HOUSE COMMITTEES:
BUDGET
FINANCIAL SERVICES

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Congress of the United States
House of Representatives
Washington, DC 20515-4003

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115 ENTERPRISE COURT, SUITE B
GREENWOOD, SC 29649
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FAX: (864) 223-1579

March 5, 2003

The Honorable Michael Powell
Federal Communications Commission
8th Floor
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

I am writing to you in reference to the FCC's January 18, 2001 ruling in CS Docket No. 98-120. As this rulemaking has such a strong impact on local and independent broadcasters, affecting their ability to remain viable entities providing important diversity of programming and viewpoints within the current industry, we would ask the FCC to reconsider this rulemaking.

As you know, prior to passage of the "1992 Cable Act," cable offered only limited, discretionary local broadcast station programming choices. In the 1992 Cable Act, Congress balanced public interest needs with industry competitiveness and designed a regulatory structure in which up to one-third of a cable operators channel capacity would be set aside for local broadcasters' signals. Congress further instructed that "must-carry" apply to future digital television operations. In 1997, the Supreme Court upheld the constitutionality of the must-carry provisions of the 1992 Cable Act, considering the one-third channel capacity allocation, and citing that the regulations would not be an undue burden on cable. "Must-carry" has been an essential element in promoting family-friendly, spiritual, and local programming.

Given the fact that cable and broadcast operators are increasing channel capacity in correlating increments, the one channel rule should be reconsidered to include cable carriage of any free over-the-air broadcast signals contained in 6 MHz of spectrum based on the intent of the 1992 Cable Act to provide an adequate voice for small, independent, and local voices. Cable carriage would be predicated on the broadcaster meeting the FCC licensing requirements for serving the public interest, and occupying up to only one-third of a cable operator's capacity.

Thank you for your attention to this matter. I look forward to your response.

Sincerely,



J. Gresham Barrett
Member of Congress

Cc: Commissioner Kevin Martin
Commissioner Michael Copps
Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein

United States Senate

WASHINGTON, DC 20510-4304

March 5, 2003

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Powell:

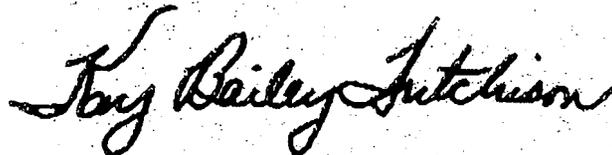
The FCC recently began its second review of the analog-to-digital television transition. This transition is required under the 1997 Balanced Budget Act. A successful transition will bring consumers new choices for video programming, encourage greater technology development, and ensure a competitive market.

I understand that Texas broadcasters are moving quickly to make the transition from analog to digital television ("DTV"). With the large investment that broadcasters have made to complete the transition, one concern is broadcasters' digital programming may not be sufficiently carried on other platforms, including cable and satellite. Part of the concern is whether broadcasters will be able to fully utilize, in the digital realm, the spectrum for which they currently have an FCC license in the analog realm.

I am concerned that the current FCC rule requiring carriage of only a limited signal will adversely impact broadcasters particularly small, independent stations. The policy rationale behind "must carry" is to insure that local and regional-interest programming is available, and this policy should apply to digital television. I encourage you to consider maintaining carriage of a broadcaster's entire 6 MHz spectrum, for which it has been licensed, as part of the DTV transition.

I commend your efforts, and your challenge to the various industries last year, to work expeditiously toward a full transition by the December 31, 2006 deadline. I would appreciate hearing from you on this matter.

Sincerely,



United States Senate

WASHINGTON, DC 20510

October 11, 2002

The Honorable Michael K. Powell
Chairman, Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

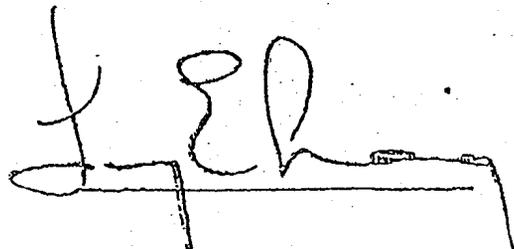
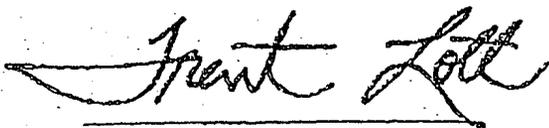
We are writing regarding the issue of mandatory cable carriage of digital broadcast signals. It is our understanding that in January of 2001, the FCC ruled in CS Docket No. 98-120 that cable systems are only required to carry, under "must carry" rules, the primary digital television signal of a broadcaster. We are concerned that this rulemaking will have an increasingly disproportionate effect on local and independent broadcasters, a group that includes many religious and multilingual broadcasters, as cable systems convert from analog to digital and the capacity of their systems expands significantly.

As they convert to digital broadcasting, we understand that many of these local and independent broadcasters plan to "multicast" by offering several digital programming options to viewers in the 6 MHz of spectrum currently used to broadcast a "primary" analog signal, rather than one high definition signal. We are worried that unless these local and independent broadcasters are permitted to continue to broadcast in the full 6 MHz of spectrum, then the constructive and positive programming which they offer will be highly diluted as a percentage of the total channels available on digital cable systems.

"Must carry" was established by Congress under the 1992 Cable Act, and the provisions of the '92 Act requiring that up to one third of a cable operator's channel capacity must be set aside for the carriage of local broadcast signals was upheld by the Supreme Court in 1997. This beneficial policy has been a key factor in fostering the availability of local, family friendly, and spiritual programming to cable television viewers. The "must carry" policy has insured that news, sports, and wholesome programming of local and regional interest is available on cable systems, and we believe that thoughtful consideration of this issue is necessary in order to ensure that such important programming will flourish and grow as the capacity of cable systems expands.

We would appreciate hearing from you with your thoughts on this matter, particularly with regard to any action you believe might be necessary from a legislative or regulatory standpoint in order to ensure that the objectives of the current "must carry" policy are carried forward as the transition to digital television continues.

Sincerely,



Congress of the United States
Washington, DC 20515

November 13, 2002

The Honorable Michael K. Powell
Chairman, Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Powell:

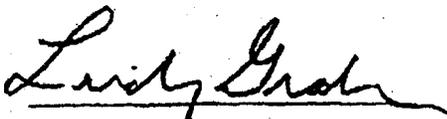
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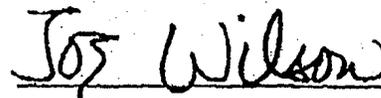
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Sincerely,



LINDSEY O. GRAHAM
Member of Congress



JOE WILSON
Member of Congress

MARK FOLEY
15TH DISTRICT, FLORIDA
DEPUTY MAJORITY WHIP

WAYS AND MEANS
COMMITTEE

SUBCOMMITTEE ON OVERSIGHT
SUBCOMMITTEE ON SELECT REVENUE
MEASURES

Congress of the United States
House of Representatives
Washington, DC 20515

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E-MAIL: mark.foley@mail.house.gov
WEBSITE: <http://www.house.gov/foley>

November 6, 2002

The Honorable Michael Powell
Federal Communications Commission
445 12th Street, S.W. 8th Floor
Washington, D.C. 20554

Dear Chairman Powell:

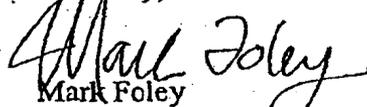
In further reference to the FCC's January 18, 2001, ruling in CS Docket No. 98-120, I would ask you to reconsider requiring mandatory carriage of only the primary digital television signal of a broadcaster, or, in the alternative, redefine the term "primary video." Given the fact that this rulemaking has such a significant impact on local and independent broadcasters, affecting their ability to remain viable entities providing important diversity of programming and viewpoints within the current state of the industry, I would ask the FCC to reconsider this rulemaking.

As you know, prior to passage of the "1992 Cable Act", cable offered only limited, discretionary local broadcast station programming choices. In the 1992 Cable Act, Congress balanced public interest needs with industry competitiveness and designed a regulatory structure in which up to one third of a cable operator's channel capacity would be set aside for local broadcast signals. Congress further instructed that must-carry apply to future digital television operations. In 1997, the Supreme Court upheld the constitutionality of the must-carry provisions of the 1992 Cable Act, citing the one third channel capacity allocation. Must-carry has been an essential element in promoting family friendly, spiritual, and local programming.

Given the fact that cable and broadcast are increasing channel capacity in correlating increments, the one channel rule should be reconsidered to include cable carriage of any free over-the-air broadcast signals contained in 6 mhz of spectrum based on the intent of the 1992 Cable Act to provide an adequate voice for small, independent, and local voices. Cable carriage would be predicated on the broadcaster meeting the FCC licensing requirements for serving the public interest, and occupying up to only one third of a cable operator's capacity.

Thank you for your attention to this matter.

Sincerely,


Mark Foley
Member of Congress

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COMMITTEES:

ARMED SERVICES

ENVIRONMENT AND
PUBLIC WORKS

INDIAN AFFAIRS

United States Senate

WASHINGTON, DC 20510-3603

July 23, 2003

The Honorable Michael Powell
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, D.C. 20554

Dear Chairman Powell:

I am writing to you regarding multicast must-carry in digital television, an issue that is of great importance to the people of Oklahoma.

I have been contacted by representatives from broadcast stations across Oklahoma on this matter, most notably, non-major network affiliated stations including family-friendly KSBI-TV 52 in Oklahoma City and KGEB-53 in Tulsa, which airs Oral Roberts University programming. These broadcasters have informed me that the transition to digital television has been an expensive and major undertaking, but one with great possibilities. However, they are very concerned with the dilution of their voice if they do not receive cable carriage of their entire 6 MHz of digital spectrum, including all free over-the-air broadcast signals contained therein. As you are aware, the cable carriage of 6 MHz of spectrum in digital television is the exact same spectrum requirement that applied to cable in analog television—nothing more, nothing less.

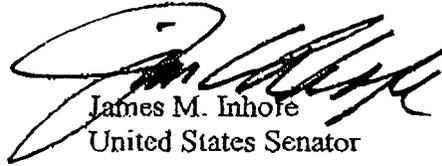
I am a strong proponent of diversity of voices in the broadcast medium and support a reasonable must-carry rule. To be clear, I do not support a "dual must-carry" requirement that would double the spectrum requirements for cable systems. This issue is even more relevant given the recent deregulatory rulemaking by the FCC to loosen ownership rules, which further limit the opportunities for small and independent broadcasters.

I also encourage the type of family-friendly and local programming that KSBI-TV and KGEB-53 air in my state. Locally produced shows like *On the Water In the Woods with Cody and Cody*; Oklahoma University and Oklahoma State University football and basketball programs; and inspirational and educational programming from Oral Roberts University are great forms of entertainment, news and information for Oklahomans.

As we transition to digital television and broadcasters and cable operators apply advances in technology to provide additional services to American television viewers, it is my hope that independent and small broadcasters are given a proportionate voice on digital cable systems. Just as analog must-carry has been an essential element in ensuring local and relevant programming to our communities, digital multicast must-carry (full carriage of broadcasters' 6 MHz of spectrum) will ensure the continued availability of community oriented programming.

Thank you for your attention to this matter. I look forward to your response.

Sincerely,



James M. Inhofe
United States Senator

Congress of the United States
Washington, DC 20515

November 26, 2002

The Honorable Michael Powell
Federal Communications Commission
445 12th Street, S.W. 8th Floor
Washington, D.C. 20554

Dear Chairman Powell:

In further reference to the FCC's January 18, 2001 ruling in CS Docket No. 98-120, we would ask you to reconsider requiring mandatory carriage of only the primary digital television signal of a broadcaster, or, in the alternative, redefine the term "primary video." Given the fact that this rulemaking has such a strong impact on local and independent broadcasters, affecting their ability to remain viable entities providing important diversity of programming and viewpoints within the current state of the industry, we would ask the FCC to reconsider this rulemaking.

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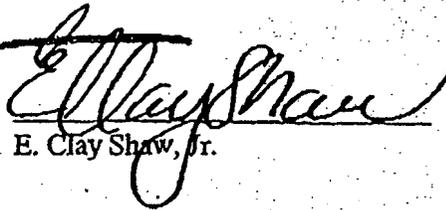
The Honorable Michael Powell
Page 2

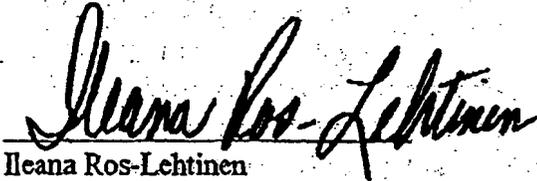
Cable Act to provide an adequate voice for small, independent, and local voices. Cable carriage would be predicated on the broadcaster meeting the FCC licensing requirements for serving the public interest, and occupying up to only one third of a cable operator's capacity.

Thank you for your attention to this matter. We look forward to your response.

Sincerely,


Lincoln Diaz-Balart


E. Clay Shaw, Jr.


Ileana Ros-Lehtinen

Cc: Commissioner Kevin Martin
Commissioner Michael Copps
Commissioner Kathy Abernathy

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Congress of the United States
House of Representatives
Washington, DC 20515

DAVE WELDON
15TH DISTRICT, FLORIDA

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CHAIRMAN
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SPACE AND AERONAUTICS SUBCOMMITTEE
FINANCIAL SERVICES
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FINANCIAL INSTITUTIONS SUBCOMMITTEE
CAPITAL MARKETS SUBCOMMITTEE

August 5, 2002

The Honorable Michael Powell
Federal Communications Commission
445 12th Street, S.W. 8th Floor
Washington, D.C. 20554

Dear Chairman Powell:

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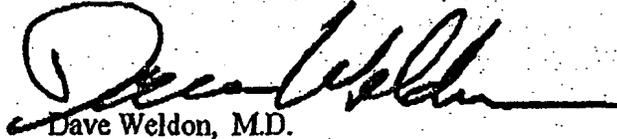
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Thank you for your attention to this matter. I look forward to your response on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Weldon", written over a horizontal line.

Dave Weldon, M.D.
Member of Congress

Cc: Commissioner Kevin Martin
Commissioner Michael Copps
Commissioner Kathy Abernathy

JAN-21-04 16:44 From:Congressman Gillmor

T-528 P.02/02 Job-862

PAUL E. GILLMOR
5TH DISTRICT, OHIO

COUNTIES: ARLAND (PART), CRAWFORD,
DEFIANCE, FULTON, HENRY, HURON, LUCAS (PART),
MERGER (PART), PAULding, PUTMAN, SANDUSKY, SENECA,
VAN WERT, WILLIAMS, WOOD, WYANDOT (PART)

ORITY MAJORITY WHIP



COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEES:
ENVIRONMENT AND HAZARDOUS MATERIALS
TELECOMMUNICATIONS AND THE INTERNET
COMMITTEE ON FINANCIAL SERVICES
SUBCOMMITTEES
CAPITAL MARKETS, INSURANCE AND
GOVERNMENT SPONSORED ENTERPRISES
FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

Congress of the United States
House of Representatives
Washington, DC 20515-3505
January 20, 2004

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, NW
Washington, D.C. 20554

Dear Chairman Powell:

I am writing regarding the current digital television, multicast "must carry" debate.

Of note, a number of Ohio broadcast stations have contacted me concerning this issue, and in particular, non-major network affiliate stations including family-friendly WLMB in Toledo, WTLW in Lima, WSFJ in Columbus and WGGN in Cleveland. These broadcasters have conveyed repeatedly that the transition to digital television has been an expensive and major undertaking, but one with great possibilities. However, they are concerned with the potential dilution of their voices, should they not receive cable carriage of their entire 6 MHz of digital spectrum, including all free over-the-air broadcast signals contained therein. I should also point out that these broadcasters do not support a "dual carriage" mandate that would double the spectrum requirements for cable systems.

I am a strong proponent of preserving localism as well as promoting the diversity of television programming, and certainly support a reasonable "must carry" rule. Should the Federal Communications Commission (FCC) take further action concerning the digital "must carry" issue, I would ask that you take into account the views of respective independent and small broadcasters across the country, providing them with a proportionate voice on digital cable systems.

Thank you in advance for your consideration.

Sincerely,

Paul E. Gillmor
Member of Congress

PEG:arb

WASHINGTON
1203 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-3505
202-225-6405

DEFIANCE
812 WEST THIRD STREET
DEFIANCE, OH 43512
419-782-1998

NORWALK
130 SHADY LANE DRIVE
NORWALK, OH 44857
419-668-0206

TIPPIN
95 SOUTH WASHINGTON STREET, SUITE 400
TIPPIN, OH 44883
419-448-9016

http://gillmor.house.gov Paul.Gillmor@mti.house.gov TOLL FREE IN OHIO 1-800-541-6446 TOLL FREE FAX IN OHIO 1-800-276-8209

PAXSON COMMUNICATIONS CORPORATION

FULL DIGITAL MULTICAST MUST CARRY

Paxson Communications Corporation (“PCC”) has been involved in FCC proceedings regarding the adoption of full digital multicast must carry rules for over five years. (CS Docket No. 98-120). Since January, 2001, PCC has been lobbying the FCC to reconsider its preliminary decision that a digital television station is only entitled to carriage of a single digital programming stream and that such digital carriage rights would not mature until the station returned its analog spectrum. In the last six months, PCC’s efforts have been redoubled through meetings with FCC Commissioners and their staffs and the submission of written material for consideration by the FCC. These PCC efforts are reflected in the attached letters which have been sent to the FCC since August, 2003.

LETTERS

TAB

- 1 Letters to FCC Commissioners (August 26 & 27, 2003) outlining the case for full digital multicast must carry.
- 2 Letter to FCC Commissioner Adelstein (September 2, 2003) regarding full digital multicast must carry.
- 3 Letter to FCC Commissioners (October 1, 2003) responding to the arguments of various state cable networks against full digital multicast must carry.
- 4 Letter to FCC Chairman Powell and all FCC Commissioners (October 29, 2003) regarding programming formats.
- 5 Letter to Jane Mago, Chief, Office of Strategic Planning and Policy Analysis – FCC (November 11, 2003) responding to certain legal issues raised by Comcast Corporation.

LETTERS (con't.)

TAB

- 6 Letter to FCC Chairman Powell (November 20, 2003) regarding primary video definition.
- 7 Letter to FCC Chairman Powell and all FCC Commissioners (December 11, 2003) regarding proposal of public broadcasters.
- 8 Letter to FCC Chairman Powell and all FCC Commissioners (December 12, 2003) regarding the need for the immediate adoption of full digital multicast must carry.
- 9 Letter to FCC Chairman Powell and all FCC Commissioners (December 30, 2003) responding to a filing by Mediacom.
- 10 Letter to FCC Chairman Powell and all FCC Commissioners (January 15, 2004) responding to various cable filings at the FCC.
- 11 Memorandum to Jane Mago, Chief, Office of Strategic Planning and Policy Analysis, FCC (January 16, 2004) regarding need to change January 2001 decision.
- 12 Letter to FCC Chairman Powell and all FCC Commissioners (January 20, 2004) responding to NCTA filing.
- 13 Letter to FCC Chairman Powell and all FCC Commissioners (February 5, 2004) regarding a unified standard for television indecency regulation.

TAB 1

**Letters to FCC Commissioners
(August 26 & 27, 2003)**

Outlining The Case For Full Digital Multicast Must Carry



August 26, 2003

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
The Portals
445 12th Street SW
Room 8-B115
Washington, DC 20554

Re: **Full Digital Multicast Must Carry**

Dear Commissioner Abernathy:

I am writing you today on an old topic but with new urgency. I ask you to direct your attention to **FULL DIGITAL MULTICAST MUST CARRY**.

You have previously hear me state that there is no regulatory initiative currently before the FCC that has more potential than full digital multicast must-carry to increase television broadcasting's diversity and local character while, at the same time, helping to preserve the world's finest system of free and universal broadcasting. With full digital multicast must carry, cable systems (consistent with the statutory limitations contained in the 1992 Cable Act) would be required to carry all free over-the-air programming services provided by local digital television stations. This concept has been endorsed by public broadcasters, minority-owned stations, foreign language broadcasters, religious broadcasters and local school systems among others. It would effectively turn a single television station into a source of multiple local voices of programming that, with full cable carriage, would be able to reach the entire local market. This would provide the opportunity to actually increase the number of local television voices in every television market. That would be a truly extraordinary accomplishment.

The time is ripe for FCC action. The record in CS Docket No. 98-120 is complete and includes the most complete legal analysis of the must carry issue since the briefing in Turner Broadcasting System, Inc. v. FCC. In fact, all of the parties who



Commissioner Kathleen Q. Abernathy

August 27, 2003

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participated in that case filed extensive and comprehensive briefs in the FCC's current rulemaking. This is also the time for FCC action as each of the five Commissioners has reviewed the extensive record and been thoroughly briefed on the issue. Let's act before there are any changes at the agency or any new reasons for delay.

It has been over five years since this proceeding was initiated by the FCC and here is what we now know:

1. Full digital multicast must carry is legal; it is entirely consistent with the 1992 Cable Act and the Supreme Court's decision in Turner Broadcasting.
2. Full digital multicast must carry is essential for broadcasters to make the best use of their digital spectrum – it enables them to provide multiple channels of local and/or diverse programming; it is key to the public broadcasters and equally important for religious, foreign language and independent stations as well as PAXTV.
3. Implementation of full digital multicast must carry is the key to getting the digital transition moving, to getting people buying digital receivers and getting new programming developed.
4. There is no capacity problem for cable since full digital multicast must carry will actually occupy less of cable's spectrum in the new world of compression and far less than the 1/3 capacity provided by law. Cable needs only 3 MHz of bandwidth for a digital broadcast signal, multicast or HDTV. The FCC staff acknowledges that there is no capacity issue.
5. Any further delay in implementing full digital multicast must carry hurts the stations that have built digital facilities, spent a lot of money as required by the FCC but cannot begin to reach their audience without cable carriage.

As we have told you before, multicasting promises to bring huge quantities of new programming options to viewers by allowing broadcasters to transmit up to six standard definition digital program streams where now they transmit one. Only multicasting offers the opportunity to so dramatically increase the diversity of programming available free over-the-air, and only full digital multicast must-carry

can bring these same benefits to the multichannel video programming subscribers in every market.

In my view, a vast increase in choice and quality is the real promise of multicast DTV. Many have touted HDTV as the main DTV innovation and that may be the case for the major networks and event programming. But emerging networks like PAXTV do not have such events that dictate HDTV but rather will utilize standard definition programming to multicast, to create new local channels and to add to the nation's diversity and discourse. PAXTV is prepared to quickly launch our multicast services and others are equally ready to act. In fact, PAXTV will launch those new programming channels within six months of FCC action and also intends to broadcast one channel of HDTV programming.

But a multicast world will not happen without must-carry. Broadcast television now reaches too few viewers over-the-air to justify developing multicast program offerings without the guarantee of cable carriage. Once full digital multicast cable carriage is assured, however, the benefits of increased diversity and localism will be felt by all television viewers, including the 15% of viewers that still receive service over-the-air and the owners of the more than 30% of the nation's television sets that are not wired to cable or satellite.

The 1992 Cable Act's must-carry provisions passed with strong bipartisan support from notable Democrats such as Senators Hollings and Daschle and Congressmen Markey and Dingell and Republicans such as Senators McCain and Hatch and Congressmen Tauzin and Bilirakis, and then were upheld by the Supreme Court in *Turner*. The provisions provide the Commission with complete authority to require full digital multicast must-carry. Cable operators' objections to multicast must-carry are not persuasive and have delayed DTV must-carry for too long. Any First Amendment concerns regarding multicast must-carry already have been definitively answered by the Supreme Court in the *Turner* litigation. In summary, multicast must-carry is a perfectly legitimate content-neutral regulation of cable television that is narrowly tailored to protect the future of over-the-air television broadcasting and furthers the substantial governmental interest in the highest and best use of the broadcast spectrum. Cable operators are already amply protected from undue incursion on their bandwidth by the Cable Act's limitation of must-carry to no more than one-third of cable operators' channels. As has been demonstrated numerous times in the DTV must-carry proceeding, full digital multicast must-carry, as a result of compression, will not increase the burdens on cable operators' bandwidth and in all

markets will require nothing near the one-third cap imposed by Congress and approved by the Supreme Court.

The Commission must also realize that when it addresses multicast must-carry, it is addressing both the financial and the moral future of over-the-air broadcasting. Multicasting will allow increased opportunities for small local broadcasters, independent broadcasters, foreign-language broadcasters and religious stations to provide programming that is both unique and consistent with television broadcasting's traditional values, enhancing their ability to compete with cable networks. PAXTV has shown that there is profit to be made providing wholesome family programming and I believe that, if given the flexibility of multiple channel offerings, many broadcasters will follow our lead.

The Commission now has been considering the DTV must-carry issue for more than five years, and during that time the need for full digital multicast must-carry has only grown. As the DTV transition continues to languish, the public policy case for including cable operators among those who must contribute to the DTV transition becomes more compelling by the day. The adoption of full digital multicast must carry will, in my opinion, hasten the pace of the digital transition and bring us more quickly to the day when some of the analog spectrum will be available for public safety use. What an incredible opportunity to strengthen the ability of our first responders at such a time in our nation's history.

The Commission should not waste this unique chance to strengthen over-the-air broadcast television, increase localism and diversity of programming, foster competition in the video delivery industry and make new spectrum available to our public safety community. **The Commission should require full digital multicast must-carry now.**

I urge you to give this issue the attention it deserves.

Very truly yours,



Lowell W. Paxson
Chairman and CEO
Paxson Communications Corporation



August 27, 2003

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street SW
Room 8-A302
Washington, DC 20554

Re: **Full Digital Multicast Must Carry**

Dear Commissioner Copps:

I am writing you today to request that you direct your attention to the most important issue facing the future of free over-the-air television broadcasting: **FULL DIGITAL MULTICAST MUST-CARRY**. During your tenure as an FCC Commissioner, you have taken the lead in advocating the public interest in diverse, local, free over-the-air television. I submit to you that no regulatory initiative currently before the FCC has more potential than full digital multicast must-carry to increase television broadcasting's diversity and local character, while at the same time helping to preserve the world's finest system of free and universal broadcasting. Please let me tell you why this is the case.

Multicasting promises to bring huge quantities of new free, over-the-air programming options to viewers by allowing broadcasters to transmit up to six standard definition digital program streams where now they transmit one. Only multicasting offers the potential to so dramatically increase the diversity of programming available free over-the-air, and only full digital multicast must-carry can bring these same benefits to multichannel video programming subscribers. We are talking about increasing localism and diversity at the local level. For your information PAXTV also intends to broadcast one channel of HDTV programming.

With full digital multicast must carry, cable systems (consistent with the statutory limitations contained in the 1992 Cable Act) would be required to carry all free over-the-air programming services provided by local digital television stations. This concept has been endorsed by public broadcasters, minority-owned stations, foreign language broadcasters, religious broadcasters and local school systems among others.



Commissioner Michael C. Copps

August 27, 2003

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It would effectively turn a single television station into a source of multiple local voices of programming that, with full cable carriage, would be able to reach the majority of the local market. This would provide the opportunity to actually increase the number of local television voices in every television market. That would be a truly extraordinary accomplishment.

The time is ripe for FCC action. The record in CS Docket No. 98-120 is complete and includes the most complete legal analysis of the must carry issue since the briefing in Turner Broadcasting System, Inc. v. FCC. In fact, all of the parties who participated in that case filed extensive and comprehensive briefs in the FCC's current rulemaking. This is also the time for FCC action as each of the five Commissioners has reviewed the extensive record and been thoroughly briefed on the issue. Let's act before there are any changes at the agency or any new reasons for delay.

The Commission must also realize that when it addresses multicast must carry it is addressing both the financial and the moral future of over-the-air broadcasting. Increasing viewers' programming choices never has been more important than it is today. As certain broadcast television and cable networks fight to see who can air the raunchiest programming to please an increasingly fragmented national audience, local voices and the voices of broadcasters that are trying to keep television out of the gutter are being drowned out. Throughout my career as a broadcaster and particularly since I founded PAXTV, I have striven to raise the decency bar higher – to show other broadcasters that there is every bit as much profit in producing wholesome, family-oriented programming as there is in the typically violent, over-sexed, and foul-mouthed content that many of the major broadcast and cable networks churn out today.

In my view, a vast increase in choice and quality is the real promise of multicast DTV. Many have touted HDTV as the main DTV innovation, but given the sex, violence, and foul language that characterizes much of today's broadcast programming, I believe that universal adoption of HDTV would result only in a "race to the bottom" that has higher quality picture and sound. While HDTV might be a useful innovation for certain types of "event" programming it is unlikely ever to become the standard for everyday broadcast fare such as local news, talk-shows, or minor sporting events.

Multicasting has the potential to do much more. It can increase the number of channels available over-the-air transforming broadcast television into a viable multi-

channel competitor to cable and DBS. This could help provide more meaningful competition to cable and DBS, and perhaps even provide much needed relief to an American viewing public that has not yet seen any effective price competition for MVPD service.

Multicasting can also be a positive force on the quality of programming. I noted with great interest your recent testimony before Senator McCain's Committee on July 23, 2003. I couldn't agree with you more about the need to clean up the indecency on our airwaves. And, in the process, I would urge the Commission to review its legal responsibility to establish licensing/programming standards for all those industries using the public's airwaves. This includes cable and DBS where the current programming abyss is the deepest. As you are aware, PAXTV has urged the FCC to adopt a programming code as recommended by the Gore Commission and to impose clear and explicit public interest obligations on digital broadcasters. I only ask that digital broadcasters be given the flexibility to do more public interest programming on one of the multicast channels than on the others. Finally, I applaud your efforts to rationalize the renewal process by soliciting meaningful information from the renewing stations and the public. I simply urge caution in implementing any field hearings that involve excessive costs for all parties.

But a multicast world will not happen without must-carry. Broadcast television now reaches too few viewers over-the-air to justify developing multicast program offerings without the guarantee of cable carriage. Once full digital multicast cable carriage is assured, however, the benefits of increased diversity and localism will be felt by all television viewers, including the 15% of viewers that still receive service over-the-air and the owners of the more than 30% of the nation's television sets that are not wired to cable or satellite.

The 1992 Cable Act's must-carry provisions passed with strong bipartisan support from notable Democrats such as Senators Hollings and Daschle and Congressmen Markey and Dingell and Republicans such as Senators McCain and Hatch and Congressmen Tauzin and Bilirakis, and then were upheld by the Supreme Court in *Turner*. The provisions provide the Commission with complete authority to require full digital multicast must-carry. Cable operators' objections to multicast must-carry are not persuasive and have delayed DTV must-carry for too long. Any First Amendment concerns regarding multicast must-carry already have been definitively answered by the Supreme Court in the *Turner*. In summary, multicast must-carry is a perfectly legitimate content-neutral regulation of cable television that is narrowly



Commissioner Michael C. Copps

August 27, 2003

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tailored to protect the future of over-the-air television broadcasting and furthers the substantial governmental interest in the highest and best use of the broadcast spectrum. Cable operators are already amply protected from undue incursion on their bandwidth by the Cable Act's limitation of must-carry to no more than one-third of cable operators' spectrum. As has been demonstrated numerous times in the DTV must-carry proceeding, full digital multicast must-carry, as a result of compression, will not increase the burdens on cable operators' bandwidth and in all markets will require nothing near the one-third cap imposed by Congress and approved by the Supreme Court. In fact, the undisputed evidence before the Commission shows that with existing compression techniques, cable need only devote 3 MHz of bandwidth for a digital broadcast signal, multicast or HDTV.

The Commission now has been considering the DTV must-carry issue for more than five years, and during that time the need for full digital multicast must-carry has only grown. As the DTV transition continues to languish, the public policy case for including cable operators among those who must contribute to the DTV transition becomes more compelling by the day. The adoption of full digital multicast must carry will, in my opinion, hasten the pace of the digital transition and bring us more quickly to the day when some of the analog spectrum will be available for public safety use. What an incredible opportunity to strengthen the ability of our first responders at such a time in our nation's history.

The Commission should not waste this unique chance to strengthen over-the-air broadcast television, increase localism and diversity of programming, foster competition in the video delivery industry and make new spectrum available to our public safety community. **The Commission should require full digital multicast must-carry now.**

I urge you to give this issue the attention it deserves.

Very truly yours,

Lowell W. Paxson

Chairman and CEO

Paxson Communications Corporation



August 27, 2003

Commissioner Kevin J. Martin
Federal Communications Commission
The Portals
445 12th Street SW
Room 8-A204
Washington, DC 20554

Re: **Full Digital Multicast Must Carry**

Dear Commissioner Martin:

I am writing you today on an old topic but with new urgency. I ask you to direct your attention to the most important issue facing the future of free over-the-air television broadcasting: **FULL DIGITAL MULTICAST MUST-CARRY.**

It has been over five years since this proceeding was initiated by the FCC and here is what we now know:

1. Full digital multicast must carry is legal; it is entirely consistent with the 1992 Cable Act and the Supreme Court's decision in Turner Broadcasting and this legal issue has been briefed before the FCC even more extensively than it was briefed before the Supreme Court.
2. Full digital multicast must carry is essential for broadcasters to make the best use of their digital spectrum – it enables them to provide multiple channels of local and/or diverse programming; it is key to the public broadcasters and equally important for religious, foreign language and independent stations as well as PAXTV. It will add to local diversity and competition.
3. Implementation of full digital multicast must carry is the key to getting the digital transition moving, to getting people buying digital receivers and getting new programming developed.



4. There is no capacity problem for cable since full digital multicast must carry will actually occupy less of cable's spectrum in the new world of compression and far less than the 1/3 capacity provided by law. The record is undisputed that cable needs only 3 MHz of bandwidth for a digital broadcast signal-multicast or HDTV.
5. Any further delay in implementing full digital multicast must carry hurts the stations that have built digital facilities, spent a lot of money as required by the FCC but cannot begin to reach their audience without cable carriage.

There is no regulatory initiative currently before the FCC that has more potential than full digital multicast must-carry to increase television broadcasting's diversity and local character while, at the same time, helping to preserve the world's finest system of free and universal broadcasting. With full digital multicast must carry, cable systems (consistent with the statutory limitations contained in the 1992 Cable Act) would be required to carry all free over-the-air programming services provided by local digital television stations. This concept has been endorsed by public broadcasters, minority-owned stations, foreign language broadcasters, religious broadcasters and local school systems among others. It would effectively turn a single television station into a source of multiple local voices of programming that, with full cable carriage, would be able to reach the entire local market. This would provide the opportunity to actually increase the number of local television voices in every television market. That would be a truly extraordinary accomplishment.

The time is ripe for FCC action. The record in CS Docket No. 98-120 is complete and includes the most complete legal analysis of the must carry issue since the briefing in Turner Broadcasting System, Inc. v. FCC. In fact, all of the parties who participated in that case filed extensive and comprehensive briefs in the FCC's current rulemaking. This is also the time for FCC action as each of the five Commissioners has reviewed the extensive record and been thoroughly briefed on the issue. Let's act before there are any changes at the agency or any new reasons for delay.

As we have told you before, multicasting promises to bring huge quantities of new programming options to viewers by allowing broadcasters to transmit up to six standard definition digital program streams where now they transmit one. Only multicasting offers the opportunity to so dramatically increase the diversity of programming available free over-the-air, and only full digital multicast must-carry

can bring these same benefits to the multichannel video programming subscribers in every market.

In my view, a vast increase in choice and quality is the real promise of multicast DTV. Many have touted HDTV as the main DTV innovation and that may be the case for the major networks and event programming. But emerging networks like PAXTV do not have such events that dictate HDTV but rather will utilize standard definition programming to multicast, to create new local channels and to add to the nation's diversity and discourse. PAXTV is prepared to quickly launch our multicast services and others are equally ready to act. In fact, PAXTV will launch those new programming channels within six months of FCC action and also intends to broadcast one channel of HDTV programming.

But a multicast world will not happen without must-carry. Broadcast television now reaches too few viewers over-the-air to justify developing multicast program offerings without the guarantee of cable carriage. Once full digital multicast cable carriage is assured, however, the benefits of increased diversity and localism will be felt by all television viewers, including the 15% of viewers that still receive service over-the-air and the owners of the more than 30% of the nation's television sets that are not wired to cable or satellite.

The 1992 Cable Act's must-carry provisions passed with strong bipartisan support from notable Democrats such as Senators Hollings and Daschle and Congressmen Markey and Dingell and Republicans such as Senators McCain and Hatch and Congressmen Tauzin and Bilirakis, and then were upheld by the Supreme Court in *Turner*. The provisions provide the Commission with complete authority to require full digital multicast must-carry. Cable operators' objections to multicast must-carry are not persuasive and have delayed DTV must-carry for too long. Any First Amendment concerns regarding multicast must-carry already have been definitively answered by the Supreme Court in the *Turner* litigation. In summary, multicast must-carry is a perfectly legitimate content-neutral regulation of cable television that is narrowly tailored to protect the future of over-the-air television broadcasting and furthers the substantial governmental interest in the highest and best use of the broadcast spectrum. Cable operators are already amply protected from undue incursion on their bandwidth by the Cable Act's limitation of must-carry to no more than one-third of cable operators' spectrum. As has been demonstrated numerous times in the DTV must-carry proceeding, full digital multicast must-carry, as a result of compression, will not increase the burdens on cable operators' bandwidth and in all



Commissioner Kevin J. Martin

August 27, 2003

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The Commission must also realize that when it addresses multicast must-carry, it is addressing both the financial and the moral future of over-the-air broadcasting. Multicasting will allow increased opportunities for small local broadcasters, independent broadcasters, foreign-language broadcasters and religious stations to provide programming that is both unique and consistent with television broadcasting's traditional values, enhancing their ability to compete with cable networks. PAXTV has shown that there is profit to be made providing wholesome family programming and I believe that, if given the flexibility of multiple channel offerings, many broadcasters will follow our lead.

The Commission now has been considering the DTV must-carry issue for more than five years, and during that time the need for full digital multicast must-carry has only grown. As the DTV transition continues to languish, the public policy case for including cable operators among those who must contribute to the DTV transition becomes more compelling by the day. The adoption of full digital multicast must carry will, in my opinion, hasten the pace of the digital transition and bring us more quickly to the day when some of the analog spectrum will be available for public safety use. What an incredible opportunity to strengthen the ability of our first responders at such a time in our nation's history.

The Commission should not waste this unique chance to strengthen over-the-air broadcast television, increase localism and diversity of programming, foster competition in the video delivery industry and make new spectrum available to our public safety community. **The Commission should require full digital multicast must-carry now.**

I urge you to give this issue the attention it deserves.

Very truly yours,

Lowell W. Paxson

Chairman and CEO

Paxson Communications Corporation



Lowell W. Paxson, Chairman

August 27, 2003

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
The Portals
8th Floor
445 12th Street SW
Washington, DC 20554

Re: **Full Digital Multicast Must Carry**

Dear Chairman Powell:

I am writing you today on an old topic but with new urgency. I ask you to direct your attention to the most important issue facing the future of free over-the-air television broadcasting: **FULL DIGITAL MULTICAST MUST-CARRY**. During your tenure as an FCC Commissioner, you have shown yourself to be a staunch advocate for the public interest in diverse, local, free over-the-air television. There is no regulatory initiative currently before the FCC that has more potential than full digital multicast must-carry to increase television broadcasting's diversity and local character while, at the same time, helping to preserve the world's finest system of free and universal broadcasting. Please let me tell you why this is the case.

With full digital multicast must carry, cable systems (consistent with the statutory limitations contained in the 1992 Cable Act) would be required to carry all free over-the-air programming services provided by local digital television stations. This concept has been endorsed by public broadcasters, minority-owned stations, foreign language broadcasters, religious broadcasters and local school systems among others. It would effectively turn a single television station into a source of multiple local voices of programming that, with full cable carriage, would be able to reach the entire local market. This would provide the opportunity to actually increase the number of local television voices in every television market. That would be a truly extraordinary accomplishment.

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August 27, 2003

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As we have told you before, multicasting promises to bring huge quantities of new programming options to viewers by allowing broadcasters to transmit up to six standard definition digital program streams where now they transmit one. Only multicasting offers the opportunity to so dramatically increase the diversity of programming available free over-the-air, and only full digital multicast must-carry can bring these same benefits to the multichannel video programming subscribers in every market.

In my view, a vast increase in choice and quality is the real promise of multicast DTV. Many have touted HDTV as the main DTV innovation and that may be the case for the major networks and event programming. But emerging networks like PAXTV do not have such events that dictate HDTV but rather will utilize standard definition programming to multicast, to create new local channels and to add to the nation's diversity and discourse. PAXTV is prepared to quickly launch our multicast services and others are equally ready to act. In fact, PAXTV will launch those new programming channels within six months of FCC action and also intends to broadcast one channel of HDTV programming.

But a multicast world will not happen without must-carry. Broadcast television now reaches too few viewers over-the-air to justify developing multicast program offerings without the guarantee of cable carriage. Once full digital multicast cable carriage is assured, however, the benefits of increased diversity and localism will be felt by all television viewers, including the 15% of viewers that still receive service over-the-air and the owners of the more than 30% of the nation's television sets that are not wired to cable or satellite.

The 1992 Cable Act's must-carry provisions passed with strong bipartisan support from notable Democrats such as Senators Hollings and Daschle and Congressmen Markey and Dingell and Republicans such as Senators McCain and Hatch and Congressmen Tauzin and Bilirakis, and then were upheld by the Supreme Court in *Turner*. The provisions provide the Commission with complete authority to require full digital multicast must-carry. Cable operators' objections to multicast must-carry are not persuasive and have delayed DTV must-carry for too long. Any First Amendment concerns regarding multicast must-carry already have been definitively answered by the Supreme Court in the *Turner* litigation. In summary, multicast must-carry is a perfectly legitimate content-neutral regulation of cable television that is narrowly tailored to protect the future of over-the-air television broadcasting and furthers the substantial governmental interest in the highest and best use of the broadcast spectrum. Cable operators are already amply protected from undue incursion on their bandwidth by the Cable Act's limitation of must-carry to no more than one-third of cable operators' spectrum. In fact, the undisputed



The Honorable Michael K. Powell

August 27, 2003

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evidence before the Commission shows that with existing compression techniques, cable need only devote 3 MHz of bandwidth for a digital broadcast signal, multicast or HDTV. As has been demonstrated numerous times in the DTV must-carry proceeding, full digital multicast must-carry, as a result of compression, will not increase the burdens on cable operators' bandwidth and in all markets will require nothing near the one-third cap imposed by Congress and approved by the Supreme Court.

The Commission must also realize that when it addresses multicast must-carry, it is addressing both the financial and the moral future of over-the-air broadcasting. Multicasting will allow increased opportunities for small local broadcasters, independent broadcasters, foreign-language broadcasters and religious stations to provide programming that is both unique and consistent with television broadcasting's traditional values, enhancing their ability to compete with cable networks. PAXTV has shown that there is profit to be made providing wholesome family programming and I believe that, if given the flexibility of multiple channel offerings, many broadcasters will follow our lead.

The Commission now has been considering the DTV must-carry issue for more than five years, and during that time the need for full digital multicast must-carry has only grown. As the DTV transition continues to languish, the public policy case for including cable operators among those who must contribute to the DTV transition becomes more compelling by the day. The adoption of full digital multicast must carry will, in my opinion, hasten the pace of the digital transition and bring us more quickly to the day when some of the analog spectrum will be available for public safety use. What an incredible opportunity to strengthen the ability of our first responders at such a time in our nation's history.

The Commission should not waste this unique chance to strengthen over-the-air broadcast television, increase localism and diversity of programming, foster competition in the video delivery industry and make new spectrum available to our public safety community. **The Commission should require full digital multicast must-carry now.**

I urge you to give this issue the attention it deserves.

Very truly yours,

Lowell W. Paxson

Chairman and CEO

Paxson Communications Corporation



August 27, 2003

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street SW
Room 8-C302
Washington, DC 20554

Re: **Full Digital Multicast Must Carry**

Dear Commissioner Adelstein:

I am writing you today to request that you direct your attention to the most important issue facing the future of free, over-the-air television broadcasting: **FULL DIGITAL MULTICAST MUST-CARRY**. During your tenure as an FCC Commissioner, you have been a leader in advocating the public interest in diverse, local, free, over-the-air television. I submit to you that no regulatory initiative currently before the FCC has more potential than full digital multicast must-carry to increase television broadcasting's diversity and local character, while at the same time helping to preserve the world's finest system of free and universal broadcasting. Please let me tell you why this is the case.

Multicasting promises to bring huge quantities of new free over-the-air programming options to viewers by allowing broadcasters to transmit up to six standard definition digital program streams where now they transmit one. Only multicasting offers the potential to so dramatically increase the diversity of programming available free over-the-air, and only full digital multicast must-carry can bring these same benefits to multichannel video programming subscribers. We are talking about increasing localism and diversity at the local level. For your information, PAXTV also intends to broadcast one channel of HDTV programming.

With full digital multicast must carry, cable systems (consistent with the statutory limitations contained in the 1992 Cable Act) would be required to carry all free over-the-air programming services provided by local digital television stations. This



concept has been endorsed by public broadcasters, minority-owned stations, foreign language broadcasters, religious broadcasters and local school systems among others. It would effectively turn a single television station into a source of multiple local voices of programming that, with full cable carriage, would be able to reach the majority of the local market. This would provide the opportunity to actually increase the number of local television voices in every television market. That would be a truly extraordinary accomplishment.

The time is ripe for FCC action. The record in CS Docket No. 98-120 is complete and includes the most complete legal analysis of the must carry issue since the briefing in Turner Broadcasting System, Inc. v. FCC. In fact, all of the parties who participated in that case filed extensive and comprehensive briefs in the FCC's current rulemaking. This is also the time for FCC action as each of the five Commissioners has reviewed the extensive record and been thoroughly briefed on the issue. Let's act before there are any changes at the agency or any new reasons for delay.

The Commission must also realize that when it addresses multicast must-carry, it is addressing both the financial and the moral future of over-the-air broadcasting. Increasing viewers' programming choices never has been more important than it is today. As certain broadcast television and cable networks fight to see who can air the raunchiest programming to please an increasingly fragmented national audience, local voices and the voices of broadcasters that are trying to keep television out of the gutter are being drowned out. Throughout my career as a broadcaster and particularly since I founded PAXTV, I have striven to raise the decency bar higher – to show other broadcasters that there is every bit as much profit in producing wholesome, family-oriented programming as there is in the typically violent, over-sexed, and foul-mouthed content that many of the major broadcast and cable networks churn out today.

In my view, a vast increase in choice and quality is the real promise of multicast DTV. Many have touted HDTV as the main DTV innovation, but given the sex, violence, and foul language that characterizes much of today's broadcast programming, I believe that universal adoption of HDTV would result only in a "race to the bottom" that has higher quality picture and sound. While HDTV might be a useful innovation for certain types of "event" programming it is unlikely ever to become the standard for everyday broadcast fare such as local news, talk-shows, or minor sporting events.



Multicasting has the potential to do much more. It can increase the number of channels available over-the-air transforming broadcast television into a viable multi-channel competitor to cable and DBS. This could help provide more meaningful competition to cable and DBS, and perhaps even provide much needed relief to an American viewing public that has not yet seen any effective price competition for MVPD service.

But a multicast world will not happen without must-carry. Broadcast television now reaches too few viewers over-the-air to justify developing multicast program offerings without the guarantee of cable carriage. Once full digital multicast cable carriage is assured, however, the benefits of increased diversity and localism will be felt by all television viewers, including the 15% of viewers that still receive service over-the-air and the owners of the more than 30% of the nation's television sets that are not wired to cable or satellite.

The 1992 Cable Act's must-carry provisions passed with strong bipartisan support from notable Democrats such as Senators Hollings and Daschle and Congressmen Markey and Dingell and Republicans such as Senators McCain and Hatch and Congressmen Tauzin and Bilirakis, and then were upheld by the Supreme Court in *Turner*. The provisions provide the Commission with complete authority to require full digital multicast must-carry. Cable operators' objections to multicast must-carry are not persuasive and have delayed DTV must-carry for too long. Any First Amendment concerns regarding multicast must-carry already have been definitively answered by the Supreme Court in the *Turner* litigation. In summary, multicast must-carry is a perfectly legitimate content-neutral regulation of cable television that is narrowly tailored to protect the future of over-the-air television broadcasting and furthers the substantial governmental interest in the highest and best use of the broadcast spectrum. Cable operators are already amply protected from undue incursion on their bandwidth by the Cable Act's limitation of must-carry to no more than one-third of cable operators' spectrum. In fact, the undisputed evidence before the Commission shows that with existing compression techniques, cable need only devote 3 MHz of bandwidth for a digital broadcast signal, multicast or HDTV. As has been demonstrated numerous times in the DTV must-carry proceeding, full digital multicast must-carry, as a result of compression, will not increase the burden on cable operators' bandwidth and in all markets will require nothing near the one-third cap imposed by Congress and approved by the Supreme Court.



Commissioner Jonathan S. Adelstein

August 27, 2003

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The Commission now has been considering the DTV must-carry issue for more than five years, and during that time the need for full digital multicast must-carry has only grown. As the DTV transition continues to languish, the public policy case for including cable operators among those who must contribute to the DTV transition becomes more compelling by the day. The adoption of full digital multicast must carry will, in my opinion, hasten the pace of the digital transition and bring us more quickly to the day when some of the analog spectrum will be available for public safety use. What an incredible opportunity to strengthen the ability of our first responders at such a time in our nation's history.

The Commission should not waste this unique chance to strengthen over-the-air broadcast television, increase localism and diversity of programming, foster competition in the video delivery industry and make new spectrum available to our public safety community. **The Commission should require full digital multicast must-carry now.**

I urge you to give this issue the attention it deserves.

Very truly yours,

Lowell W. Paxson

Chairman and CEO

Paxson Communications Corporation

TAB 2

**Letter to FCC Commissioner Adelstein
(September 2, 2003)
Regarding Full Digital Multicast Must Carry**

STAMP & RETURN

Lowell W. Paxon, Chairman

September 2, 2003

Commissioner Jonathan S. Adelstein
Federal Communications Commission
The Portals
445 12th Street SW
Room 8-C302
Washington, DC 20554

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Federal Communication Commission
Bureau / Office

Re: Full Digital Multicast Must-Carry,
CS Docket No. 98-120

Dear Commissioner Adelstein:

On behalf of Paxson Communications Corporation ("PCC"), I would like to offer this response to several arguments recently raised by Comcast Corporation in an August 7, 2003 *Ex Parte* letter following a meeting with your office.

In its letter, Comcast simply repeats the same tired arguments against DTV must-carry that cable has been making for years now. It is becoming clearer every day, however, that the only way to ensure the public interest in a smooth transition to DTV and the return of valuable and much needed spectrum is to order full digital multicast must-carry as soon as possible. The Commission already has a record that fully supports this course and ample statutory authority that has been confirmed by the Supreme Court. The Commission must reject cable operators' attempts to turn the clock back and ignore the Court's decision in *Turner Broadcasting*. Instead, the Commission should look to the future, and ensure full and free over-the air DTV service by ordering full digital multicast must-carry. Toward that end, PCC offers these observations on three arguments raised by Comcast.

1. FULL DIGITAL MULTICAST MUST-CARRY DOES NOT VIOLATE CABLE OPERATORS' FIRST OR FIFTH AMENDMENT RIGHTS

Cable operators have raised Constitutional arguments against multicast must-carry in the past but with no success. The Supreme Court fully resolved the First Amendment issues surrounding must-carry in the *Turner* cases. Cable operators' argument that the transition to DTV somehow alters the Supreme Court's decision on this matter is puzzling, and reflects a backward-looking desire to refight a lost battle. The record in this proceeding indicates that the imposition of multicast must-carry would place no more burden on cable operators and would advance the same important government interests identified by the *Turner* court. Thus, the question of multicast must-carry presents no new First Amendment issues, and, given the 6-year old *Turner* precedent, it is unlikely



Commissioner Jonathan S. Adelstein

September 2, 2003

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that the Supreme Court would even grant a hearing on a First Amendment challenge to multicast must-carry, let alone uphold one.

Cable operators' reference to the fact that *Turner* was decided by a 5-4 vote of the Supreme Court justices is more bizarre still. Supreme Court decisions are the law of the land – binding on the Commission and cable operators alike – regardless of the split of the justices. Moreover, the same justices currently sit on the Supreme Court as heard *Turner II*, and eight of the nine currently sitting justices heard *Turner I*. There is simply no reason to believe these same justices, presented with essentially the same facts, would decide the multicast must-carry issue any differently than they did the original must-carry issue.

Moreover, no court ever has accepted cable operators' Fifth Amendment takings argument against any form of must-carry. It is difficult to image that the Supreme Court would have upheld must-carry against constitutional challenge if it believed that the Fifth Amendment would thereby be violated, but the Supreme Court never had a chance to pass on the Fifth Amendment issue because cable operators withdrew it. Cable operators' history of making, then withdrawing, then reasserting their Fifth Amendment claims makes it rather hard to take the argument seriously. It seems that cable operators simply hold this argument as a litigation threat to the Commission whenever a new must-carry issue presents itself.

The Commission should not be persuaded or misled by these arguments. Today, full digital multicast must-carry is every bit as sound legally as analog must-carry was when *Turner II* was decided. Cable operators' unfounded Constitutional arguments and thinly veiled litigation threats can safely be ignored. In fact, since the FCC's initial decision in this proceeding in January, 2001, the issue of the legality of full digital multicast must carry has been more fully briefed before this agency than the issue was briefed before the Supreme Court in *Turner Broadcasting*. Every major party to the Supreme Court's review of the must carry rules has now submitted comprehensive briefs to the FCC on digital must carry. There is no position that has not been fully and adequately presented on the legality of digital must carry.

2. THE "PRIMARY VIDEO" LANGUAGE IS IRRELEVANT TO THE MULTICAST MUST-CARRY

The "primary video" argument has long been a favorite of the cable industry, but it simply does not impact on the legality of multicast must carry because it ignores the relevant statutory language governing which broadcast signals, and what parts of those signals, must be carried. Congress demonstrated in Section 614 of the 1992 Cable Act that it intends **all** free over-the-air broadcast services to be carried on cable systems.

The 1992 Cable Act not only fully anticipated digital must carry, it anticipated the Commission's role in putting it into effect. Congress clearly directed the Commission to make rules regarding the technical changes needed to ensure carriage and nothing



Commissioner Jonathan S. Adelstein

September 2, 2003

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more. The Act provides that the Commission shall initiate proceedings “to establish any changes in the signal carriage requirements of cable television systems necessary to insure cable carriage of broadcast signals of local commercial television stations which have been changed to conform with such modified standards.” The legislative history of this provision makes it clear that Congress intended the Commission to take whatever steps were necessary, from a technical standpoint, to insure that television broadcasters’ digital signals (just as with their analog signals) are carried by local cable systems. The House Report interpreting the above language noted that:

The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.

The Commission’s mandate was clear: make whatever technical changes are necessary to ensure continued mandatory carriage of local television stations in the digital world. This mandate from Congress was contained in the section of the must carry provisions of the 1992 Cable Act dealing with the technical aspects of must carry, (e.g., signal degradation). The placement of the digital must carry discussion in this same section is indicative of the Congressional intent that the question of must carry was not at issue, just the technical aspects. Any actions concerning cable carriage matters beyond such technical aspects of digital must carry are beyond the scope of the Commission’s statutory mandate.

In addition, Section 614(b)(3)(A) of the 1992 Cable Act states that cable operators “shall carry, in its entirety . . . the primary video, accompanying audio . . . and, to the extent technically feasible, programming-related material carried in the vertical blanking interval or on subcarriers.

The second half of Section 614(b)(3) then states:

The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under [the Commission’s rulers regarding nonduplication protection and syndicated exclusivity and sports broadcasting].

Thus, the Commission’s unnecessary reading of “primary video” (as meaning only one programming stream) conflicts with the policy and plain language of Section 614(b)(3)(B) – if a cable operator is not carrying the multicast programming of a digital station, it cannot be carrying the entirety of the television station’s programming schedule.

The 1992 Cable Act does not distinguish between analog and digital. Analog broadcasters carry the entirety of their programming schedule on a single video stream, while digital broadcasters may carry different parts of their programming schedule on multiple video streams. Nothing in the 1992 Cable Act allows the abridgment of the broadcaster's programming schedule on the basis of the number of video streams used to deliver that programming. In fact, Section 614(b)(3)(B) of the 1992 Cable Act specifically states that the only allowable reason for carrying less than the entirety of the broadcaster's programming schedule is to ensure compliance with the Commission's rules regarding nonduplication protection, syndicated exclusivity and sports broadcasting. The Commission was not free to create exceptions in addition to those specified by Congress. As such, the entirety of the programming schedule is entitled to cable carriage regardless of whether broadcasters carry programming on one video stream or several video streams.

The "primary video" language was not intended to be a limitation on digital must carry. It was rather used by Congress in Section 614(b)(3)(A) to distinguish broadcaster's free programming streams from the ancillary and supplementary services (which are secondary to, or *derived from*, the "primary video") but which are not entitled to must carry. Accordingly, primary video as used in the 1992 Cable Act includes all free, over-the-air multicast signals of television stations.

3. CABLE OPERATORS ARE NOT ENTERING INTO VOLUNTARY DTV CARRIAGE AGREEMENTS WITH LOCAL BROADCASTERS

Finally, the cable industry's claims that multicast must-carry is unnecessary because carriage of DTV stations is being negotiated successfully is simply wrong. PCC's experience is directly to the contrary. Cable operators generally will not discuss DTV carriage with PCC and when they do, they refuse to consider multicast must-carry. It is a matter of record before the Commission that most broadcasters, including public broadcasters, have had similar experiences.

Nonetheless, while the cable industry trumpets the few *HDTV agreements* it has entered as proof that *multicast must-carry* is unnecessary, the fact is that these agreements are rare indeed.

Must-carry never has been about ensuring carriage for stations – such as the major network affiliates currently broadcasting in HDTV – that would be carried anyway. The voluntary HDTV carriage agreements with major network affiliates in the top markets, cited by cable, do not even begin to satisfy any of the important statutory goals furthered by must-carry. Must-carry is about ensuring that all broadcasters are entitled to carriage so that even if cable operators do not wish to negotiate carriage agreements, the U.S. system of free over-the-air broadcasting is preserved in its current vigorous form.



Commissioner Jonathan S. Adelstein

September 2, 2003

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Cable's attitude regarding DTV carriage is unsurprising, given its near monopoly position. Most cable operators would prefer not to have to deal with the competition and headaches that a full digital multicast marketplace would present. The public interest, however, demands that broadcasters have the opportunity both to broadcast in HD and to multicast. As PCC has shown in the past, some stations may never broadcast primarily in HD due to the expense and the nature of the programming they offer. At the same time, multicasting is an important DTV innovation and its implementation may eventually create greater consumer benefits than HDTV. Cable operators should not be permitted to limit broadcasters' use of the digital spectrum by insisting on HDTV programming before engaging in carriage negotiations. To allow cable operators to control broadcasters' conduct in this way would make a mockery of Congress's intent in establishing the must-carry regime in the first place.

With multicast must-carry, the Commission has been given a chance not only to preserve free over-the-air broadcasting against cable's anti-competitive inclinations, but to strengthen free over-the-air service to all viewers. Cable operators still have not explained what the negative effects of this improvement would be. Indeed PCC submits this is because there will be no such effects. The end result of full digital multicast must-carry will be improved service and increased choice for the public in exchange for a continued use of cable bandwidth that is well within the one-third limit set by Congress. Cable operators and their wholly owned subsidiary networks may not like the competition, but fostering that competition is what Congress has instructed the Commission to do. To stay true to these mandates, the Commission must order full multicast must-carry as soon as possible to bring the benefits of DTV, increased service, and greater competition to every over-the-air and cable television viewer in America.

And finally, full digital multicast must carry will effectively turn a single television station into a source of multiple local voices of programming able to reach the entire local market. This unprecedented opportunity to actually increase the number of local television voices is simply awaiting FCC action. Localism and diversity will be the real winners – more truly local voices subject to the FCC's oversight and much more diversity to challenge the cable monolith. This is a rare and exciting opportunity for this FCC.

Very truly yours,

Lowell W. Paxson
Chairman & CEO

Paxson Communications Corporation

cc: Johanna Mikes

TAB 3

**Letter to FCC Commissioners
(October 1, 2003)
Responding To the Arguments of Various State Cable
Networks Against Full Digital Multicast Must Carry**



STAMP & RETURN

Lowell W. Paxson / Chairman

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 1, 2003

Ms. Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20054

Re: A Response to the State Cable Channels' Arguments Against Full
Digital Multicast Must-Carry
CS Docket No. 98-120

Dear Ms. Dortch:

Another autumn has descended on Washington and broadcasters still await the Commission's decision on full digital multicast must-carry. The Commission now has been reviewing full digital multicast must-carry for almost three years, and the delay has done nothing but damage the long-term health of the broadcasting industry. **Full digital multicast must-carry must be ordered now if the Commission is to carry out Congress's charge and protect the future of free over-the-air broadcasting for all Americans.**

At this point, the record in this proceeding unequivocally demonstrates that:

- Multicasting is the future for a great number of broadcasters in the digital world, particularly for independent stations, public broadcasters, religious stations, emerging networks, and some network-affiliated stations.
- Without full digital multicast must-carry, there will be no DTV transition.
- The cable industry has refused to negotiate reasonable carriage agreements for digital broadcast signals. The strategy of relying on voluntary agreements for DTV carriage has failed.
- Full digital multicast must-carry is consistent with the terms of the 1992 Cable Act.
- Full digital multicast must-carry can be implemented by the FCC without congressional action.



Marlene H. Dortch, Esq.

October 1, 2003

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- Full digital multicast must carry is defensible in court and will withstand constitutional review.
- Full digital multicast must-carry will increase the number of local programming channels on cable without any increase in cable rates

Despite the copious evidence showing the need for multicast must-carry, the cable industry's campaign against it continues apace. The more vigorously they press their arguments, however, the less persuasive those arguments become.

For example, last week the Commission received visits from representatives of three state cable public affairs channels and C-SPAN.¹ The ostensible reason for these visits was to express concern that these channels would be dropped from local cable systems if the Commission orders full digital multicast must-carry. If the cable industry were truly interested in serving the public interest, it might consider recommending that operators drop their eighth HBO channel or their twenty-fourth pay-per-view movie channel before dropping C-SPAN or a local cable news or public affairs channel. The cable industry's position on multicast must-carry, however, has nothing to do with the public interest and everything to do with maintaining their dominance of the video delivery market by thwarting broadcasters' attempts to compete.

BANDWIDTH LIMITATIONS WILL NOT FORCE CABLE OPERATORS TO DROP LOCAL CABLE PROGRAMMING IF THE COMMISSION ORDERS FULL DIGITAL MULTICAST MUST-CARRY.

The State Cable Channels' visit to Washington is just another facet of the cable industry's disingenuous "bandwidth scarcity" argument, which is designed to defeat multicast must-carry by distorting the truth. The cable industry continues to argue to the Commission that if it orders multicast must-carry, cable operators will be required to drop many of the programming services that they currently offer. To complete this threat, the cable industry sent in representatives of the few public interest-oriented channels that they fund and carry to put the best face on the program services that supposedly will be dropped to accommodate broadcasters' DTV signals. The Commission should not be fooled.

The cable industry's dire warnings about dropping local public affairs programming in the wake of multicast must-carry echo the same claims they made in 1992 when

¹ The state cable channels represented at the meetings addressed in this letter included representatives of The California Channel, Pennsylvania Cable Network, and Michigan Government Television (collectively, the "State Cable Channels").



Marlene H. Dortch, Esq.

October 1, 2003

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Congress enacted must-carry. History has shown, however, that even with must-carry, cable operators have expanded the amount of public affairs programming through the addition of a second and in some markets a third C-SPAN channel. Likewise, the State Cable Channels apparently have thrived under must-carry, and they will continue to thrive under multicast must-carry.

Why? Because the obvious explosion in cable bandwidth and the development of compression technologies have all but eliminated concerns about the sufficiency of available cable bandwidth. The 1992 Cable Act, which was upheld by the Supreme Court less than six years ago permits the use of up to 33% of cable bandwidth for must-carry stations, a threshold that rarely, if ever, has been reached, and thanks to cable capacity increases, probably never will be. Even if cable operators' bandwidth concerns had some basis, however, PCC and others have shown repeatedly that **multicast must-carry will reduce the long-term burden on cable bandwidth**. Carrying the entirety of a broadcast stations' multicast DTV program stream takes as little as 3 MHz of cable bandwidth, whereas carriage of the analog stream takes 6 MHz. Thus, full digital multicast must-carry will leave more, not less, cable bandwidth for public affairs programming, if cable operators choose to carry it. It is impossible to understand cable operators' resistance to this bandwidth savings as anything other than the next point of attack in their relentless attempt to preserve their dominant position in the video delivery industry rather than promoting the public interest.

Finally cable operators are unlikely to drop the State Cable Channels, C-SPAN, or any other state and local public affairs programming because most of these channels are carried as a condition of their freely negotiated franchise agreements with local municipalities. These agreements often require that a certain amount of bandwidth be set aside for local public affairs programming. Accordingly, even if multicast must-carry forced cable operators to drop programming – which it will not – cable operators are highly unlikely to drop their local public affairs programming.

It is important that the Commission not be misled by the cable industry's half-truths and regulatory gamesmanship because the future of over-the-air broadcasting is increasingly threatened. As Chairman Powell noted recently in his op-ed piece in the Wall Street Journal, the prospects for over-the-air broadcasting are at best uncertain and at worst in peril. As the DTV transition drags on, broadcasters, who already have been required to build expensive new digital facilities, now are required to maintain resource-draining dual operations indefinitely, despite the fact that almost no one currently can view their DTV signals. As cable channels have continued to erode broadcasters' market share, the traditional single-channel, over-the-air broadcasting business model has become less and less viable. Without mandatory cable carriage of their full DTV signals, however, broadcasters lack access to enough viewers to experiment with alternative DTV business plans. In short, the television broadcasting industry must change, but without full digital multicast must-carry, it cannot do so.



Marlene H. Dortch, Esq.

October 1, 2003

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THE CABLE INDUSTRY CANNOT BE DEPENDED UPON TO SERVE THE PUBLIC INTEREST.

The cable industry is free to issue thinly veiled threats to drop the small amount of public affairs programming cable operators air because they operate without any obligation to serve the public interest. Conversely, broadcasters everywhere are required to serve their local communities by airing programming designed to meet local interests and needs. The history of the video delivery industry shows that it has been broadcasters that have supplied local communities with depended-upon local news, informational, and public affairs programming. Examples of such service from the cable industry are notable because they are rare.

Curiously, the article that the State Cable Channels submitted with their *ex parte* letters unmistakably demonstrates cable operators' ambivalence towards airing public interest programming. In the article, the founder of the Connecticut Network explains that local public affairs channels do not exist in more states because they generate little to no revenue. Essentially, the article says that if state and local governments provide funding, cable operators may make available some of their spare bandwidth to accommodate public affairs cable programming. In the case of the Connecticut Network, the article even discusses the possibility of a state-government imposed cable tax rate increase to help pay for coverage of the local and state legislature.

With all due respect to the fine public services that state and local cable channels provide, imagine the uproar if broadcasters suggested that state governments should contribute some of the funding for local news. Still worse, imagine if broadcasters suggested a tax increase to subsidize their public affairs programming. These ideas are laughable, and no broadcaster would suggest them. For cable operators however, expecting the public to foot the bill for programming and then threatening to pull that programming if the FCC orders additional must-carry requirements is just business as usual.

The Commission simply cannot count on cable operators to adequately serve the local needs and interests of communities across America. Fortunately, the Commission need not count on cable operators for this purpose so long as over-the-air broadcasting remains viable. **But the only way to ensure the long-term viability of over-the-air broadcasting is by requiring full digital multicast must-carry now.** By ordering full digital multicast must carry, the Commission also would greatly expand broadcasters' opportunities to provide service to their local communities, to increase diversity, and to expand political discourse. The Commission could be certain that every channel of broadcast programming would conform to the Commission's and Congress's requirements that broadcasters operate in the public interest. Thus the Commission's mandate to regulate the nation's airwaves in the public interest would be fulfilled, and viewers would be guaranteed programming that serves their needs.



Marlene H. Dortch, Esq.
October 1, 2003
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THE PUBLIC INTEREST DEMANDS FULL DIGITAL MULTICAST MUST-CARRY.

The preservation of over-the-air programming and improved television service to all Americans are two of the Commission's most important objectives. Full digital multicast must-carry will serve those objectives by (1) increasing the amount and diversity of over-the-air broadcast content, including foreign language, faith-based, public broadcasting and other local programming designed to reach currently underserved groups; (2) increasing the amount of local and public affairs programming available free over-the air, thereby increasing local diversity; (3) exerting downward pressure on cable rates by providing viewers with a free multichannel alternative to cable and DBS; and (4) providing more chances for broadcasters and program producers to rise out of the gutter inhabited by too much of today's available video programming. The Commission's opportunity to use multicast must-carry to increase the level of competition, localism, diversity, and quality in the video delivery market is truly historic.

This opportunity, however, will not last forever. The longer the Commission waits, the weaker over-the-air broadcasting becomes. Accordingly, we strongly encourage the Commission to place this item on its agenda for its November monthly meeting so that the issue can be decided this year. The public interest would be best served if we can begin the new year under a must-carry regime that guarantees all Americans full access to all broadcasters' free over-the-air programming.

Sincerely,

Lowell W. Paxson
Chairman and CEO
Paxson Communications Corporation

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Paul Gallant
Jordan Goldstein
Stacy Fuller
Anthony J. Dale
Kenneth Ferree



Marlene H. Dortch, Esq.

October 1, 2003

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Deborah E. Klein
William H. Johnson
Rick Chessen
Mary Beth Murphy
Eloise Gore
Ben Bartolome

TAB 4

**Letter to FCC Chairman Powell
And All FCC Commissioners
(October 29, 2003)
Regarding Programming Formats**



It is now 2003 and the digital transition is in its infancy. What can the country expect from full digital multicast must carry. We believe that the country will see another burst of new, free over-the-air network services targeting local communities, minority groups and those who have generally been unserved by the major networks. Multicast must carry is essential if we are to see those new networks.

Where are the shopping channels and should this be a concern? In the 11 years since the 1992 Cable Act, shopping has become a cable service dominated by cable-owned QVC and other distributed shopping services. At this time, there are no more than 15 full powered television stations broadcasting a shopping format and no shopping service today maintains an extensive over-the-air broadcasting distribution system. Let me repeat, only 15 out of the 1600 television stations in this country have a shopping format. This is a non-issue.

The FCC cannot regulate program content and neither can Congress. The Supreme Court has made that quite clear. All free, over-the-air programming services broadcast by television stations, in contrast to cable, will be FCC-regulated and required to operate in the public interest. This means additional channels providing localism and diversity for thousands of communities throughout the United States and opportunities for those currently unable to gain access to the American viewing audience.

It is simply time to move the digital transition into high gear by adopting full digital multicast must carry.

Very truly yours,

Lowell W. Paxson
Chairman & CEO
Paxson Communications Corporation

cc: The Honorable W. J. ("Billy") Tauzin
Commissioner Kathleen Q. Abernathy
Commissioner Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein

TAB 5

**Letter to Jane Mago, Chief,
Office Of Strategic Planning And Policy Analysis – FCC
(November 11, 2003)
Responding To Certain Legal Issues Raised By Comcast Corporation**



COMMUNICATIONS

Joseph A. Parsons, Chairman

November 11, 2003

RECEIVED - FCC

NOV 14 2003

Federal Communication Commission
Bureau / Office

Jane Mago
Chief, Office of Strategic Planning
and Policy Analysis
Federal Communications Commission
445 - 12th Street, S.W.
Washington, DC 20554

Re: **Full Digital Multicast Must Carry**
CS Docket No. 98-120

Dear Ms. Mago:

Comcast Corporation filed a letter with the FCC on October 17, 2003 following a meeting with you regarding the FCC's consideration of digital must carry rules and responding to certain statements submitted by public broadcasters describing their multicasting plans. Several statements in that Comcast letter deserve brief comment.

First, Comcast argues that the FCC's adoption of full digital multicast must carry would be a content-based regulation, subject to a "strict scrutiny" standard of review and implicating the First and Fifth Amendment rights of cable operators. It is worth noting that Comcast has raised these constitutional arguments against multicast must carry in the past with no success. The Supreme Court fully resolved the First Amendment issues surrounding must carry in the Turner Broadcasting cases and the question of multicast must carry presents no new First Amendment issues. Moreover, no court has ever accepted Comcast's Fifth Amendment takings argument against any form of must carry. As you are aware, the cable operators withdrew their Fifth Amendment claims before the Turner Broadcasting court had a chance to pass on it. The legal analysis supporting full digital multicast must carry is part of



Jane Mago
November 11, 2003
Page 2

the record in CS Docket No. 98-120 and Comcast's letter does not change that analysis which fully supports full digital multicast must carry.

Second, the suggestion that Comcast has reached voluntary carriage agreements with public broadcasters in every market where Comcast has launched HDTV service misses the issue even while it raises questions as to its accuracy. Must carry is not about cable operators voluntarily agreeing to carry some broadcasters under some conditions. Must carry is about insuring that **all broadcasters are entitled to carriage** so that even if cable operators do not wish to negotiate carriage agreements, this country's system of free, over-the-air broadcasting is preserved in its current vigorous form. The FCC cannot allow cable operators to control broadcasters' access to their audiences in a way that would make a mockery of Congress' intent in establishing the must carry regime in the first place. Comcast's statement that it has reached "such agreements in virtually every single market" in which it has launched HDTV service is not supported by the statements of the public broadcasters and should give the Commission no solace in any event. Public broadcasters (like commercial broadcasters) cannot wait for cable operators to decide that its programming is entitled to carriage or it will be the end of over-the-broadcasting as we know it. In any event, we do not believe that Comcast has reached agreements with public broadcasters, as described in its October 17th letter, and we believe that public broadcasters will tell you so.

Very truly yours,

Lowell W. Paxson
Chairman & CEO
Paxson Communications Corporation

TAB 6

**Letter to FCC Chairman Powell
(November 20, 2003)
Regarding Primary Video Definition**



STAMP & RETURN

Lowell W. Paxson / Chairman

November 20, 2003

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
8th Floor
Washington, D.C. 20554

RECEIVED - FCC

NOV 21 2003

Federal Communication Commission
Bureau / Office

Re: **Full Digital Multicast Must Carry**
CS Docket No. 98-120

Dear Chairman Powell:

During a recent review of the January 2001 decision of the FCC on digital must carry, I was struck by the tenuousness of the FCC's split decision that "primary video" refers to one programming stream and that this phrase was the controlling element of the FCC's decision limiting the scope of broadcasters' digital must carry rights. I know that you are carefully reviewing the record that has been compiled by the FCC in the nearly three years since the release of the January, 2001 decision. I would, in particular, like to direct your attention to the following points:

- Your Separate Statement that the 1992 Cable Act "clearly did not contemplate must carry in a digital world" is not accurate. As the FCC itself noted, Section 614(b)(4)(b) of the 1992 Act requires the FCC to ensure continued cable carriage of digital broadcast signals and the House Report interpreting this section made it clear that "the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which had been changed to conform to such modified signals." The 1992 Cable Act did, in fact, contemplate digital must carry but limited the FCC's role to



establishing whatever “technical standards” were necessary in the digital world for must carry purposes. Furthermore, Section 614(b)(3)(B) of the 1992 Cable Act requires that “the cable operator shall carry the entirety of the program schedule of any television station carried on the cable system” and this remains unchanged in the digital world.

- The focus on the phrase “primary video” has proven to be an unfortunate distraction when considering digital must carry **since that phrase only appears in the section of the 1992 Cable Act discussing analog must carry.** In the digital section of the 1992 Cable Act, it talks about cable carriage of the broadcast signals of digital television stations. In any event, the FCC’s January, 2001 decision recognized that the phrase was susceptible to different interpretations and that the legislative history of the 1992 Cable Act did not definitively resolve any ambiguity regarding the proper interpretation of the phrase “primary video.”
- Finally, the FCC’s January, 2001 decision was “based on the record currently before [it]” and that record has now changed dramatically in the ensuing three years. The compelling need for full digital multicast must carry has now been thoroughly documented and the FCC’s authority, not to mention its obligation, to review and revise its January 2001 decision is clear.

Finally, I want to urge you once again to keep the FCC on track to resolve this matter in December.

Very truly yours,

Lowell W. Paxson
Chairman and CEO
Paxson Communications Corporation

TAB 7

**Letter to FCC Chairman Powell and All FCC Commissioners
(December 11, 2003)
Regarding Proposal of Public Broadcasters**



STAMP & RETURN

RECEIVED - FCC

DEC 12 2003

**Federal Communication Commission
Bureau / Office**

December 11, 2003

The Honorable Michael K. Powell
Federal Communications Commission
445 Twelfth St., NW
Washington, D.C. 20554

Re: Full Digital Multicast Must-Carry for All Broadcast Television
Stations
CS Docket No. 98-120

Dear Chairman Powell:

I am writing to you today to comment on a recent *ex parte* letter filed by the Association of Public Television Stations, the Corporation for Public Broadcasting, and the Public Broadcasting System requesting immediate Commission action on multicast must-carry for public broadcasters. As you know, Paxson Communications Corporation ("PCC") has been a long-time supporter of full digital multicast must-carry for all television broadcasters, commercial and non-commercial alike, because we believe that multicast must-carry is essential to a swift DTV transition and to the future vibrancy of the over-the-air broadcasting system. The public broadcasters' recent letter only serves to underscore these points and provides still further evidence in favor of multicast must-carry. The Commission now has a complete and definitive record before it that unequivocally supports multicast must-carry. The Commission should act now to ensure that American television viewers are given full access to broadcasters' entire free over the air programming schedule, as Congress intended.

The arguments raised by the public broadcasters' *ex parte* demonstrate why multicast must-carry should be ordered for all stations, commercial and noncommercial alike, and why that action should be taken sooner rather than later. Both commercial and noncommercial broadcasters are part of a unified Congressional scheme designed to ensure that all viewers' programming needs are met. Just as public broadcasters have a special mission under the Public Broadcasting Act to serve their communities' educational and informational needs, commercial broadcasters also are governed by the Communications Act's requirement that they serve all the needs of their communities in the public interest. This unified system will not work if the Commission ensures only a vigorous public over-the-air broadcasting system; it must strengthen and protect commercial broadcasting as well.



As PCC has shown in previous submissions to the Commission, the only effective way to promote a vigorous over-the-air DTV broadcasting system is by requiring multicast must-carry for all stations. All the evidence in the record shows that the health of the over-the-air broadcasting system has been damaged by a DTV transition that has not gone according to plan. Public Broadcasters properly point to the massive investments that they have made with the aid of local, state and federal government agencies to make their multicasting plans a success. Commercial broadcasters also have made great investments in their DTV facilities, and, due to their earlier build-out dates, have been investing funds in the DTV conversion for an even longer period than public broadcasters.

To cover their DTV build-out costs, most commercial broadcasters have been forced to rely on outside sources of funding, such as bank loans and bond issues. While public broadcasters have state and federal governments to answer to if their multicasting plans are prevented from coming to fruition, commercial broadcasters must satisfy investors and shareholders. In addition, both public and commercial broadcasters must cope with the added costs of simultaneously operating of both analog and digital stations. Without hope of a financial return on their DTV investments, these costs are stranded, and broadcasters have been and will continue to be forced to reduce the quality and quantity of service to their local communities as a way of economizing to cover these additional costs. The evidence of this dilemma is before the Commission, but it also is simply an irrefutable fact of business life.

Moreover, just like public broadcasters, commercial broadcasters have suffered due to cable operators' unwillingness to negotiate multicast DTV carriage agreements. Although many broadcasters have forged ahead with multicasting despite the uncertainty that lack of cable carriage engenders, the effect that cable's intransigence is having on the development of multicast programming plans cannot be overstated. Nor should it be ignored that the only parties that gain from refusing to carry multicast signals are (1) cable operators, who benefit from weakened broadcast competitors, and (2) their largely vertically integrated cable programming operations, which are given preferential access to cable channels regardless of the public interests at stake. Cable's nakedly anticompetitive maneuvers in this regard are exactly what Congress sought to combat with the 1992 Cable Act. Moreover, the public broadcasters' complaints about cable "cherry-picking" are both reminiscent of pre-1992 Act cable malfeasance and a foreshadowing of misconduct to come in the absence of full digital multicast must-carry. Cable's bottleneck control over what programming reaches consumers negatively impacts both commercial and non-commercial broadcasters. A Commission decision to tolerate this anticompetitive conduct only guarantees that it will continue.

The statutory differences between the treatment of commercial and public broadcasters are not material to the question of whether cable operators should be required to carry all broadcasters' free over-the-air programming. PCC has great respect for public broadcasters and their mandate to serve the educational needs of all Americans, but



the issues in this proceeding do not turn on the provisions of the Public Broadcasting Act or the differences in the carriage rules set out in Section 614 for commercial broadcasters and in Section 615 for public broadcasters. The issue is what Congress meant when it ordered cable operators to carry the over-the-air programming provided by local television stations. PCC continues to believe that Congress meant that cable operators should carry all broadcasters' free over-the-air content. The multicast transmissions of both commercial and noncommercial stations satisfy that standard and accordingly should be carried.

The Commission has before it an unprecedented opportunity to expand access to the public's airwaves and it is an opportunity that is unlikely to come again in the future. Full digital multicast must-carry of both commercial and noncommercial stations would be good for competition; it would be good for American television viewers; and it would be good for the public interest. It is also the law of the land.

The Commission should order full digital multicast must-carry for all broadcasters without further delay.

Sincerely,

Lowell W. Paxson
Chairman and CEO
PAXSON COMMUNICATIONS, INC.

cc: The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
The Honorable Jonathan S. Adelstein
Catherine Crutcher Bohigian
Jonathan Cody
Stacy Robinson Fuller
Jordan Goldstein
Johanna Shelton
Rick Chessen
Kenneth Feree
Jane Mago
John Rogovin

TAB 8

**Letter to FCC Chairman Powell and All FCC Commissioners
(December 12, 2003)
Regarding the Need for the Immediate
Adoption Of Full Digital Multicast Must Carry**


STAMP & RETURN

Lowell W. Payson, Chairman

December 12, 2003

RECEIVED - FCC
DEC 15 2003

The Honorable Michael K. Powell
 Federal Communications Commission
 445 Twelfth St., NW
 Washington, D.C. 20554

Federal Communication Commission
 Bureau / Office

Re: ACCELERATE THE DTV TRANSITION

RECOVER THE ANALOG SPECTRUM SOONER

ADOPT MULTICAST MUST CARRY NOW

CS Docket No. 98-120 -- Don't Delay

Dear Chairman Powell:

The fact that the Commission is considering indefinitely delaying a decision on full digital multicast must-carry is very disturbing. As it did last year, the Commission apparently is considering releasing another *Further Notice of Proposed Rulemaking* that would request additional information about full digital multicast must-carry as well as the public interest obligations of broadcasters in the DTV world. Mr. Chairman, this is a terrible idea. It is bad public policy and wholly unnecessary. Further delaying full digital multicast must-carry would be detrimental to the digital transition and the recovery of the analog spectrum.

The Commission already has a fully developed record that makes plain the huge benefits that full digital multicast must-carry would bring and the legal basis for acting. Linking the must-carry proceeding to the public interest proceeding only promises another extended delay. Frankly, if the Commission wants to complete the digital transition during this decade and place reclaimed spectrum into the hands of the commercial wireless providers and public safety operators that want and need it, there is no more time to waste. I urge you to nix the *Further Notice*, set forth the multicast must carry rules and address broadcasters' public interest obligations without further delay.

There simply is no need for a *Further Notice* concerning multicast must-carry. The Commission has a crystal clear record before it demonstrating that a sensible transition plan requires full digital multicast must-carry. The record demonstrates, for example,



that broadcasters across this nation are struggling to complete construction and to continue operations of unwatched DTV channels; that these added DTV costs will impair the quality and viability of the over-the-air broadcasting service if additional revenue streams are not made available for broadcasters; and that cable operators steadfastly refuse to carry broadcasters' digital services. Moreover, Congress has required that 85% of viewers receive broadcasters' over-the-air signals before the transition can end. This record shows that without full digital multicast must-carry, the transition will drag on past the foreseeable future and that consequently, over-the-air broadcasting will be a significantly weaker competitive force as the DTV era continues.

This weakened over-the-air broadcasting system would be in stark contrast to the robust and vibrant over-the-air broadcasting industry whose protection Congress sought to ensure through the 1992 Cable Act and the importance of which the Supreme Court recognized in the *Turner* cases. Rarely does the public interest weigh so heavily in favor of one side as it does toward broadcasters on this issue. Here is what the Commission knows from the existing record:

- It knows that the future vibrancy of over-the-air broadcasting is in danger in the absence of multicast must-carry.
- It knows that cable operators will not be harmed one iota by full digital multicast must-carry.
- It knows that full digital multicast must-carry will bring increased localism and diversity through access to broadcast spectrum for traditionally underrepresented programmers and underserved communities.
- In addition, it knows that public safety wireless operators are fighting spectrum congestion and interference to provide essential local and homeland security functions while the slow DTV transition ensures that broadcasters will be using the 700 MHz spectrum earmarked for those purposes for a long time to come.

Further delay will only harm the multitudes of viewers that would benefit from the increased programming options, whereas ordering multicast must carry will harm no one. It is hard to imagine an initiative more clearly aligned with the public interest than full digital multicast must-carry.

On the other hand, while the correct path forward with respect to DTV broadcasters' public service obligations is far from clear the record is already before the Commission. Following the submission of the Gore Commission Report to the White House in December, 1998, the FCC initiated a Notice of Inquiry on December 20, 1999 seeking comments on broadcasters' public interest obligations as they transition from analog to

digital. Numerous comments were with the FCC by April, 2000 and later that year the Commission initiated a further round of Notices seeking comment on digital broadcasters public interest obligations. This past January, the FCC solicited updated comments on all of these proceedings and the comments have been before the Commission since May of this year. The issue of the public interest obligations of digital television broadcasters simply awaits FCC action.

PCC agrees with the Commission's view that resolving DTV broadcasters' public service obligations is of paramount importance. PCC has been an active participant in that proceeding since 2000 and has long been an advocate of cleaning up the airwaves and enhancing broadcasters' service to the public. Indeed, PCC has authored several initiatives aimed at making broadcasters take full responsibility for raising the standards of over-the-air television and eliminating the foul language, overt sexuality, and wanton violence that too often characterizes broadcast programming today. Unfortunately, there does not appear to be any consensus at this time about what is the correct regulatory approach to these issues. **It is ludicrous to hold up the five-year old DTV proceeding where the correct answers could not be more manifest in order to conclude the four-year-old DTV public service proceeding.**

Moreover, linking these proceedings will net neither the Commission nor the public any benefit. The Commission's goal should be the promotion of a strong DTV broadcasting industry with strong public service requirements. Unfortunately, if it does not act now, the Commission will ensure a weakened DTV broadcasting industry with a decreasing ability to satisfy strong public service requirements. There is no justification for putting multicast must-carry behind the public service proceeding under these circumstances. It goes without saying that broadcasters must adhere to whatever public service obligations the Commission ultimately imposes, so it would be a great deal more reasonable for the Commission to seize this opportunity to secure the future of over-the-air DTV broadcasting by ordering full digital multicast must-carry and then turn immediately to the issue of DTV broadcasters' public service obligations. If the Commission feels it is necessary to make a commitment on the public service issue at this time, perhaps the best course would be to decide the multicast must-carry issue immediately and separately set out a time-frame in which it will commit to concluding the long-pending DTV public service proceeding so those obligations are announced prior to the multicast must carry rules going into effect.

The DTV must-carry issue is crying for a decision and the Commission should stop putting it off. Full digital multicast must-carry will benefit a wide range of interests – from over-the-air television viewers to public safety operators – while harming no one. These types of opportunities do not come along every day and the Commission should not ignore this one. Cable operators continue to threaten lawsuits over the Commission's decision, but must-carry remains the indisputable law of the law, and full digital multicast must-carry is no more than the logical outgrowth of analog must-carry – that is what



Congress said! All television viewers should have access to all broadcasters' free over-the-air content. That was what Congress intended and that is what the Commission should ensure. There is only one way to do that: **Order full digital multicast must carry now**, and return to the DTV public service proceeding as soon thereafter as possible.

Sincerely,

A handwritten signature in black ink that reads "Lowell W. Paxson". The signature is written in a cursive, flowing style.

Lowell W. Paxson
Chairman & CEO
Paxson Communications Corporation

cc: Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Catherine Crutcher Bohigian
Jonathan Cody
Stacy Robinson Fuller
Jordan Goldstein
Johanna Shelton
Rick Chessen
Kenneth Feree
Jane Mago
John Rogovin
Members of the Senate Communications
Subcommittee and the House
Telecommunications Subcommittee

TAB 9

**Letter to FCC Chairman Powell and All FCC Commissioners
(December 30, 2003)
Responding To a Filing by Mediacom**



STAMP & RETURN

Lowell W. Paxson / Chairman

December 30, 2003

RECEIVED - FCC

DEC 31 2003

The Honorable Michael K. Powell
Chairman
Federal communications Commission
445 12th St., SW
Washington, DC 20554

Federal Communication Commission
Bureau / Office

Re: Response to Mediacom Attack on Full Digital Multicast Must-Carry

Dear Chairman Powell:

In an *ex parte* notice dated December 11, 2003, Mediacom launched an unfounded attack on full digital multicast must-carry and in the process, impugned the programming of Paxson Communications Corporation ("PCC") station KFPX(TV), Newton, Iowa, which serves the Des Moines, Iowa market. Mediacom's letter is riddled with inaccuracies and logical lapses, and I am filing this response to set the record straight.

As PCC has shown on numerous occasions, full digital multicast must-carry is necessary to restore and preserve the health of the over-the-air broadcasting service. It also is necessary to maintain and promote broadcast television's position as a viable competitor to the pay television offered by MVPDs. Cable operators like Mediacom have steadfastly resisted multicast must-carry because they have no interest in ensuring robust competition. But the public interest is not served by maximizing cable operator profits; it is served by ensuring that viewers get the maximum amount of diverse programming for the minimum price. The public pays for the current dominance of cable and satellite both from their pocketbooks and with the moral rot that accompanies so much of their foul-mouthed, over-sexed, and grotesquely violent programming. America is screaming out for a choice, and full digital multicast must-carry will give them one.

Mediacom's recent letter continues the cable industry's recent strategy of attacking full digital multicast must-carry by denigrating the programming offered by broadcasters. In Mediacom's view, all broadcasters offer is a worthless mix of "paid programming ("infomercials"), re-runs, [and] home shopping." Mediacom goes on to tout the local programming its channels air as evidence of the superiority of cable over broadcast programming. As its case in point, Mediacom attacks the programming offered to the Des Moines, Iowa community by PCC station KFPX(TV), but Mediacom's

portrayal could not be further from the truth. In fact, KFPX(TV) airs a rich mixture of family friendly programming that serves important and otherwise underserved segments of the Des Moines market. This programming includes nearly 40 hours of original and syndicated prime-time programming, classic syndicated series such as *Bonanza*, and more than 40 hours weekly of religious and educational programming. Like most communities across the heartland of America, Des Moines is a deeply spiritual community, and PCC is the only major national broadcast network that offers a significant amount of programming to help meet this basic community need and desire. All Des Moines broadcasters are as dedicated as dedicated a KFPX(TV) to serving that community, and despite Mediacom's claims, the vast bulk of the local programming available to Des Moines viewers comes from local broadcasters.

Mediacom's characterization of the programming offered by KFPX(TV) and broadcasters in general is both false and hypocritical. Indeed, Mediacom's *ex parte* is just the latest example of the standard cable industry spin point that broadcast programming is nothing but home shopping and infomercials. MediaCom's own channel lineup proves that this claim is farcical. Mediacom complains about infomercials, home shopping, and reruns. There are three home shopping networks available over Mediacom's Des Moines cable system. The number available from local full-power over the air broadcasters? Zero.

Do broadcasters air infomercials? Certainly they do, just like cable networks aired on Mediacom's Des Moines system like Discovery, USA, SpikeTV, A&E, CourtTV, the History Channel, Lifetime, Comedy Central, TLC, Hallmark, the Food Network, WE, and the Travel Channel. Indeed, PCC examined the schedule for Mediacom's Des Moines system for Sunday December 28, 2003, and found that the system's cable channels aired a total of 187 hours of paid programming compared to just 28.5 hours by local broadcasters. These figures include 11 hours by cable channels GoodLife TV; 7 hours by the International Channel; 7 hours by the Health Network; 6 hours by Fox Sports World; 6 hours by the Discovery Channel; 6 hours by TechTV; 5.5 hours by the National Geographic Channel; 5.5 hours by Lifetime; 5.5 hours by TLC; and 5.5 hours by Women's Entertainment. This reality hardly fits the fanciful picture Media Com is trying to paint.

And yes, broadcasters air reruns, but Mediacom carries at least three channels – TVLand, SOAPNet, and the Game Show Network – that are either entirely or primarily dedicated to airing *nothing but reruns*.

Is there anything wrong with this programming? Absolutely not. Home shopping is so popular that QVC and HSN are among the top 20 networks in the country. Infomercials may seem unstylish to some, but they often introduce useful products to viewers in less cosmopolitan parts of the country. Reruns often take American viewers on a fun and nostalgic trip back into television's past. Viewers want this programming and that is why broadcasters and cable networks air it. So there is nothing wrong with this programming, but there is something wrong with cable operators' attempts to corner the market on airing it while claiming that when broadcasters air the same

programming, it is somehow undesirable. Given the massive volume of infomercials aired by cable channels on its Des Moines system, Mediacom's complaints about broadcasters' home shopping, infomercials, and reruns appear to be self-serving at best, and deceptive at worst.

But there is one thing broadcasters do not carry that cable operators do: pornography. On Sunday, December 28, 2003, channels carried on Mediacom's systems aired a whopping 195.5 hours of X-Rated programming. Sporting irreverent and degrading titles like "Porn School," "Asian Fever 5: Be Our Master," "Black and Wild 8," and "Wet Teen 3: Ready to Obey," Mediacom's pornographic offerings truly scrape the scum off the bottom of the programming barrel. Mediacom should be ashamed of airing this programming which no broadcaster would be caught dead trying to offer, but more to the point, the Commission should remember what programming really is occupying those precious channels that cable operators are so reluctant to give up to multicast must-carry. All PCC ever hears is that if the Commission orders must-carry, cable operators will have to drop C-Span. If Mediacom chooses to drop C-Span and continue carrying Playboy Channel classics like "Les Bitches Part 2," that should be seen as the crass, calculated business decision that it is, not as the inevitable result of multicast must-carry.

Thus, Mediacom, like the rest of the cable industry, is both misrepresenting (1) the programming available on broadcast stations like KFPX(TV); (2) the extent to which cable channels offer a more desirable alternative; and (3) the choices it will face if the Commission orders. Mediacom seems to think that if it just says "home shopping" or "infomercial" enough times, the Commission will ignore its misrepresentations and the many benefits that full digital multicast must carry would bring. Because this dishonest effort must fail, let me remind you of just a few of those benefits:

- increased opportunities for local programming;
- greater opportunities for minority-oriented, family-oriented, child-oriented, religious, and foreign-language programming (particularly of a local nature);
- massive increases in the amount of programming available free over-the-air to all Americans;
- the preservation of a robust over-the-air broadcasting system; and
- lower cable rates.

To state the obvious: the Commission must not be distracted by cable operators' attempts to defeat full digital multicast must-carry by disparaging the programming available on broadcast stations.

The Honorable Michael K. Powell

December 30, 2003

Page 4

Finally, Mediacom weakly attacks broadcasters for asserting that the additional revenue streams created by full digital multicast must-carry will help preserve the future of a vibrant over-the-air broadcast system. The gist of Mediacom's argument appears to be that broadcasters will not realize much additional revenue from their multicast channels, so the benefit would be negligible. After spending many millions of dollars on the government-mandated DTV transition, PCC and other broadcasters will gladly pursue the additional revenue that multicasting will bring. Unlike the cable industry, which has had the freedom to upgrade to digital at its own leisure, broadcasters cannot afford to chase only the highest profit-margin revenue sources. PCC believes that when broadcasters use multicasting to provide the public with more and diverse high quality programming, the viewers will follow.

The Commission should ignore Mediacom's latest salvo in the cable industry's holiday assault on broadcasters. It should order full digital multicast must-carry without further delay.

Sincerely,

A handwritten signature in black ink, appearing to read "Lowell W. Paxson". The signature is written in a cursive, flowing style.

Lowell W. Paxson
Chairman and 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
Stacy Robinson Fuller
Catherine Bohigian
Johanna Mikes Shelton
Jordan Goldstein

TAB 10

**Letter to FCC Chairman Powell and All FCC Commissioners
(January 15, 2004)
Responding To Various Cable Filings at the FCC**



Paxson Communications Corporation

Lowell W. Paxson / Chairman

January 15, 2003

RECEIVED - FCC

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

JAN 16 2004

Federal Communication Commission
Bureau / Office

Re: Full Digital Multicast Must-Carry
CS Docket No. 98-120

Dear Chairman Powell:

The recent holiday season brought to the Commission a blizzard of cable industry lobbyists, all of them attempting to assure that (1) the Commission does not order full digital multicast must-carry, and (2) the cable industry maintains its stranglehold on the video delivery industry. Comcast and NCTA have taken the lead in continuing to press the cable industry's anti-competitive agenda and further Commission delay only advances this cable agenda. What is really at stake in this proceeding is whether the Commission continues to honor Congress's commitment to the maintenance of broadcasters' free over-the-air television model or whether it sadly chooses the pay-TV model offered by cable. As we move into this New Year, however, there are several facts that Paxson Communications Corporation ("PCC") would like the Commission to keep in mind as it moves towards a conclusion to the five-year process of determining broadcasters' DTV mandatory carriage rights.

1. THE COMMISSION'S ROLE IS NOT TO REVISIT THE *TURNER* DECISION. *TURNER* IS THE LAW OF THE LAND AND FULL DIGITAL MULTICAST MUST-CARRY IS REQUIRED BY ITS HOLDING.

One consistent element of the cable industry's anti-multicast attacks is their repeated assertions that DTV must-carry in any form would violate cable operators' and programmers' First and Fifth Amendment rights. By this time, cable operators' arguments are well worn, but that did not stop NCTA from trotting out its paid advocate, Professor Laurence Tribe, for a pre-Thanksgiving repeat of his previous filing detailing his opinion about the constitutionality of DTV must-carry.¹ Each of Professor Tribe's assertions was thoroughly refuted by the legal analysis prepared by Jenner and Block for NAB, which was submitted over eighteen months ago,² and he offered nothing new

¹ *Ex Parte* of NCTA, filed November 24, 2003. See also *Ex Parte* of NCTA, filed July 9, 2002.

² *Ex Parte Communication* of National Association Broadcasters, filed August 5, 2002 ("*NAB August 5, 2002 Ex Parte*").

in his most recent analysis. As Jenner and Block showed, the FCC has little to fear from litigation regardless of the form DTV must-carry ultimately takes.

As an adjunct to its constitutional arguments against full digital multicast must-carry, Comcast displayed another of the cable industry's favorite irrelevant arguments: that the Supreme Court might decide *Turner II* differently today if the case were again before it. This argument essentially posits that the closeness of the 5-4 *Turner II* decision means that the case is unreliable precedent because circumstances have changed since the decision.³ The Commission needs only about 1 second to reject this argument. First, the Commission's role is not to second-guess the Supreme Court. As Comcast knows, Supreme court cases decided by a 5-4 majority have precisely the same precedential value as those decided 9-0. The Supreme Court held in no uncertain terms that Congress's reasonable must-carry requirement, with its 1/3 cable channel capacity cap, does not infringe on cable operators' First Amendment rights.⁴ Thus, under the law enacted by Congress and approved by the Supreme Court, the Commission requires cable operators to dedicate up to 1/3 of their channel capacity to the carriage of local television broadcast signals. Neither the must-carry statute nor the *Turner II* decision provides any basis for distinguishing between local analog broadcast signals and local digital broadcast signals.⁵ The Commission is in no position to ignore the prevailing law, and full digital multicast must-carry with the 1/3 capacity limitation is the law of the land.

Second, Comcast is wrong when it asserts that conditions are radically different today than they were when *Turner II* was decided.⁶ The *Turner II* decision is only six-years old and circumstances really have not changed much since that case was decided. Indeed the two changes that Comcast cites – the rise of DBS competition and the declining number of viewers receiving service over-the-air – were well known by 1997. The issues are still the same. Multicast must-carry, no less than analog must-carry, is a reasonable regulation intended to safeguard Congress's model for free over-the-air broadcast television. It would be highly unusual for the Court to revisit an issue that was so recently decided, particularly because multicast must-carry does not present any legal issue that the Supreme Court did not already address in *Turner II*.⁷ Indeed, under these circumstances, the Supreme Court would be unlikely even to grant

³ *Ex Parte Notice of Comcast Corporation*, filed October 16, 2003, at 1-3 ("Comcast October 16 *Ex Parte*").

⁴ *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

⁵ The only context in which the 1992 Cable Act addressed DTV signals was in granting the FCC the authority to extend must-carry rights to DTV signals. 47 U.S.C. § 534(b)(4)(B).

⁶ Comcast October 16 *Ex Parte* at 1-3.

⁷ Cable operators continue to raise their Fifth Amendment arguments against must-carry, e.g. Comcast October 16 *Ex Parte* at 5-8, but as Jenner and Block have shown, the cable industry's failure to press this issue during the original *Turner* litigation makes it highly unlikely that the argument will be considered now. NAB August 5, 2002 *Ex Parte*, Attachment at n.17.

certiorari, let alone reverse, an FCC decision to adopt a full digital multicast must-carry regime.

Third, cable operators have tried hard to confuse the Commission about the relevant factors in determining whether multicast must-carry is consistent with existing law, when the issues really are quite simple. Comcast, for example, implies that the Commission must make new findings showing that broadcasters will go bankrupt in the absence of multicast must-carry.⁸ This is nonsense. *Turner II* plainly recognizes Congress's and the Commission's authority to adopt must-carry rules that provide for a vigorous and robust free over-the-air broadcasting system – not a system indefinitely hobbled by the costs of the DTV transition and permanently stuck with the single-channel broadcasting of the analog world.⁹ Thus, the Commission is well within its Supreme Court-approved authority in enforcing broadcasters' statutory carriage rights and viewers' expectation that they will receive all broadcasters' free over-the-air programming, even if they decide to purchase pay-TV from cable operators.

2. FULL DIGITAL MULTICAST MUST-CARRY IS NECESSARY TO A SUCCESSFUL COMPLETION OF THE DTV TRANSITION.

Comcast also has fancifully asserted that full digital multicast must-carry is unnecessary because the DTV transition is well on its way to a successful completion.¹⁰ PCC agrees that the Commission's initiatives over the past two years – including the adoption of mandates and other affirmative requirements – have advanced the DTV transition to some extent. But, these advances have not gotten us anywhere near the 85% DTV penetration threshold necessary to end the DTV transition in any market. As the Commission has learned over the past ten years, the DTV transition is like a puzzle: unless all the pieces are assembled, it cannot come together. The Commission – through its construction and tuner mandates and its recent adoption of rules regarding plug-and-play capability and the broadcast flag – has brought many

⁸ *E.g.*, Comcast October 16 *Ex Parte* at 3-4.

⁹ *Turner II*, 520 U.S. at 192 (Congress's goals would not “be satisfied by the preservation of a rump broadcasting industry”). Comcast insists on referring to Congress's entirely reasonable must-carry regime as “governmental coercion,” *Ex Parte Notice* of Comcast Corporation regarding “either/or” proposal, at 2, filed November 10, 2003 (“Comcast Either/Or *Ex Parte*”), which is an ironic choice of words for the leading corporation in an industry that never could have gotten off the ground if the government hadn't allowed cable operators to free-ride on broadcasters' programming investments for *thirty years* while they got their business plans together. The cable industry's arguments seem designed to protect some pre-regulatory Eden, when the fact is that both cable operators and broadcasters have been subject to fairly heavy government regulation since their inception. When viewed in the context of the development of the cable and broadcasting industries, full digital multicast must-carry plainly is the same type of measured and reasonable regulation the Commission has traditionally used to maintain competitive balance in the video delivery industry.

¹⁰ *Ex Parte Notice* of Comcast Corporation regarding progress of the DTV transition, filed November 10, 2003 (“Comcast DTV Transition *Ex Parte*”).

of the pieces of the puzzle together, but without full digital multicast must-carry, the puzzle can never be completed and the DTV transition can never be successful.

And as the Commission knows, the missing piece of the DTV puzzle is shaped like a cable operator. Cable operators have not done their share, and their failure is delaying the DTV transition. Broadcasters feel the brunt of these delays as they now are saddled with the indefinite costs of dual analog and digital operations. No party seriously asserts that the current regulatory regime will bring the transition's end at any time remotely near Congress's December 31, 2006 statutory target date, but, other than full digital multicast must-carry, no party has put forward any plausible plan for significantly increasing DTV penetration. Rather than pitch in to help break this logjam, Comcast argues that the transition is progressing at an acceptable rate, and that no further regulatory mandates are needed.

Comcast's position on this issue is absurd and hypocritical. In Comcast's view, the DTV transition has been furthered by a government mandate for broadcasters to build and operate DTV stations that few viewers were or are equipped to access.¹¹ Indeed, Comcast heaps scorn upon broadcasters that failed to meet the FCC's build-out deadlines despite its knowledge that the broadcasters – including PCC – who met that deadline are operating stations that essentially are broadcasting to no one.¹² Comcast further asserts that the DTV transition has been furthered by a government mandate on consumer electronics manufacturers.¹³ Despite the gains it sees from these mandates imposed on other industries, Comcast asserts that a government mandate for cable operators to contribute to the DTV transition by carrying broadcasters' multicast program streams (as required by law) would not advance the DTV transition. Comcast offers no explanation why only cable operators should be excused from doing their part to further the DTV transition. Instead, it continues to trumpet cable HDTV programming and cable operators' upgrade in digital cable facilities without offering any explanation at all for how these service improvements advance the DTV transition.¹⁴

At this late stage of the transition, Comcast's platitudes in the service of its desire to avoid compliance with the 1992 Cable Act must be ignored. The Commission has more than enough evidence to show exactly why a multicast must-carry requirement is necessary to jumpstart DTV penetration and further the DTV transition. Until cable operators are carrying broadcasters' free over-the-air signals, there is no hope of any

¹¹ *Id.* at 2.

¹² *Id.* at 2 & n.8.

¹³ *Id.* at 3.

¹⁴ In a related vein, NCTA, in a paroxysm of self-serving disingenuity, has the nerve to repeat its ridiculous comparison of cable operators' freely invested funds in upgraded digital cable systems, which promise immediate handsome revenue returns, to broadcasters' government-mandated spending on DTV facilities, which offer no return for the foreseeable future. *Ex Parte* of NCTA, filed December 15, 2003, at 4 ("NCTA December 15 *Ex Parte*"). This argument is beneath contempt.

market reaching the 85% penetration threshold necessary to end the DTV transition. The Commission does not have to take PCC's word on this point; the Government Accounting Office told it the same thing almost two years ago.¹⁵ Full digital multicast must-carry standing alone may not be enough to meet the 85% threshold, but without it, 85% penetration will be all but impossible to reach. At this point, full digital multicast must-carry is the only trick left in the Commission's bag that will provide a near-term boost to the DTV transition. One thing is certain: if the Commission does not attempt to spur DTV penetration through a multicast DTV must-carry requirement, those parties estimating a 2025 end-date for the transition will start looking a lot more like prophets and less like the doomsayers they looked like a few short years ago.¹⁶

3. CABLE OPERATORS' OWN PUBLIC STATEMENTS SHOW THAT THERE IS MORE THAN ENOUGH BANDWIDTH TO ACCOMMODATE FULL DIGITAL MULTICAST MUST-CARRY.

Although cable industry lawyers insist on arguing that cable operators' spectrum cannot accommodate multicast must-carry without widespread dislocation of cable program services, cable industry technicians long ago conceded that upgraded cable systems have more than enough capacity for full digital multicast must-carry and whatever other program services they *choose* to carry.

For example, earlier this year, Comcast's chief Technology Officer, David Fellows told investors that a 750 MHz cable system can deliver 84 standard analog cable channels, 216 digital cable channels, and 8 additional channels of HDTV.¹⁷ According to Mr. Fellows, carrying that number of video channels still leaves plenty of room to carry high-speed data and telephone services to 40% of subscribers, a far higher number than are likely to desire those services in the foreseeable future. Under the Supreme Court-approved 33% cap, that means that up to 27 analog and 72 digital channels are available for must-carry on the typical 750 MHz system. If the Commission ordered multicast must-carry according to the PCC plan, all markets with 14 or fewer stations could have full digital multicast must-carry even in the unlikely event that every broadcaster in the market multicasts 6 channels at all times. Even in the markets with the most broadcasters – like New York and Los Angeles – all stations could have full digital multicast must-carry presuming they multicast an average of 4 channels each.

Cable operators constantly complain that full digital multicast must-carry would force them to drop program services like C-SPAN, but that is only because they don't even

¹⁵ Additional Federal Efforts Could Help Advance Digital Television Transition, *Report to the Ranking Minority Member, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives*, GAO 03-7, at 20 (2002).

¹⁶ See, e.g., "What Does \$70 Billion Buy You Anyway?": *Rethinking Public Interest Requirements at the Dawn of the Digital Age*, Remarks By FCC Chairman William E. Kennard, October 10, 2000.

¹⁷ Matt Stump, *Fellows Gives the Street Preview of Tech's Future*, MULTICHANNEL NEWS, May 26, 2003, at 29.

want to consider dropping their lucrative hard-core pornography distribution services. For example, the cable operator serving my West Palm Beach community offers 30 pay-per-view channels and 6 X-Rated programming channels, and an additional 30 pay-per-view channels (showing time-shifted offerings of only 10 movies). No operator ever has produced a shred of market-based evidence showing what or how many programming services would need to be dropped if the Commission ordered full digital multicast must-carry. As shown above, cable operators can carry all broadcast stations' multicast programming and still have room on their systems to carry 201 video channels, plus cable and Internet service to 40% of their customers. If cable operators wish to use their bandwidth to provide their customers with Internet, telephone, video-on-demand and video sex services rather than C-Span, that is their business decision to make, but the fault will lie not with multicast must-carry.

It bears repeating that using Comcast's own numbers, even if must-carry stations occupy 33% of the available bandwidth on a 750 MHz cable system, cable operators still would have room to provide 57 analog and 144 digital channels of cable programming. That is a greater number of channels than any cable operator could offer at the time *Turner II* was decided, so to suggest that recent developments call into question the continuing vitality of the Supreme Court's conclusion that the bandwidth constraints caused by must-carry are constitutionally reasonable borders on the absurd.

And, as the Commission knows, cable bandwidth is still growing. Recent press reports of Cablevision completing its upgrade to 750 MHz, and, in some places, 860 MHz, just show that the number of cable systems capable of accommodating full digital multicast must-carry continues to grow. Moreover, with greater advances in cable compression technology on the horizon, the burden that multicast must-carry will place on cable will only continue to shrink.¹⁸ There is simply no basis for cable operators' complaints about the burden that multicast must-carry will create. The reality is that under the reasoning in *Turner II*, the burden that multicast must-carry will place on cable operators is not constitutionally significant.

4. MULTICAST MUST-CARRY WILL VASTLY INCREASE THE OPPORTUNITY FOR NEW CONTENT PROVIDERS TO REACH A MASS AUDIENCE.

Comcast also claims that multicast must-carry would not ensure the wide dissemination of information from a multiplicity of sources because it would not increase the number

¹⁸ Today, most cable operators utilize 64 or 256 QAM digital compression techniques to boost channel capacity far beyond what was possible in 1997 when *Turner II* was decided. Indeed, cable operators are now contemplating adoption of 1024 QAM which will enable them to expand by approximately 30% 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. Statistical multiplexing, which allows cable operators using 64 and 256 QAM compression to deliver up to 18 programming streams per multiplexed channel, also has become commonplace. *Id.*

of independent voices providing service.¹⁹ This is just another attempt to distort Supreme Court and Commission precedent to suit the cable industry's anti-competitive ends. It is incontrovertible that additional free over-the-air broadcast channels will mean additional chances for content producers to get their programming to viewers. Today, if a new programming service wishes to build an audience, it must go through cable operators to do so, because pay-TV is the only distribution alternative. In a multicast must-carry world, however, program services would have the opportunity to partner with broadcasters to reach viewers. If recent statements by MSO executives are any guide, this alternative will be a godsend to new content providers because, by and large, the major MVPDs have decided that they no longer need to foster the development of new independent channels – only new channels that are vertically integrated with another major media company need apply.²⁰

Comcast's argument boils down – again – to its desire to remain dominant in the video distribution industry by maintaining its monopoly over which programs reach viewers and which do not. It is this very bottleneck control that prompted Congress and the Supreme Court to approve must-carry and the same logic applies with equal force to full digital multicast must-carry. Full digital multicast must-carry would break that bottleneck and allow a flood of new and diverse content to become available to all Americans, be they cable subscribers or over-the-air viewers. Contrary to Comcast's assertions, there is no initiative currently before the FCC that is more likely to increase the amount of diverse content available from a multiplicity of sources.

5. MULTICAST MUST-CARRY WILL INCREASE COMPETITION BETWEEN CABLE OPERATORS AND BROADCASTERS.

The Commission must recall that competitive concerns were a chief impetus for Congress's must-carry scheme, and the distortions caused by cable operators' market power only have been amplified since 1992. Cable operators often point to the fact that on a percentage basis, fewer cable channels are vertically integrated with MSOs than were in 1992 when must-carry was enacted.²¹ While it may be true that some non-cable operators have acquired large cable programming networks, the majority of broadcasters have no such holdings, and many of the largest cable networks, such as TBS Superstation and the Discovery Channel are owned, at least in part, by major MSOs.

In addition, cable operators have a massive built-in advantage over broadcasters in that they are permitted to charge for every channel that customers receive, regardless of whether they have to pay for the programming. For example, PAXTV affiliates

¹⁹ Comcast October 16 *Ex Parte* at 4-5.

²⁰ Allison Romano, *How About the Fat Chance Channel: New Cable Networks Face Rough Road*, BROADCASTING & CABLE, December 1, 2003 at 1.

²¹ Comcast November 18 *Ex Parte*, n.1.

appear on cable systems around the country and cable operators charge their customers for reception of that signal, but they do not reimburse PCC for the privilege of carrying our signal. Since its inception, the cable industry has built its pay-TV model by charging customers to receive signals that cable operators receive for free. Needless to say, broadcasters continue to provide their services free over-the-air to anyone with a television receiver. But single program-stream free television simply cannot compete with cable's 500 channel universe anymore. Multicast must-carry is needed to sustain the Congress's free television model, and it is needed soon.

Equally important, cable operators often undermine competition even when they don't directly own the networks they carry on their systems. For example, one effect of cable operators' opposition to multicast must-carry will be to diminish competition for Spanish-language television viewers. Traditionally, most broadcasters have been hamstrung in their ability to serve this segment of their community because the economics and public interest considerations in most markets require broadcasters to provide English-language programming that appeals to the broader community. The dearth of Spanish-language and Hispanic-interest programming, however, led to the rise of successful broadcast networks like Telemundo, Univision, and AztecaAmerica. Recently, however, cable operators have recognized that there is profit in designing Spanish-language digital packages and have aggressively begun marketing them. These new tiering strategies might lose some of their attractiveness if all broadcasters were able to use their spectrum to serve the Spanish speakers in their market – an opportunity that multicast must-carry would provide. So, unsurprisingly, cable operators' opposition to full digital multicast must-carry will help them to maintain their emerging monopoly in serving these customers.

If successful, cable operators' opposition to multicast must-carry would cement cable operators competitive advantages and also would foreclose new programming and competition for other underserved minority audiences. Multicasting would allow broadcasters to go beyond the Hispanic market to serve other minority and/or non-English speaking audiences – including African and Asian-Americans in markets with sufficient demand. These are audiences that cable operators have not even begun attempting to serve, and without competitive pressure, they are unlikely to do so. Although cable operators often talk about competitive pressure from DBS providers, they cannot point to one area where services offered by DBS induced cable operators to change their programming strategies. These services basically offer the same programming and compete only on the basis of customer convenience and price. Only broadcasters are in a position to generate the types of competitive pressure likely to improve service to local communities and underserved minorities, and to do so within the free over-the-air model that has been chosen by Congress. And only full digital multicast must-carry will give them the opportunity to exert that pressure.

6. CABLE INDUSTRY ATTACKS ON THE RECENT "EITHER/OR" DTV MUST-CARRY PROPOSAL PRESENTED BY NAB AND MSTV ONLY SHOW THE STRENGTH OF THE CASE FOR FULL DIGITAL MULTICAST MUST-CARRY.

Both NCTA and Comcast spent a good portion of their holidays deriding the recent "either/or" DTV must-carry proposal of NAB and MSTV,²² reprising their arguments that any DTV must-carry rule would violate cable operators' First Amendment rights.²³ Contrary to the cable industry's unsupported arguments, the NAB/MSTV plan is consistent with Congress's must-carry mandate and will not violate cable operators' First or Fifth Amendment rights. More importantly, attacking the NAB/MSTV plan does nothing to improve the cable industry's argument against full digital multicast must-carry. The Commission must find a way to accommodate broadcasters' right to mandatory carriage of all their free over-the-air broadcast offerings, including their digital signals and multicast program streams. This is Congress's must-carry plan, designed to preserve and protect free over-the-air television broadcasting, and that is the case regardless of any flaws in the details of the NAB/MSTV plan.

Comcast is simply wrong when it describes the NAB/MSTV plan – and, by implication, full digital multicast must-carry itself – as an unconstitutional "expansion" of broadcasters' carriage rights.²⁴ Congress never expected that anything less than broadcasters' entire free over-the-air signal would be carried on cable systems and that is the model that the Supreme Court upheld. As described above, the cable industry's constitutional arguments are nothing but straw men designed to frighten the Commission with threats of litigation²⁵ and distract it from cable operators' true anti-competitive motives in opposing full digital multicast must-carry. None of the cable industry's rhetoric changes the Commission's statutory duties under the 1992 Cable Act, which plainly include immediate recognition of broadcasters full digital multicast must-carry rights. Accordingly, the Commission must adopt full digital multicast must-carry in some form, whether it be the NAB/MSTV proposal or some other.

CONCLUSION

The cable industry's holiday lobbying blitz may have created a smokescreen, but it cannot change the law, which absolutely requires full digital multicast must-carry. Indeed, the cable industry's arguments over the past two months have added nothing to their anti-multicast crusade, and have only served to highlight the deficiencies in their positions and their true anti-competitive instincts. Now that the holidays are over, the

²² Letter from NAB and MSTV to the Honorable Michael K. Powell, filed November 25, 2003.

²³ NCTA December 15 *Ex Parte*; Comcast Either/Or *Ex Parte*").

²⁴ Comcast Either/Or *Ex Parte* at 1-2.

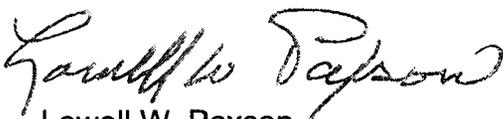
²⁵ See *id.* at 2; Comcast DTV Transition *Ex Parte*.

The Honorable Michael K. Powell
January 15, 2003
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Commission must immediately get back to the serious business of weighing the evidence and making a DTV must-carry decision that accords with the law. As PCC and many other broadcasters have shown for nearly five years now, the only option the Commission has under the 1992 Cable Act and the facts as they presently exist is to order cable operators to carry broadcasters' free over-the-air program offerings. Nothing less will ensure the future of over-the-air broadcasting, which the Commission is bound by law to protect.

As time passes, Commission action on this issue becomes more and more critical. The financial burdens of the DTV transition have taken their toll on broadcasters and the result has been an inevitable reduction in services as broadcasters scramble to cover the additional technical costs of instituting DTV transmission and converting to digital production. Only full digital multicast must-carry will allow broadcasters to begin to make up the competitive ground that the DTV transition has cost them and only full digital multicast must-carry will give broadcasters the financial wherewithal to actually begin improving service again, rather than just desperately trying to maintain it. PCC, for example, is looking forward to launching additional new family-friendly programming as the costs of the transition begin to subside, but the revenues generated by full digital multicast must-carry will be essential to that effort. Further delay will only make broadcasters' service cutbacks permanent and future service improvements impossible. At this crucial time, the Commission must not forsake broadcasters free over-the-air programming in favor of cable's pay-TV model. In this new year, the Commission must move swiftly to fulfill its duty under the 1992 Act and to spur the DTV transition by adopting full digital multicast must-carry.

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

TAB 11

**Memorandum to Jane Mago, Chief,
Office of Strategic Planning and Policy Analysis, FCC
(January 16, 2004)
Regarding Need To Change January 2001 Decision**



STAMP & RETURN

RECEIVED - FCC

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, 2003 (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
Jonathan Cody, Esquire
Stacy R. Fuller, Esquire
Catherine C. Bohigian, Esquire
Jordan Goldstein, Esquire
Johanna Mikes Shelton, Esquire

TAB 12

**Letter to FCC Chairman Powell and All FCC Commissioners
(January 20, 2004)
Responding To NCTA Filing**



Letter to Chairman Powell

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.¹ 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 –

¹ *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,² arguing that those plans only confirm cable operators’ assertion that “broadcasters would utilize [] multicast channels for infomercials, paid programming, and other low-budget fare.”³ 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,⁴ 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.⁵ Affiliates of NBC and CBS have submitted over 100 pages of documentation of their local multicast endeavors and experiments.⁶ 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

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

³ NCTA January 7 *Ex Parte* at 4.

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

⁵ NCTA January 7 *Ex Parte* at 3.

⁶ 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.⁷ 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.⁸ 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

⁷ NCTA January 7 *Ex Parte* at 2.

⁸ *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.⁹ 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

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

TAB 13

**Letter to FCC Chairman Powell and All FCC Commissioners
(February 5, 2004)
Regarding a Unified Standard for Television Indecency Regulation**



February 5, 2004

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

c/o Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th St., NW
Washington, D.C. 20554

Re: A Unified Standard Of Public Decency for Video Service Providers
Using Public Spectrum

Dear Chairman Powell:

I am writing today to express the views of Paxson Communications Corporation ("PCC") on television indecency, an issue which I know has been heavy on your mind in the past week. As you know, an unusually strong convergence of events – the Commission's recently proposed fines for some outrageous programming, Congress's recent indecency hearings, and MTV's repugnant Super Bowl stunt – finally has crystallized public opinion on this issue. **Something must be done now to restore basic American values to television, that most basic of American institutions. I propose that the Commission adopt or urge Congress to enact a unified public decency standard for all video program providers that operate on the public's spectrum.** Please let me explain.

PCC long has sounded the alarm about the rank indecency and practical obscenity being piped into American homes through their television sets. Many have described the rise of profanity, graphic violence and explicit sexual content as a "race to the bottom" led by cable operators trying to expand market share and chased by broadcasters trying to maintain it. Unfortunately, as cable operators push more and more outright pornography on their subscribers and broadcasters feel compelled to air footage of naked popular music stars, we may be finding that there is no "bottom," and that the downward spiral of television programming will continue until some leader emerges to attack this issue and restore common decency to television. By your quick action on the Super Bowl matter, you have shown that you have the mettle to be that leader.

The Honorable Michael K. Powell

February 5, 2004

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But investigating the Super Bowl will not be enough. Indeed, all the fines the Commission can muster against broadcasters under current indecency regulations will not even begin to stem the tide of filthy programming choking America's channels. While broadcasters might be pushing the indecency envelope, cable operators and DBS providers long ago broke free of any reasonable bounds on the programming they distribute. They now offer some of the most patently offensive programming available from any source. For example, on Friday, February 6, 24 channels on Comcast's Washington D.C. system will air programming that is euphemistically termed "adult" or "mature." But I ask you, do mature adults really demand programming with titles like *Lord of the G-Strings*, *Ghetto Booty*, *Co-Ed Coven*, or *Dirty Newcomers*? Satellite-delivered programming from Echostar and DirecTV is no better. This programming is nothing but hard-core pornography – pure titillation without any artistic merit whatsoever. Under current Commission regulations, however, no cable or DBS operator ever must explain why it provides this type of content to viewers 24 hours per day, every day.

The conventional wisdom says that the Commission can't regulate the content offered by cable operators and DBS providers because they operate privately built distribution platforms on which they possess nearly unassailable First Amendment free speech rights (see the attached article from the *Washington Post*). This argument has never made sense to me. **I don't believe that the First Amendment requires Americans to allow any of the public spectrum to be used to distribute hardcore pornography, senseless violence, or non-stop profanity.** Cable operators use a great deal of the public's spectrum for microwave and satellite facilities; DBS providers use licensed spectrum as well to deliver their programming over-the-air not unlike broadcasters. Granted a public privilege like broadcasters, cable and DBS providers should be subject to the same types of public interest and indecency requirements as broadcasters. If the Commission threatened to revoke cable operators' CARS and microwave licenses or DBS satellite authorizations in response to indecent cable programming the same way it threatens to revoke broadcast licenses for indecent broadcast programming, we'd have come a long way toward the restoration of sanity to the programming offered to Americans.

As you can see, PCC is not asking to be permitted to match the low standard set by cable and satellite. PCC is asking that non-broadcast video service providers that use any public spectrum be held to the same moral standards and values of the vast majority of Americans, just like broadcasters. American citizens own the spectrum, and it's about time they stop being forced to donate it to cable operators and DBS providers (and broadcasters, for that matter) who use it to subvert the very community standards that keep America strong. **There should be a unified decency standard that applies to all video service providers that use the public spectrum. The Commission should institute a proceeding as soon as practicable to consider what the contours of this standard should be. If the FCC does not feel that it has the authority to create such a standard, it should request that authority from Congress immediately.**

So I say: investigate the Super Bowl. If it turns out that Janet Jackson exposed herself to millions of American children by design, then make those responsible pay a fine so big they'll make sure it never happens again. But don't stop there. The recent attention that this

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Over the Line? Only If Over the Air FCC's Reach Doesn't Extend Beyond Broadcast

By Frank Ahrens
Washington Post Staff Writer
Tuesday, February 3, 2004; Page E01

Singer Janet Jackson's on-camera sexual gyrations and exposure during the halftime show of Sunday's Super Bowl were broadcast by CBS via 200 free, over-the-air television stations around the country, all of which can be fined by the federal government for airing indecent content.

But the show's saucy dance numbers were produced by CBS corporate cousin MTV, a cable channel noted for its often sexual content and whose sensibilities have clearly clashed with many mainstream Super Bowl viewers, who have logged thousands of complaints about the show to the Federal Communications Commission.

Had the Super Bowl halftime show aired on MTV, however, the FCC would have been powerless to fine it. By federal law, the agency has no authority to crack down on profanity, vulgarity, nudity and sexual content on the hundreds of cable or satellite television channels now received in most homes.

The blurring of this line between over-the-air television and pay television is troubling to a growing number of viewers, lawmakers and advocacy groups. Programs seen on MTV, Comedy Central and ESPN should be held to the same standards of decency as those seen on ABC, CBS, Fox or Univision, they say.

In other words, it seems to make little sense that the FCC can fine the Simpsons but not the Sopranos.

Now that the prime-time cable audience is larger than the audience that watches broadcast networks, some federal regulators, advocacy groups and a bipartisan group of lawmakers worry that broadcast networks will increasingly be tempted to spice up their shows to win over viewers. A potential result: A race to the bottom, say a number of lawmakers and regulators.



The FCC was criticized for ruling a profanity uttered by Bono during a January 2003 NBC awards show was not indecent. At right is U2 guitarist The Edge. (Chris Haston -- Nbc)

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"The concerns I hear from parents aren't limited to broadcast, but also include channels on cable," said FCC Commissioner Kevin J. Martin. "I think there's an obligation and an opportunity to talk about how we should be trying to deal with this issue and for parents to be able to try to protect children from some of the content they might be concerned about."

In 2003, the FCC received 240,000 complaints from viewers about 390 television programs, including about 30 shows on cable. Viewers were angry about the profanity and partial nudity on "Nip/Tuck," FX's drama about plastic surgeons, for instance, and about boozing and skin on "Real World Las Vegas," shown on MTV. The music network is owned by Viacom Inc., which also owns CBS and Comedy Central, which shows "South Park," featuring profanity and scatological humor.

Yet the FCC can do nothing to penalize those cable channels, or others, such as the Walt Disney Co.'s ESPN, which showed "Playmakers," a series about a professional football league that featured profanity and drug use. Even A&E (owned by NBC, ABC and Hearst Corp.), the cable channel known for its generally erudite programming, recently broadcast the bloody Quentin Tarantino film "Reservoir Dogs" on a Saturday afternoon, with much of the profane language intact.

Lawmakers attempting to extend the FCC's indecency oversight to cable television likely would run into constitutional obstacles, according to specialists in First Amendment and FCC law. Congress has given the FCC authority to govern content on radio and television broadcasts that travel over the airwaves because that spectrum belongs to the public. It is lent to broadcasters and may be revoked by the government.

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Over the Line? Only If Over the Air

Over-the-air broadcast signals are "pervasive," the courts have ruled, calling them an "uninvited guest" into the home, because anyone with a TV or radio antenna can receive them for free. As such, they must adhere to certain standards of decency.

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But cable and satellite channels are carried on privately built systems and are received only by paying viewers; they are invited guests and therefore do not have to behave with the same decorum as broadcast channels.

"In cable, there is no real content regulation," said Randy Falco, group president of NBC television network. NBC also owns the Bravo and CNBC cable channels and half of MSNBC. "The FCC has to be careful about what it's going to regulate and not regulate. Are they going to regulate every sporting event? For instance, should profanity be permissible and not carry a fine on Sunday night football on ESPN but have a different set of rules for Monday Night Football because it's on ABC?"

In an era when at least 86 percent of the nation's homes are served by cable or satellite services, most viewers no longer make a distinction between broadcast and cable programming, no difference between channels 4 and 40. They know that when they flip through their hundreds of channels, they are likely to run across potentially offensive material. The sheer odds favor it -- depending on where they live, fewer than a dozen of those hundreds of channels must hew to government guidelines on what can be aired.

More worrisome for some are the viewing trends. In 2003, according to Nielsen Media Research, 51 percent of television viewers spent prime time watching shows on cable, while 49 percent watched shows on the networks, such as Fox and NBC. Even though the top-rated shows on the networks still draw five times the audience of their counterparts on cable, 2003 marked the first time that the combined cable audience outpaced the combined network audience.

The FCC's indecency standards were enacted well before the rise of cable and



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The FCC was criticized for ruling a profanity uttered by Bono during a January 2003 NBC awards show was not indecent. At right is U2 guitarist The Edge. (Chris Haston -- Nbc)

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did not anticipate its dominance. With each viewer who leaves network programming for cable, the FCC's enforcement ability shrinks. Soon, some fear, the government will only be able to police a small corner of the television playground for indecent behavior.

"Cable is a real problem, but the solution is a tricky one," said L. Brent Bozell III, president of the Parents Television Council, which has mobilized its more than 75,000 members to e-mail the FCC with indecency complaints, causing the FCC's in-box to swell. "More and more, the audience is gravitating to cable so you have to address the sewage that is seeping through there."

Though many agree that cable content is getting more coarse, there is no easy fix. Moreover, Bozell and others have slammed the FCC for not doing all it can under current law.

Live, over-the-air profanities uttered by everyone from rock singer Bono to reality-show star Nicole Richie to veteran actress Diane Keaton have incensed viewers. Lawmakers have introduced no fewer than three bills that would significantly increase the FCC's muscle to crack down on indecent broadcasts.

The agency was criticized and derided for a November decision that ruled a profanity uttered by rock singer Bono during a January 2003 NBC awards show was not indecent. At a House hearing last week, David H. Solomon -- chief of the FCC's enforcement bureau and the man who rendered the decision, saying he was acting within precedent -- testified he would welcome its reversal, which FCC commissioners are mulling.

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Such a rollback, he said, "would represent a significant strengthening of indecency enforcement." FCC Chairman Michael K. Powell says that under his chairmanship, the FCC has imposed more fines for indecency than the past two chairmen combined.

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All of which has no effect on cable.

The National Cable & Telecommunications Association -- the trade group that represents the largest cable companies, such as Comcast Corp. -- points out that technical safeguards exist allowing viewers to block cable programming they find objectionable. Set-top boxes are available that give viewers the ability to block channels. Some newer boxes even allow them to block shows with certain ratings, such as "TVMA." Even so, that means they are paying for channels they do not use.

Most cable channels, such as FX, which is owned by Rupert Murdoch's News Corp., have an internal standards-and-practices division that decides what gets aired on shows such as "Nip/Tuck." The critically acclaimed show airs at 10 p.m., the network points out, and 95 percent of the audience is over age 18. Also, FX displays a warning before the show, alerting viewers to its adult content.

The show could be much racier were it not for its advertisers, said FX spokesman John Solberg. The show's producers give preview copies of upcoming episodes to media buyers and have cut material that advertisers found objectionable, he said.

The Senate's Commerce, Science and Transportation Committee chaired by Sen. John McCain (R-Ariz.) has tentatively scheduled a Feb. 11 hearing on indecency. FCC Commissioner Michael J. Copps is planning to argue that cable could be brought underneath the FCC's indecency jurisdiction. Copps has called for a summit, bringing together heads of the broadcast, cable and satellite industries, to consider resurrecting an industry-wide code of conduct



The FCC was criticized for ruling a profanity uttered by Bono during a January 2003 NBC awards show was not indecent. At right is U2 guitarist The Edge. (Chris Haston -- Nbc)

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establishing standards of decency. The Democratic commissioner dissented from last week's FCC fines, saying the offending radio and television stations should have been hauled before an FCC license-revocation hearing.

Copps's Republican colleague Martin is trying another lever on the cable industry.

He has proposed that cable companies offer a "family tier" package of cable programming, bundling channels such as Viacom's Nickelodeon and ABC Family, so parents can buy what they want.

The cable industry giants generally oppose such a la carte selection or packaging of their channels, saying such measures would reduce advertising revenue and ultimately raise consumer prices, because new set-top boxes would be required.

"Parents need to have the option of being able to get the Discovery Channel without getting SpikeTV," Martin said, referring to a Viacom channel that advertises itself as "America's network for men" and is home to the animated series "Stripperella," starring the voice of Pamela Anderson as a superhero-stripper.

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