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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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: Response to Discovery Communications February 20, 2004 Ex Parte
CS Docket No. 98-120

Dear Chairman Powell:

I am writing this letter in response to the recent *ex parte* letter filed by Discovery Communications ("Discovery"), which continues the cable industry's anti-competitive strategy of distorting the law in an attempt to prolong the DTV transition and further impair broadcasters' ability to provide top-quality television service to all American viewers. Despite Discovery's dissembling, multicast must-carry is entirely consistent with governing law and Supreme Court precedent and is not foreclosed by the 1992 Cable Act's "primary video" language. Multicast must-carry is the only way for the Commission to inject new momentum into a transition that, despite considerable effort by broadcasters and the Commission, now is beginning to slow. **It is now just 1020 days until Congress intends the transition to be complete. To put that in the proper perspective, it is 1153 days since the Commission's tentative (and misguided) initial decision against multicast must-carry.** The *only* way for the Commission to carry out its duties under the must-carry and DTV transition statutes is to order full digital multicast must-carry *without further delay*.

Discovery's arguments about "primary video" and "constitutional avoidance" collapse under the weight of the record evidence and existing law. Paxson long has maintained that the only reasonable interpretation of the primary video language in the context of the 1992 Cable Act actually argues in favor of multicast must-carry,

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not against it. Congress was not silent in the 1992 Cable Act with regard to the must carry rights of digital broadcasters. Section 4, which covers must-carry of "advanced television," *i.e.* digital television, as it is now called, provides that:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding 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.

47 U.S.C.A. § 534(b)(4)(B) (emphasis added).

The legislative history of this provision makes it clear that Congress intended the Commission to take whatever steps are 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." H.R. Rep. 102-628 at p.94.

Significantly, the primary video language is located not in the section noted above, but in the section dealing with analog, not digital, must-carry. Equally important, it is clear that the distinction Congress made between the primary and non-primary portion of broadcasters' video streams in Section 614(b)(3) was designed to distinguish between free over-the-air video programming and ancillary subscription video and non-video services, not between "primary" and "secondary" free over-the-air services. This conclusion is buttressed by the fact that in Section 336(b)(3) of the Act, Congress makes the same distinction between primary video and non-primary ancillary or supplementary DTV services, exempting the latter from carriage. Neither of these statutes provides even the smallest hint that the primary/non-primary distinction was meant to preclude cable subscribers from receiving broadcasters' free over-the-air services. Congress never has expressed such an intent.

The Commission's 2001 construction of primary video surely is not reasonable today. Three years of construction and dual operating costs have sapped broadcasters and forced them to compromise services. Cable operators have shown that they will not negotiate DTV carriage agreements with the vast majority of broadcasters. Consumers have not shown the enthusiasm for HDTV that the Commission reasonably expected – and if they haven't shown it for marquee programming like the Super Bowl or prime-time network programming, it is

unreasonable to think they will show it for the niche-market and local programming that are the bread-and-butter of most broadcasters' schedules. **Conditions have changed such that *denying multicast must-carry now is a dagger to the heart of the DTV transition and a real threat to the future vibrancy and health of the over-the-air broadcasting system that Congress and the Supreme Court have sought to protect.***

In short, the stakes are simply too high for the Commission to hide behind a weak prudential doctrine like constitutional avoidance. In a matter of this importance, the Commission should not hesitate to exercise to the full extent the power Congress has granted it through the must-carry statutes. Multicast must-carry will not violate the First Amendment, and the Commission should not flinch from ordering it due to misplaced concerns sown by disingenuous commenters like Discovery and the others in the cable industry.

Discovery is dead wrong when it claims that ensuring a swift and fair DTV transition is not the type of government interest that would support a multicast must-carry order against First Amendment challenge. The *Turner* case turned on whether the First Amendment allows Congress to use must-carry to protect and defend over-the-air broadcasting; the Supreme Court said Congress can do just that. Now the Commission is called upon to carry out Congress's intent by requiring full digital multicast must-carry. As the Commission knows, bringing the DTV transition to a speedy and successful conclusion is absolutely essential to the future health of over-the-air broadcasting. Many broadcasters already have been severely weakened by the costs of their DTV build-out and simply cannot afford to operate both digital and analog facilities indefinitely. Even the majority of broadcasters that can handle the increased costs can do so only by reducing expenditures on local news and independent and syndicated entertainment programming, a result that surely is not what Congress intended when it mandated an expedited DTV transition. Indeed, it is hard to imagine a result that is more contrary to the public interest and the viability of free over-the-air television than an indefinite DTV transition that turns over-the-air television into a second-class service.

The Commission now has compiled an extensive record demonstrating the hardships that the DTV transition has created and an equally impressive catalog of the ways in which broadcasters would use multicast services to mitigate these hardships. In light of this record, there is simply no justification for continuing to delay multicast must-carry and thus indefinitely extend the DTV transition.

Only the cable industry benefits from an extended DTV transition, and their constant attacks on multicast must-carry show that they know it. The cable industry has used these past five years while broadcasters have been faced with massive new capital costs to build market share, and they know that the longer the transition continues, the longer they will have to competitively exploit broadcasters' weakness. Of course, the cable industry still tries to claim that they to have invested large amounts

of capital to upgrade their cable systems, but that money was voluntarily spent and the upgraded systems offer new services and immediate financial returns. Contrast that to the DTV transition that the cable industry would impose upon broadcasters: if cable has its way, broadcasters will complete an expensive DTV transition so that they can offer exactly the same service with a somewhat improved picture. Again, the only beneficiaries of such a policy would be cable operators.

Nothing less than the health and vitality of over-the-air broadcasting is at stake in the DTV transition. The Supreme Court found in 1994 and again in 1997 that Congress's concern with the health of over-the-air broadcasting is an important public interest and it also found that Congress legitimately required cable operators to dedicate up to 1/3 of cable spectrum to ensure that health. All broadcasters are asking is for the Commission to make the technical adjustments necessary to the must-carry rules that would allow us to make a quick and clear transition to DTV, a request that not only is fully consistent with the governing acts of Congress, but indeed, is the only way to satisfy those Congressional commands.

The health of over-the-air television broadcasting is inextricably bound up in the DTV transition and the health of over-the-air television broadcasting is precisely what the original analog must-carry requirement was designed to promote. Accordingly, the Commission must reject Discovery's self-serving argument that furthering the DTV transition is not an interest that would support a multicast mandate against constitutional challenge. Plainly multicast must-carry will further the DTV transition, and equally plainly, a multicast must-carry mandate that relies in part on that fact will withstand First Amendment scrutiny.

Since the Commission's January 2001 decision tentatively rejecting multicast must-carry, the Commission has received literally hundreds of comments and *ex parte* letters that have thoroughly vetted every legal issue involved in this proceeding. The Commission has received full legal briefs from noted constitutional scholars like Lawrence Tribe and from some of the finest law firms in the country, like Jenner And Block. Indeed, the Commission has heard from representatives of every interested industry, including broadcasters, cable operators, cable programmers, broadcast program syndicators, broadcast networks, satellite operators, and consumer electronics manufacturers; every party that has an interest in this proceeding has expressed it. Due to the comprehensive briefing of these issues, the Commission has heard not only from the parties that participated in the *Turner* litigation, but also from every party likely to participate in litigation following a multicast must-carry decision. What the Commission is left with is an overwhelming record that conclusively demonstrates multicast must-carry is consistent with the Cable Act's primary video language and raises only First Amendment questions that already have been authoritatively addressed by the Supreme Court in *Turner*.

Due to the active participation of all interested parties, the Commission now has both a factual and legal record that demonstrates the need for full digital multicast must-

The Honorable Michael K. Powell
March 16, 2004
Page 5

carry The vast legal record should give the Commission confidence that even though a decision ordering full digital multicast must-carry is sure to be appealed by cable operators who have been shameless in their constant litigation threats, it can be equally sure that its decision will be upheld by the D.C. Circuit. Moreover, the Commission should be confident that the Supreme Court, which addressed precisely these same issues less than 5 years ago, is highly unlikely to grant *certiorari* simply to review the application of the must-carry statute to digital television in accordance with the 1992 Cable Act. Under these circumstances, the Commission's only legitimate choice is to jettison the January 2001 decision, which was rushed out the door on the final day of former Chairman Kennard's administration, and order full digital multicast must-carry.

For all these reasons, let me reiterate that full digital multicast must-carry is the last regulatory initiative in the Commission's arsenal that will have a significant effect in advancing the DTV transition. Ordering full digital multicast must-carry will provide an unprecedented expansion of the amount of television programming available free over-the-air and will make great contributions to the diversity and local character of the information disseminated in every market across this country. **The case in favor multicast must-carry is overwhelming; the Commission should order it as soon as possible.**

Sincerely,



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
John A. Rogovin, General Counsel
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