

May 24, 2004

**FILED ELECTRONICALLY**

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

Re: Written *Ex Parte* Submission in CS Docket No. 98-120

Dear Ms. Dortch:

On March 1, 2004, Entravision Holdings, LLC (“Entravision”) urged the Commission to permit cable systems to strip out free over-the-air multicast services provided by broadcasters to the American public. Entravision’s request is premised on its concern that a court challenge to a multicast carriage requirement might lead to invalidation of must carry rules in their entirety, either the analog carriage requirement or a digital carriage requirement applicable only to a single channel of digital programming or both. Overturning the carriage requirement, Entravision claims, would disadvantage smaller broadcasters like Entravision more than it would harm network affiliated stations, which would be able to negotiate with cable operators for carriage of their signals. The CBS and NBC affiliate associations, which represent stations in the country’s smallest markets, as well as stations in other markets, understand the challenges faced by Entravision and other smaller station licensees. The digital transition imposes significant costs on all stations, and as the CBS and NBC affiliates have explained in various filings in this docket, the burden of those costs falls disproportionately on smaller stations, including smaller network affiliated stations.

However, we believe Entravision’s position is backward-looking and contrary to its own self-interest and the interests of the public its stations serve. Rather than jeopardizing the future of smaller and independent stations, multicasting opens promising opportunities for them to enhance the services they provide to their viewers, generate additional revenue streams and thereby contribute to their financial health and vitality in the multichannel digital environment.

**I. THE COMMISSION SHOULD NOT BASE A DECISION WITH RESPECT TO MULTICAST CARRIAGE ON AN UNFOUNDED FEAR THAT THE *TURNER* DECISIONS ARE NO LONGER GOOD LAW.**

The basis of Entravision’s concerns seems to be a lack of confidence that a multicast carriage requirement would withstand a constitutional challenge and that even the basic analog carriage requirement would be put in jeopardy. But the *Turner* decisions upholding the

constitutionality of the analog cable must carry requirement are still good law, and there is no reason for suggesting that courts today would evaluate the permissibility of must carry rules any differently. For the reasons set forth in a multitude of pleadings on record, the CBS and NBC affiliates, along with numerous other parties to this proceeding, firmly believe in the constitutionality of a multicast carriage requirement, just as we believe in the constitutionality of analog carriage rules.<sup>1</sup>

Furthermore, Entravision's reasoning is based on a faulty premise. Entravision assumes that digital must carry rules would be challenged only if the Commission adopts a multicast carriage requirement. However, there is equally likely to be a court challenge if the Commission does not adopt a multicast carriage requirement.<sup>2</sup> Several Commissioners have correctly recognized that, regardless of where the Commission comes down on digital must carry, the lawfulness of the rules it adopts will ultimately be determined by the courts. This would give a reviewing court the inevitable opportunity to strike down the basic carriage rules if it were so inclined. For these reasons, the Commission should not decline to adopt a multicast carriage requirement out of fear that doing so would jeopardize basic carriage principles.

## **II. MULTICASTING WILL OPEN NUMEROUS OPPORTUNITIES FOR STATIONS, INCLUDING SMALLER STATIONS.**

While the affiliates sympathize with Entravision for the burden the digital transition imposes on its stations, the transition, and particularly the ability to multicast, can also open many opportunities for them. For example, the multitude of declarations from broadcast stations of all sizes that the affiliates submitted to the Commission earlier this year demonstrate how broadcasters, even small stations, can use multicasting to serve the public in important new ways, create additional revenue streams and better compete with cable.<sup>3</sup> The same point—that multicasting can enhance the viability of smaller, financially-strapped stations—has been made by other parties to this proceeding as well, including the Minority Media and

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<sup>1</sup> As a matter of engineering fact, digital carriage rules encompassing all of broadcasters' free digital services would halve the capacity cable systems are required to devote to carriage of broadcasters' signals. Moreover, digital carriage promotes the additional policy goal of facilitating the transition and freeing up spectrum for other uses. Accordingly, the case for upholding digital carriage rules entails half the burden and an additional public policy justification as compared to the analog carriage rules upheld by the Court in *Turner*.

<sup>2</sup> It should be noted that the broadcast industry will likely challenge the Commission's ruling on January 18, 2001, that the Communications Act does not require it to mandate dual carriage. To date, it has been prevented from taking this issue to court because of the pendency of petitions for reconsideration.

<sup>3</sup> See Special Factual Submission by the CBS Television Network Affiliates Association in Support of Multicast Carriage Requirement in CS Docket Nos. 98-120, 00-96 & 00-2 (Jan. 13, 2004); Special Factual Submission in Support of Multicast Carriage by the NBC Television Affiliates Association in CS Docket Nos. 98-120, 00-96 & 00-2 (Jan. 8, 2004).

Telecommunications Counsel and Black Education Network.<sup>4</sup> Even if Entravision lacks the resources to invest in creating its own additional streams of programming, there are others who may be willing to pay Entravision's stations to carry the programming they have created. For example, DIC Entertainment, owner of the largest independent library of children's programming, plans to negotiate with broadcasters to provide a full-time kids' oriented program service as a multicast stream.<sup>5</sup> Similarly, the National Medical Association would like to provide programming concerning minority health issues for carriage on multicast streams.<sup>6</sup> Such arrangements would allow smaller stations like Entravision's to benefit financially from multicasting while not having to invest in creating content for additional program streams themselves.

The Hispanic population is the United States's fastest-growing demographic, with numbers that are predicted to increase from 35.6 million in 2002 to 63 million by 2020.<sup>7</sup> There are presently four Spanish language over-the-air broadcast networks: Univision and the second network it launched two years ago, TeleFutura; Telemundo and TV Azteca.<sup>8</sup> Each provides different types of programming to rapidly increasing Hispanic populations and different Hispanic communities. Univision, for example, offers Latin American telenovelas, while TeleFutura

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<sup>4</sup> See *Ex Parte* submission of Minority Media and Telecommunications Counsel in CS Docket No. 98-120 (Jan. 30, 2004) (explaining that a multicast carriage requirement would help "the nation's 23 minority owned full power television stations[, which] . . . are struggling economically. . . . compete by taking advantage of their unique knowledge of minority and multicultural audiences and developing niche channels for deployment by themselves and other TV licensees using DTV spectrum"); *Ex Parte* submission of Black Education Network, Inc. in CS Docket No. 98-120, at 1 (Jan. 28, 2004) ("To small and minority-owned broadcasters and programmers, alike, multicasting may be a necessity, not an option.").

<sup>5</sup> See Notices of *Ex Parte* Presentations of DIC Entertainment Corp. in CS Docket No. 98-120 (Nov. 4 & 6, 2003); see also *Ex Parte* submission of Black Education Network, Inc. in CS Docket No. 98-120, at 1 (Jan. 28, 2004) ("The alternative to multicast must-carry will likely be the extinguishment of even the minimal broadcast services [minority] audiences currently receive. . . . In addition to preserving ownership diversity among television broadcasters, multicast must-carry will also promote diversity among program producers, as new programmers will begin to compete to fill the vast new quantities of airtime.").

<sup>6</sup> See *Ex Parte* submission of the National Medical Association in CS Docket No. 98-120, at 2 ("Digital multicasting represents a great opportunity to reintroduce robust competition and diversity of material to the video content marketplace. By increasing the channel capacity of local and independent broadcasters, the FCC will greatly increase the chances of the NMA securing effective distribution of the types of programming we believe will be effective in addressing health issues.").

<sup>7</sup> See Lee Hall, *Proliferating Nets Chase Big Market; As Hispanic Demo Grows Larger and More Upscale, Spanish-Language Channels Are Popping Up Everywhere*, Television Week, Mar. 29, 2004, at 12; Jean Bergantini Grillo, *All Fired Up; Telemundo bets on original shows, NBC support to fuel future*, Broadcasting & Cable, Mar. 22, 2004, at 30.

<sup>8</sup> Several of Entravision's stations are affiliated with Univision.

offers sports and movies and Telemundo focuses on original productions.<sup>9</sup> However, in all but the very largest television markets, there are not sufficient channel allotments to support each of these networks. Where Entravision and other Spanish language broadcasters cannot acquire or, on realistic terms, affiliate with a second station in the market, multicasting offers an ideal way to expand audience reach and viewer choice by carrying the programming of other networks as multicast streams. Multicast capacity might also support other services, including bilingual learning opportunities, news and information from different Hispanic cultures and bulletin boards and other services of special interest to local Hispanic communities.

At bottom, Entravision's proposal would stand in the way of one of the primary goals of the DTV transition—to provide additional services to the American public. The record in this proceeding establishes that permitting cable operators to strip broadcaster's free multicast services would lead to a failure to develop such services at all.<sup>10</sup> This would naturally harm viewers, who would be denied the opportunity to take advantage of the innovative new services made possible by digital technology. It would also harm broadcasters, including Entravision, who would not be able to enhance their service to viewers and thereby compete more effectively in a multichannel environment.

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Because a multicast carriage requirement is constitutional and consistent with Congress's mandate in the Communications Act, would bring countless benefits to the public and would strengthen smaller stations and stations targeted to minority audiences, the CBS and NBC affiliates urge the Commission to adopt such a requirement in the above-captioned proceeding.

Respectfully submitted,



Bob Lee  
Chair  
CBS Television Network Affiliates  
Association



Terry Mackin  
President-Chairman  
NBC Television Affiliates

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<sup>9</sup> See Hall at 12.

<sup>10</sup> See *supra* note 3.