

Lowell W. Paxson - Chairman & CEO

ORIGINAL

DOCKET FILE COPY ORIGINAL

August 30, 2004

Bryan Tramont
Chief of Staff
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

RECEIVED

AUG 31 2004

Federal Communications Commission
Office of Secretary

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

Re: Accelerating the DTV Transition
CS Docket No. 98-120

Dear Mr. Tramont:

I read with deep interest your recent comments to the Association of Public Safety Communications Officials ("APCO") regarding the FCC's determination to accelerate the DTV transition and the recovery of the 700 MHz spectrum currently used for broadcast television channels 52-69. The DTV transition and spectrum recovery are two of the most important issues before the Commission today, and each has a direct impact on the health, safety, and day-to-day lives of all Americans. Few broadcasters have contributed as much to the DTV transition and 700 MHz band-clearing as Paxson Communications Corporation ("PCC"). PCC has actively participated in the DTV transition by constructing more than 40 full-power DTV stations and pioneering the practice of DTV multicasting, and in the past it has taken a leading role in developing plans for clearing broadcasters from the 700 MHz bands. I am glad to see that the Commission is returning its attention to DTV transition issues because the history of the transition has been that when the FCC applies the pressure by applying the law, the industries respond by moving forward. But when the Commission backs off and does not use its regulatory authority, as it did in the second half of 2003 and the first half of 2004, the transition stalls.

No. of Copies rec'd ot 1
List ABCDE

It's about time that the FCC started to apply the pressure once again – but this time to the MVPDs and wireless service providers that thus far have sacrificed nothing for the DTV transition or spectrum recovery, even though each industry will receive great benefits from the accomplishment of those goals. The Commission must act decisively with regulations that are narrowly focused on achieving a swift but equitable transition and recovery of spectrum if it is to ensure both the continuity of the American over-the-air broadcasting system and the redeployment of the 700 MHz spectrum for public safety and advanced wireless services as it has been directed to do by Congress. Thankfully, the tools necessary to achieve these tasks already have been identified and fully explored by the Commission in the rulemakings that have been concluded or are still underway. **What the Commission must do is require full digital multicast must-carry without further delay and commence preparations for full 700 MHz auctions. But full digital must-carry must precede the auctions and any consideration of low power DTV must await resolution of must-carry; awarding paired DTV channels to single-channel broadcasters; granting all full power DTV construction permits; and resolving the Canadian coordination and other interference concerns.**

Full Digital Multicast Must-Carry Is the Only Targeted Regulatory Tool the FCC Has Left that Can Accelerate the DTV Transition

In your comments, you mentioned two important initiatives that will help clarify the contours of the DTV transition: broadcasters' public interest obligations and the meaning of Congress's 85% over-the-air DTV receiver penetration threshold for the close of the DTV transition. Although each of these issues is important and requires resolution, neither of them are likely to catalyze the transition or lead to the recovery of the 700 MHz spectrum. The only regulatory tool the Commission has left to accelerate the transition of all Americans to DTV broadcasting is full digital multicast must-carry. At the outset of the transition, the Commission noted that all interested industries, including broadcasters, consumer electronics manufacturers, and cable and satellite MVPDs would be required to participate fully to ensure a smooth and swift transition. Broadcasters have fulfilled their charge by spending hundreds of millions of dollars building out their DTV facilities. The Commission instituted the DTV tuner mandate to ensure that consumer electronics manufacturers do their share.

The only industries that have thus far had a pain-free DTV transition are cable operators and satellite providers. Now, the cable operators will tell you that they have been spending tens of millions dollars upgrading their physical plant so that they can offer digital services to their customers but most of their set-top boxes are not HDTV compatible. Furthermore, we all know that the DTV transition is not about giving cable operators the chance to offer 500 channels; it is about securing the benefits of free over-the-air television to all Americans once the DTV transition

is over. It's about time cable operators and satellite providers did their part to ensure a smooth DTV transition.

MVPDs' part in the DTV transition is offering broadcasters full digital multicast must-carry. The Cable Act of 1992 not only required carriage of broadcasters' analog signals, it also mandated full digital multicast must-carry. At the time Congress enacted the must-carry requirement, digital technology was in its infancy and the precise path of the digital transition had not yet been determined. Nevertheless, with an eye toward the coming digital revolution, Congress unequivocally extended the must-carry obligation to cover DTV signals. Section 614(b)(4)(B) of the law requires:

(B) ADVANCED TELEVISION. 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 ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

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

Significantly, Congress made clear that, upon implementing the eventual digital transition, the FCC was to consider only technical issues associated with the application of must-carry; it was not to re-evaluate the policy-rational behind the requirement:

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. No. 102-628, 102d Cong., 2d Sess. at 94(1992) (cited in In re Carriage of the Transmissions of Digital Television Broadcast Stations, First Report and Order and Further Notice of Proposed Rulemaking, 16 F.C.C.R. 2598, 2603 n.25 (2001) (app. Ex. 5)) (emphasis added).

In the digital world, for many stations must-carry will mean that cable operators must carry multiple program streams of free over-the-air programming. This is a simple matter of statutory construction: Congress gave the Commission discretion only to work out the technical details of how full digital carriage would be achieved; **Congress did not give the Commission the discretion to reduce**

broadcasters' must-carry rights. The 1992 Cable Act decreed that all local broadcasters' free over-the-air programming would be carried by cable systems, the Commission's only role is to ensure that in the digital world, those same rights obtain.

The statute is perfectly clear on this point, but even as a policy matter, full digital multicast must-carry is clearly the right choice. Multicasting has the potential to transform the market for television services by dramatically increasing the number of channels that are available free over-the-air. Widespread multicasting would assure that the level of diversity and localism in broadcast programming would increase, while at the same time providing viewers with a free multichannel alternative to cable and DBS, thereby exerting a leveling influence on rapidly escalating cable rates. Another key advantage of multicasting would be that the Commission could be certain that nearly every market would gain new outlets for diverse programming brought to the public by licensees who are bound to uphold at least the standards of decency demanded as a condition of every television broadcaster's license. Thus, it would give those broadcasters that now respond to the race-to-the-bottom pressure exerted by cable and DBS by airing increasingly indecent programming additional opportunities to seek to provide alternative programming to the many viewers that have turned away from television in disgust. **Competition. Diversity. Localism. Decency.** Moreover, to the extent that increased choice encourages more viewers to rely on over-the-air DTV broadcasting, multicast must-carry will encourage viewers to buy digital television sets with over-the-air tuners, increasing the penetration of those receivers towards the 85% necessary to end the DTV transition. All this, and in the long-run the reduced burden on cable spectrum will be tremendous. It's hard to remember a time when the Commission had an opportunity to promote so many interlocking Commission policies with one action, but multicast must-carry will do it.

None of these public benefits, however, will come to pass without full digital multicast must-carry because over-the-air viewership will not initially support multicast business plans. Because the major broadcast networks will, at least initially, likely focus their DTV energies on ramping up their roll-out of broadcast HDTV, most multicast pioneers are likely to be independent, faith-based, and foreign language broadcasters, as well as emerging networks like PAXTV. These are the broadcasters with the least financial wherewithal to launch new multicast services without the assurance of cable carriage. These also are the broadcasters most at-risk for failure as America migrates to DTV. Ordering multicast must-carry would therefore, bring all these tremendous public benefits while also preserving the free over-the-air programming these stations provide by giving these stations the additional revenue streams required to keep them on the air. **Multicast Must-Carry Also Could Help the Commission Recover 700 MHz Spectrum More Quickly**

Multicast must-carry also could aid the Commission in an effort that both the Commission and PCC care deeply about: 700 MHz band-clearing. We both know that clearing the 700 MHz band is a must for broadcasters, wireless providers, and most of all, for the brave public safety first responders operating across America to keep this country safe. The Commission long ago realized that completing the DTV transition and 700 MHz spectrum clearing are intimately linked, if not completely inseparable. As you remarked to APCO, the Commission tried two years ago to schedule and hold the 700 MHz auctions. PCC backed the Commission every step of the way, assembling the Spectrum Clearing Alliance to bargain with 700 MHz auction winners, encouraging the FCC to hold to its auction schedule, and lobbying Congress around-the-clock to allow the 700 MHz auctions to go on. But those efforts were derailed by a fevered lobbying campaign by a wireless industry that balked at the idea of bidding on the 700 MHz spectrum and negotiating with broadcasters to vacate their channels early under the difficult economic conditions that then prevailed. Instead they extracted from Congress the Auction Reform Act of 2002, which indefinitely delayed the 700 MHz auctions and gutted the FCC's regulatory flexibility to grant broadcasters' relocation applications from their 700 MHz channels. PCC and the FCC lost that battle, and the DTV transition suffered a serious blow.

But multicast must-carry could give the FCC a new opportunity to clear the 700 MHz band for public safety and new wireless carriers by providing broadcasters on Channels 52-69 with an incentive to move from those channels and become digital broadcasters before the close of the DTV transition. Multicast must-carry could aid 700 MHz band-clearing in two ways. First, if 700 MHz broadcasters could be assured of the multiple revenue streams that full digital multicast must-carry would create, they might be persuaded to negotiate about vacating the 700 MHz analog channels sooner rather than later. Second, by making multicast business plans viable, the Commission would encourage all broadcasters to move to DTV more quickly, ensuring that even if the 700 MHz spectrum is not fully cleared before the close of the transition, that date itself will come sooner than is currently expected. And as noted above all of this must precede any Commission action on low power DTV operations.

As the law currently stands, the Commission has no authority to move 700 MHz broadcasters from their analog channels before the close of the DTV transition, and 700 MHz broadcasters will strenuously resist any attempt to do so forcibly. Under these circumstances, the Commission's existing voluntary band-clearing policies continue to be the most straightforward mechanism for achieving band-clearing. Broadcasters are much more likely to pursue and accept reasonable band-clearing agreements if they are assured of the multiple revenue streams that multicast must-carry will guarantee. Several stations already have requested authority to become single-channel digital broadcasters; if the Commission

ordered full digital multicast must-carry, many more broadcasters might explore that option. But even if some 700 MHz broadcasters do not vacate their out-of-core channels early, multicast must-carry's role in advancing the transition overall will substantially advance the date by which the 700 MHz spectrum will become fully available for wireless and public safety use.

Band-clearing becomes even more likely if voluntary band-clearing agreements between broadcasters and wireless service providers become a real possibility. The key to the implementation of the Commission's voluntary band-clearing policies is holding the 700 MHz auctions and the consequent creation of new stakeholders in that spectrum. Accordingly, the Commission should be directing its attention to setting dates for the remaining 700 MHz spectrum auctions.

The combination of full digital multicast must-carry and setting dates for the 700 MHz auctions is the Commission's best hope for eliminating the continuing encumbrance of the 700 MHz spectrum bands. If the Commission takes this course, every interested party will benefit. Public safety operators will get 24 MHz of some of the best spectrum available for their important work. Wireless service providers will get a slice of spectrum that is uniquely suited to mobile wireless applications. Broadcasters will gain the certainty they need to vacate their analog channels and finally stop the economically draining dual operations the Commission has required since 2002. But the greatest victors will be the public, which will reap obvious benefits from all three of these developments without any significant cost.

Further Delay of a DTV Must-Carry Decision Is No Longer an Option

It may be that the Commission is reluctant to order full digital multicast must-carry because it already has spent too much time and money in court and cable operators have made no secret of their plans to derail multicast carriage through immediate legal action. I would respectfully submit, however, that a fear of legal action is absolutely no excuse for ignoring the law or for depriving Americans of the incredible benefits that multicasting offers. In fact, the FCC should not fear the threat of legal challenges to full digital multicast must-carry. Just read the legal briefs filed with the FCC in the must-carry proceeding and you will see that hundreds of parties filed, including virtually all of the participants in the Turner litigation and that the preponderance of those briefs fully supports full digital multicast must-carry. Moreover, legal action may commence regardless of what decision the Commission takes on the multicast must-carry issue, so concerns over litigation do not weigh in favor of any particular decision – except that **if the Commission does not order full digital multicast must-carry, it is sure to suffer another reversal at the hands of the D.C. Circuit.** PCC recently filed a petition for a writ of mandamus to the District of Columbia Circuit to compel

Bryan Tramont
August 30, 2004
Page 7

Commission action on this important issue. Thus the Commission can no longer avoid litigation by delaying a decision on this matter.

No one wants to see the end of the DTV transition and the recovery of the 700 MHz spectrum more than PCC, which currently is saddled with the dual expenses of analog and digital operation and is still waiting to see whether its DTV business plans will be viable even as the Commission discusses ending the transition as soon as possible. Thus I am glad to see that the FCC is beginning to recognize that without purposeful regulatory intervention and full application of the law, the DTV transition will continue to

drift, and the recovery of the 700 MHz spectrum will be indefinitely delayed. **The path that regulatory intervention should take is clear: (1) Order full digital multicast must-carry without further delay and (2) commence planning for full 700 MHz auctions before the New Year.**

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