

October 4, 2004

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

*Ex Parte Notice*

Re: Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120  
(also CS Docket Nos. 00-96 and 00-2)

Dear Ms. Dortch:

On September 30, 2004, representatives of Comcast Corporation (“Comcast”) discussed must-carry issues with members of the Media Bureau. Comcast was represented at the meeting by James R. Coltharp and the undersigned. Media Bureau participants in the meeting included Ken Ferree, Bill Johnson, Deborah Klein, Mary Beth Murphy, Ben Bartolome, and Eloise Gore. The Comcast representatives subsequently met briefly with Johanna Mikes Shelton, Legal Advisor to Commissioner Adelstein.

In the meeting with the Bureau, the Comcast representatives first discussed Comcast’s performance in response to Chairman Powell’s proposal for voluntary industry actions to speed the digital television transition. We reported that Comcast is now offering high-definition television (“HDTV”) in 55 markets, including all of the 45 markets in the top 100 Designated Market Areas (“DMAs”) in which Comcast provides cable service, as well as in ten additional markets. We stated that the markets where Comcast offers HDTV programming encompass 92% of Comcast’s customers. We also stated that Comcast typically provides between 10 and 14 channels of HDTV programming in these markets and that four to six channels of HDTV programming from local broadcasters are routinely included. We noted that all of these carriage agreements, including a number of multicast carriage arrangements with commercial and public broadcasters, are the product of voluntary marketplace negotiations rather than governmental coercion.

Turning more directly to the subject of must-carry, we emphasized that the Commission’s ability to establish new regulatory requirements is constrained not only by the Communications Act but also by the First and Fifth Amendments to the U.S. Constitution. This is not a proceeding in which the Commission has unfettered discretion to choose among competing policy considerations. Fundamental constitutional principles are at stake.

For reasons that Comcast has previously set forth at some length in this proceeding, even existing analog must-carry requirements are of dubious constitutional legitimacy under present circumstances, and the challenges of justifying dual or multicast carriage requirements are insurmountable. Those who believe that the public interest would somehow be served by forcing every cable operator to carry multiple channels of programming from each broadcast licensee in a given market, regardless of content or quality and to the exclusion of other programming that the cable operator believes would be of greater interest to its customers, cannot reconcile such a requirement with the freedoms of speech and of the press of cable operators and their rights not to have their property taken for public use without just compensation. Nor can they show that any such requirement is contemplated by the Communications Act, which the Commission is duty-bound to construe so as to avoid, not to exacerbate, substantial constitutional concerns. We noted that Comcast has presented detailed analyses on these subjects in a number of previous *ex parte* submissions and that the vast majority of the points made in these filings remain un rebutted on the public record.

In response to questions, we affirmed that Comcast continues to work toward the deployment of technologies that will permit it, during times when a broadcaster's primary video transmission is not a high-definition signal but a standard-definition signal, to transmit the primary video signal using less bandwidth and then recapture the remaining spectrum (that would otherwise be used during a time of HDTV broadcasting) and put it to productive use. In fact, recent discussions with the vendor community confirm that technical feasibility of this approach has already been demonstrated. Thus, to be denied this flexibility by the Commission, through a rule that requires the carriage of multiple program streams for a single broadcaster, would represent an even greater intrusion on the editorial discretion and the reasonable investment-backed expectations of the cable operator than a rule that requires the carriage of a single HDTV programming stream per broadcaster.

In the subsequent meeting with Johanna Mikes Shelton, the Comcast representatives summarized, but did not discuss in detail, some of the points mentioned above. We also provided her with a copy of the attached handout (copies of which were also distributed in the Media Bureau meeting).

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This letter is filed pursuant to Section 1.1206(b)(2) of the Commission's rules. Submission of this letter was delayed by one day to allow for further confirmation (which was secured) and elaboration of the factual assertions in the fifth paragraph. Please let me know if you have any questions.

Respectfully submitted,

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Attachment

cc: Ben Bartolome  
Ken Ferree  
Eloise Gore  
Bill Johnson  
Deborah Klein  
Mary Beth Murphy  
Johanna Mikes Shelton



## **BROADCASTERS SHOULD NOT BE GRANTED INCREASED “MUST-CARRY” RIGHTS ON CABLE SYSTEMS**

**Dual or multicast must-carry requirements would harm consumers as well as cable operators and cable programmers.**

- Expanded must-carry obligations would impede Comcast’s ability to allocate finite cable system bandwidth in structuring its services and program packages.
- Any bandwidth consumed by compulsory carriage of broadcasters’ services necessarily diminishes the bandwidth that can be used to accommodate other video programming channels -- or non-cable services such as competitive phone and broadband Internet services.
- Additional must-carry requirements (including six or more separate program streams for *each* broadcast licensee) could consume a significant portion of the cable bandwidth recently added through expensive upgrades and rebuilds. Upgrades and rebuilds, of course, were funded through private capital raised by other cable operators, not funded by the broadcasters that now demand compulsory -- and uncompensated -- carriage.
- Additional must-carry burdens would skew programming purchase decisions by cable operators. This would make it more difficult for producers of cable programming -- including those not affiliated with cable operators -- to obtain carriage of their programming services.
- Granting multicast must-carry rights to broadcasters would diminish their incentive to offer high-definition television (“HDTV”) programming. It was HDTV programming that the broadcasters promised when they sought the “loan” of a second 6-MHz channel, and it is HDTV programming that is so dramatically expediting consumer acceptance of the DTV transition. Making broadcasters compete on the merits is the best way to induce them to create programming that consumers will want to watch.

**To require dual must-carry and/or multicast must-carry would violate the Communications Act as well as the First and Fifth Amendments of the U.S. Constitution.**

- The Commission correctly determined that, “[b]ased on the plain words of the Act, we conclude that, to the extent a television station is broadcasting more than a single video stream at a time, only one of such streams of each television signal is considered ‘primary.’” There is nothing in the history, structure, or purpose of the statute that suggests this plain meaning should be ignored.
- Expanding must-carry would present serious problems under the First Amendment. The logic of the Supreme Court’s prior ruling in *Turner* (involving a single channel of analog programming) does *not* extend to dual or multicast must-carry.
- In *Turner*, broadcasters could invoke explicit Congressional findings that free, over-the-air television broadcasting would be jeopardized without must-carry. Congress has made no

such findings regarding dual or multicast must-carry, nor could such findings be justified under current conditions. Thus, there is no basis for a determination that expanded must-carry serves an important government interest.

- The Court approved analog must-carry in part because it promoted “the widespread dissemination of information from a *multiplicity of sources*.” By contrast, allowing each broadcaster to distribute two (or even six or more) program streams on a given cable system would not promote diversity but *diminish* the ability of other, independent voices to be carried. (This consideration becomes even more powerful to the extent broadcasters can operate duopolies or even triopolies, because then a single broadcaster could control 12 or even 18 channels.)
- To a much greater degree than in *Turner*, there is compelling evidence that dual or multicast must-carry would impose significant burdens on cable operators and would adversely affect other programmers. Thus, it would burden cable operators’ free-speech rights substantially more than is necessary.
- Even the foundation of *Turner* is shaky in light of numerous marketplace changes since the 1992 Cable Act. Just to mention a few: cable now faces robust competition from strong satellite providers (one of which is controlled by News Corp.); consumers have now shown a marked preference for nonbroadcast programming; fewer consumers depend on over-the-air television; broadcasters have much weaker public interest responsibilities than previously; vertical integration by cable operators is much reduced, and vertical integration by broadcast networks is much increased.
- Must-carry also presents serious problems under the Fifth Amendment. A coerced physical occupation of cable operators’ plant with the electronic signals of broadcasters constitutes a “taking,” for which the Constitution requires “just compensation.” Even absent physical intrusion, courts have found takings where the government effectively expropriates one person’s private property for the benefit of another through regulations that interfere with the property owner’s reasonable investment-backed expectations.

### **Expanded must-carry requirements are not needed to spur the digital transition.**

- The digital transition is now in high gear.
  - Cable companies are widely distributing HDTV programming. Comcast offers HDTV to nearly 20 million customers, in 55 markets.
  - Consumers have reacted enthusiastically to HDTV. Sales of digital TV sets are robust and increasing.
- Comcast and other cable operators are successfully negotiating agreements with broadcasters as well as non-broadcast programmers (*e.g.*, HBO, Showtime) for carriage of digital signals. In many cases, particularly with PBS affiliates, Comcast has agreed to multicast arrangements -- *not* because the government has required it but because the stations are offering compelling programming that Comcast, operating in a vigorously competitive marketplace, wants to make available to consumers.