National Association of NAB BROADCASTERS

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

Re: **Ex Parte Notification**
CS Docket No. 98-120

Dear Ms. Dortch:

On January 24, 2005, Mr. Andy Fisher, President, Cox Television and Chairman of NAB's Television Board of Directors, Eddie Fritts, President of NAB and Marsha MacBride, Executive Vice President of NAB met with Catherine Bohigian, legal advisor to Commissioner Kevin Martin to discuss the critical issue of cable carriage of DTV multicasting. Mr. Fisher was present as a representative of NAB and did not speak on behalf of Cox Television. We stressed the importance to viewers and to the future vibrancy of free over-the-air television of a Commission DTV must carry rule requiring cable operators to carry all free programming contained within the 6 MHz broadcast DTV signal.

NAB's representatives discussed the importance of broadcasters' using DTV technology to its fullest to provide over-the-air consumers with the benefits of another platform for multiple video distribution. The governmental interest in promoting this nascent business is therefore substantial. Indeed, public policy should encourage broadcasters to produce as much free over-the-air programming as possible. Adding more free program choices for consumers and strengthening the vibrancy of the over-the-air television system with potential new revenue streams provide new, tangible public interest benefits not present in the analog world. But without cable must carry of multicast streams and access to the two-thirds of the audience controlled by cable, broadcasters and program developers simply will not have the economic base to produce and broadcast a variety of free program streams. Multicasting will be stillborn, and the FCC will have resigned over-the-air television viewers to single stream television viewing, despite the capabilities of the new DTV technology.

We also discussed how cable carriage of a 6 MHz DTV broadcast channel is no more burdensome for cable whether the channel has one HDTV stream or five multicast streams. (And, as we have explained in our pleadings, it would be unworkable, difficult and unrealistic for broadcasters to provide updated communications of their changing programs and bit rates to cable operators, so that cable operators could strip all but one stream from a multicast and still have the full bit stream available for HD programs.) The burden imposed by carriage of a digital broadcast signal – whether a single HD program or multiple SD programs – is less as an absolute matter than the burden imposed by analog must carry that the Supreme Court approved in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994) ("Turner I") and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("Turner II") (collectively, the "*Turner* cases"). Cable systems can carry *two* 6 MHz digital broadcast signals in one 6 MHz cable channel, rather than carrying just one 6 MHz analog channel in one cable channel as was approved by the Supreme Court in the *Turner* cases. Moreover, given the explosion of cable capacity and the lack of any increase in the absolute burden, the *relative* burden imposed by carriage of the full video DTV stream is a fraction of that approved in the *Turner* cases.

Further, requiring cable to carry the entire free 6 MHz broadcast DTV channel advances the same interests set out in the 1992 Cable Act in precisely the same way: it preserves the benefits and vibrancy of free, over-the-air television; in doing so, it promotes the widespread dissemination of information from a variety of sources; and it offers a counterweight to the clear incentives possessed by cable companies to engage in anticompetitive behavior. Moreover, by helping to hasten the digital transition, the requirement of carriage parity not only furthers these interests but also hastens the government's independent interest expressed in numerous statutes (including the 1992 Act) and Commission orders to accomplish that transition as quickly as possible. For these reasons, cable carriage of a single 6 MHz broadcast channel would pass constitutional muster whether that signal contains a single program or multiple programs.

The FCC's interpretation of the Cable Act's "primary video" provision will determine the content of free over-the-air television far into the future. The Commission's current interpretation, that "primary video" means only a single programming stream, is not supportable as *the only* interpretation. Indeed, the Order contradicts itself. Although the Order purported to be "based on the plain words of the Act," it also admitted that the provisions are "susceptible to different interpretations."

Thus, the Commission's previous Order was wrong to suggest that the result was compelled by the plain words of the Act. The meaning is not plain in a digital world, the Agency must look to context. For example, in digital, there is no line 21, no vertical blanking interval and no subcarriers – all statutory terms, written for the analog context. One must apply to digital *what was intended by the term* for the analog situation. In context, it becomes clear that what was meant by "primary" is the "basic" broadcast

service viewed by the public without special equipment or subscription fee, versus ancillary or "secondary" material carried, in analog, in the VBI or on subcarriers. "Primary" equates, as in the dictionary definitions, with "first in importance, "basic," "fundamental," as opposed to secondary or ancillary. "Primary" does not relate to "one" or "single," as the Order concludes, but rather to "first in importance" or "fundamental." Of everything in the signal, it is the video and audio that are primary. And, thus, the same dichotomy that was intended for analog should be applied to digital, that is, the entirety of the free video and audio (the "primary" television service) should be subject to the must carry law.

Sincerely yours,

Marsha J. MacBride

cc: Commissioner Kevin Martin
Catherine Bohigian