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February 1, 2005

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:

Representatives of Comcast Corporation (“Comcast”) discussed must-carry issues with Catherine Bohigian, Legal Advisor to Commissioner Martin, and with Jordan Goldstein, Senior Legal Advisor to Commissioner Copps, on January 31, 2005. Similar meetings were held on February 1, 2005, with Eric Bash, Interim Legal Advisor to Commissioner Adelstein, and also with Jon Cody, Legal Advisor to Chairman Powell, and Erin Dozier, Special Advisor for Media Ownership. Comcast was represented at each meeting by James R. Coltharp, Chief Policy Advisor, FCC & Regulatory Policy, Comcast, and the undersigned.

The discussion in these meetings focused largely on information and analysis reflected in ex parte reports and submissions that have already been placed on the public record. New material that was presented during these meetings includes the following points: Comcast is now providing high-definition television service in 62 markets. Comcast currently has digital carriage agreements with public broadcasters in 45 markets. Many of these agreements provide for carriage of multiple channels of programming, and agreements of this sort are now extending to markets like Charleston, SC, Fort Wayne, IN, Eugene, OR, and Tallahassee, FL. Comcast strongly supports the DTV carriage accord announced yesterday by the Association of Public Television Stations and the National Cable & Telecommunications Association. Comcast has reached digital multicast carriage agreements with a growing number of commercial broadcasters regarding channels that Comcast believes will be of value to its customers. To date, these agreements generally pertain to local all-news or all-weather channels.

Copies of the attached summary of position were given to each of the Commission representatives with whom Comcast met.

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Please let me know if you have any questions.

Respectfully submitted,

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Attachment

cc: Catherine Bohigian  
Jordan Goldstein  
Eric Bash  
Jon Cody  
Erin Dozier



## **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.