

February 3, 2005

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Mr. Chairman:

Representatives of many of the undersigned broadcasters have met with the Commissioners over the past week about the Commission's intention to vote on multicast carriage and other digital carriage issues on February 10, 2005. We came away from those discussions believing that the Commissioners generally

- appreciate that permitting cable to strip out free multicast services from broadcasters' digital signals will adversely affect the public interest -- including diversity, competition and localism -- and will handicap the digital transition by stifling a major incentive for consumers to purchase digital sets;
- understand that cable has the incentive (since they compete against commercial broadcasters for advertising revenues, programming and viewers) to thwart or cripple the launch of competitive broadcast multicast services and will exercise its chokehold power over the public's access to broadcasters' multicast services to serve that objective;
- believe that a holistic approach to all of the digital roll-out issues is preferable to the piecemeal approach represented by the proposed February 10 vote on selective issues;
- understand that insufficient attention has been paid to the interrelationship between the Commission's (1) upcoming decision on multicast and other digital carriage issues and (2) the comprehensive digital transition issues Congress has pledged to act on this year, including replacement of an analog channel give-back tied to 85% of American homes being digitally equipped by a give-back tied to a fixed date when tens and tens of millions of homes will likely not be digitally equipped, and the poor, minorities and rural Americans will suffer the most severe disenfranchisement;

- realize that there is little difference between the capacity cable would devote to HDTV carriage and the capacity it would devote to multicast carriage and that, therefore, a multicast carriage requirement would impose little or no additional burden on cable systems;
- also realize that the intended vote next Thursday will harm if not crush multicast initiatives while leaving little or no additional capacity for cable to use for its video, data or telephony service as broadcasters will continue to use the same capacity for their signals, to wit HDTV programming;
- understand that the economics of local station operations in small and medium-sized markets are fragile and in decline and that multicasting may be a way to sustain broadcasting's viability and vigor into the future consistent with the public interest; and
- are deeply uneasy about voting in a week on these issues.

Some Commissioners are concerned that the current record does not at this time sufficiently support the constitutional case for a multicast carriage requirement. As to this concern, the question is not whether a carriage requirement is constitutional as a de novo matter. Congress decided that issue on the basis of in-depth factual findings, and the Supreme Court upheld those decisions. Congress then directed the Commission to adapt those decisions to television's new, replacement technology -- digital. Moreover, constitutional issues have at least two components -- the factual circumstances and the law.

Factual circumstances: Thirteen months ago, our affiliate associations filed 140 pages of pleadings including numerous declarations specifying (1) the then existing multicast operations and plans of broadcasters, (2) why cable carriage was essential if those operations were to have a chance to compete for viewers, (3) that multicast carriage requirements were necessary because cable's anti-competitive motivation and power would otherwise lead systems to block carriage of these channels and (4) that multicasting could well be essential to the future vitality of the public's over-the-air, local, free and universal television service. At that time some 160 commercial broadcasters were multicasting, far more, we believe, than there were public stations multicasting.

We understand that according to DecisionMark, as of January 28, 2005, 493 stations are multicasting; some are providing several multicast services. Yet of this substantial number, we know of no instances of commercial broadcasters using their digital capacity for home shopping or infomercials -- the sort of programming Commissioners are concerned about providing carriage protection for. The record evidence as of January 2004 also shows many instances of cable's refusal to carry multicast services that constructively serve local communities.

Some of the Commissioners with whom we visited expressed the concern that the record is stale. We submit that the announcement of the Ferree Plan 10 months ago incorporated multicast carriage as part of an overall transition strategy and endorsed multicast carriage as a way to expedite the transition. But if that is the view, and we don't disagree, we believe the

responsible course is *not* to proceed to vote on a stale record. Instead, we urge the Commission to update the record by asking broadcasters (and perhaps cable systems) to respond to a simple questionnaire: do you currently multicast, do you intend to in the next 18 months, what is the nature of your multicast services or intended services and are they being carried or will they be carried by some, all, or none of the cable (and DBS) systems in the market.

In our visits, the Commissioners showed an understandable concern about cable carriage of public broadcasters' multicast services, but comparable information elicited by the Commission's including public broadcasters within the suggested questionnaire might well demonstrate that commercial broadcasters have not lagged behind in launching worthwhile multicast services and that they are experiencing far worse carriage refusals because of cable's anti-competitive motivations *against commercial broadcasters* that obviously don't apply to public broadcasters.

This information, which in the first instance is for the Commission (not Congress) to develop and assess, is essential to resolving the constitutional issue that the Commission is wrestling with. Therefore, the Commission should reach out to obtain that information, not vote on the issue based on a flawed record.

Legal analysis: Legal experts have presented their somewhat dated evaluations to the Commission on both sides of the matter. It must be noted that Professor Tribe's analysis on behalf of NCTA submitted in this docket on July 9, 2002, suffered from a wobbly understanding of the technology, and hence its evaluation of the burdens on cable of a multicast carriage requirement was fundamentally flawed. But in any event, the constitutional debate was based on facts that are several years old and there have been important changes in the marketplace since then, including a proliferation of broadcaster multicast programming that serves the public interest and numerous instances of cable's denying carriage for these valuable services despite a significant increase in cable systems' capacity. Moreover, courts routinely hold oral argument on such weighty issues in which the decision makers and often the government's lawyers participate. The Commission's rules also provide for oral argument when circumstances warrant, and that is what it should consider doing now to reach an informed decision.

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Mr. Chairman, you have fostered innovation and have understood that it is a stop-and-go exercise, fraught with risks and dead ends. As much as any public official you have also articulated and fought for a vision that the digital transition must be addressed comprehensively. The proposed vote on February 10 is inconsistent with these principles. We urge that you set in motion the proper course for resolving these remaining, knotty and most important issues affecting the transition. That would be a worthy legacy for your successors to follow.

Sincerely,



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cc: The Honorable Kathleen Abernathy
The Honorable Kevin Martin
The Honorable Michael Copps
The Honorable Jonathan Adelstein