

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)
)
Carriage of Digital Television Broadcast) CS Docket No. 98-120
Signals: Amendments to Part 76)
of the Commission's Rules)

To: The Commission

PETITION FOR RECONSIDERATION
OF THE
ABC TELEVISION AFFILIATES ASSOCIATION
CBS TELEVISION NETWORK AFFILIATES ASSOCIATION
NBC TELEVISION AFFILIATES
ABC OWNED TELEVISION STATIONS
NBC AND TELEMUNDO STATIONS

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SUMMARY

The ABC, CBS, and NBC Affiliates and the ABC and NBC/Telemundo-owned stations request reconsideration of the Commission's recent *Order* permitting cable systems to strip free, over-the-air multicast programming from a local broadcast station's 6 MHz digital signal. In 1992 Congress adopted comprehensive and extensively-supported analog carriage rules and directed the Commission to adapt them for the new advanced technology which it knew would replace analog. These carriage obligations, upheld by the Supreme Court, advanced important governmental objectives, especially that of preserving the availability of free broadcast services to the public. Three Commissioners found that broadcasters' multicast services have the potential to enhance the value of broadcast services to the public. Nevertheless, the *Order* found that the 1992 Cable Act was ambiguous as to whether the carriage obligations must apply to the full digital broadcast signal and concluded that they should not. The *Order* is flawed in a number of legal and factual respects, and should be reconsidered.

First, the Commission applied the wrong legal standard. The *Order* is based on a finding that multicast carriage is not "necessary" or "essential" to achieve important governmental interests, including those identified in *Turner II*. The proper standard is whether a multicast carriage requirement would "advance" important governmental interests – a standard which the record evidence, largely ignored in the *Order*, amply satisfies. The *Order*'s interpretation of the statute is also suspect. Compounding its misapplication of the law, the Commission failed to take into account other governmental interests, in addition to those enumerated in *Turner II*, that are being served by multicasting.

Second, the Commission failed to give adequate weight to the substantial evidence that (a) commercial broadcasters (300 of them at this point) are offering and others (hundreds more) plan to offer valuable multicast services that promote localism, diversity and

competition; (b) these services are important to the health of broadcast services, including main-channel programming, given the substantial erosion in broadcasters' financial position since 1992; and (c) to come into existence and survive, multicast services need access to the nearly 70% of homes that subscribe to cable.

Third, the Commission should have weighed these benefits against the minimal burden on cable systems of multicast carriage. Instead, the Commission took no account of the massive documentation in the record that cable capacity has doubled or tripled since 1992 and that full digital carriage would require half the capacity of analog carriage.

Fourth, the *Order* concluded that a multicast carriage requirement was not necessary because commercial stations could bargain for multicast carriage rights. But the *Order* ignored facts showing how illogical it would be to rely on marketplace solutions in the digital context, but not in the analog, when in 1992 (a) 98% of the public had analog receivers and 97% of broadcasters' analog signals were being carried by cable systems voluntarily, (b) a less concentrated cable industry had less leverage over broadcast stations, and (c) the cable industry was much less engaged in the local advertising market and so had fewer incentives to withhold carriage of broadcast signals. The *Order* also failed to take account of record evidence showing:

- fewer than 2% of American homes have digital sets; cable carriage of broadcasters' digital signals, though increasing, is often withheld especially for smaller, rural and minority stations; and cable's record of multicast carriage is worse;
- cable systems are far more clustered than they were in 1992, their penetration has increased to roughly 67% today, and therefore they have commensurately greater power over broadcasters with respect to multicast carriage; and
- because cable systems now compete much more aggressively against local broadcasters for local advertising than in 1992, cable operators have far greater incentives today to withhold carriage of broadcasters' digital services, including especially their multicast services.

The Commission also inaccurately concluded that the PBS-NCTA deal demonstrates that multicasting carriage for commercial broadcasters can be resolved by

negotiations in the marketplace. What that agreement does show is that multicast carriage is not burdensome to cable. Misplaced reliance on marketplace negotiations is an inadequate substitute for the Commission's establishing the regulatory rules of the road as the Congress directed it to do in 1992. Cable's increased power and its competitive incentives, *not applicable to public broadcasters*, to deny multicast carriage to commercial broadcasters thwart the market in this case.

* * *

Congress and the Commission provided to broadcasters – at their substantial expense, disruption and risk and for the price of surrendering over 25% of their spectrum – an opportunity to use digital technology to enhance their services to the public. As in the case of their analog channels, Congress entrusted to licensee discretion how to optimize the use of this resource for the public's benefit. High definition is clearly one such service and it is being extensively deployed. Multicasting services can be a valuable supplement. If cable stripping is allowed, however, the public will be denied these enhanced services, broadcasters will revert to an HDTV-only service and broadcast service will weaken. At the same time, cable will have saved very little additional spectrum for their own video, voice or data services.

The *Order* dramatically reduces the dividends that both Congress and the Commission wanted the public to receive from the digital transition, and undermines the future viability of broadcast television. It misconstrues the law and ignores record evidence and should, accordingly, be reconsidered.

pursuant to must-carry or retransmission consent, cable systems were required to carry all of a broadcaster's signal except certain material that Congress specified.⁴ In fidelity to Congress's mandate, the Commission adopted a comprehensive set of analog rules that also dealt with "cherry-picking" (a form of degradation), the definition of program-related (also pertinent to degradation), tier and channel placement, and signal quality.⁵

At the same time, Congress realized that broadcasters would be migrating from analog to digital. It, therefore, directed the Commission to "ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with [digital] standards."⁶ Pursuant to that mandate, this proceeding sought to adapt the existing interrelated analog rules to digital. It was, therefore, not appropriate to re-open debates about the desirability or constitutionality of the basic carriage requirements. The new digital carriage rules will rest solidly on the groundwork established by Congress in connection with the analog rules and upheld by the Supreme Court in *Turner II*.⁷ Unfortunately, the *Order* seems to ignore this fact. It also plucked from the half-dozen, interrelated, pending digital carriage issues only two – multicast carriage and interim carriage – for resolution at this time.

The *Order* found that Congress's mandate in the 1992 Cable Act that cable systems carry a local broadcast station's "primary video"⁸ was "susceptible to different interpretations" and therefore the plain language did not resolve the issue of whether cable

services is a clear instance of degradation in the digital context. A multicast carriage requirement is needed to protect against this form of signal degradation.

⁴ See 47 U.S.C. 534(b)(3)(A) (specifying types of "nonprogram-related material" that may be retransmitted at the discretion of the cable operator).

⁵ See, e.g., 47 C.F.R. §§ 76.56, 76.57 & 76.62.

⁶ 47 U.S.C. § 534(a).

⁷ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

⁸ 47 U.S.C. § 534(b)(3)(A) (referring to carriage of commercial stations) & 47 U.S.C. § 535(g)(1) (referring to carriage of noncommercial stations).

systems have to carry a broadcaster's full digital signal including multicast services.⁹ The Commission determined also that the legislative history did not resolve the issue.¹⁰ It said that the statutory provisions, which were drafted for the analog world, "do not directly translate to digital technology generally, much less to associated multicasting capabilities specifically, and thus do not appear to compel a particular result for multicasting must-carry."¹¹ Nevertheless, the Commission decided to permit cable systems to strip multicast services because it found that a multicasting carriage requirement is not *necessary* to further governmental interests relied on by the Court to uphold the analog carriage rules in *Turner II*.

In doing so, the *Order* used the wrong legal framework to analyze the issues. It did not adequately consider compelling record evidence of the benefits of a multicast carriage requirement for a variety of important governmental interests, of the minimal burdens on cable operators, and of the need for a carriage requirement because cable systems have denied multicast carriage and will continue to do so. Nor was the *Order* adequately calibrated with Commissioners' concerns about broadcasters' digital public interest responsibilities, which are the subject of another pending proceeding,¹² or with other interrelated digital carriage issues that remain pending in this proceeding.

II. THE COMMISSION APPLIED THE WRONG STANDARD.

The *Order* held that the 1992 Cable Act was ambiguous¹³ as to whether cable systems could intrude upon and degrade a local broadcast station's signal by stripping out its

⁹ *Order* at ¶ 33 (quotations omitted).

¹⁰ *Order* at ¶ 33.

¹¹ *Order* at ¶ 34.

¹² *See In re Public Interest Obligations of TV Broadcast Licenses*, Notice of Inquiry, MM Docket No. 99-360 (rel. Dec. 20, 1999).

¹³ The Joint Petitioners maintain that the statute is not ambiguous and prohibits cable systems from stripping out any free, over-the-air video programming provided within a (continued...)

multicast programming.¹⁴ Once the Commission found the statute ambiguous and the legislative intent unclear, its task was to derive a “reasonable interpretation” of the statute.¹⁵ The Commission employed the wrong standard, however, in seeking to do so.

At the heart of the *Order* is the conclusion that “we cannot find on the current record that a multicasting carriage requirement is *necessary* to further either of these goals”¹⁶ – the two goals being: (1) preserving the benefits of free, over-the-air local broadcasting for viewers, and (2) promoting the widespread dissemination of information from a multiplicity of sources.¹⁷ The *Order*’s insistence that the statute cannot be read to impose a multicast carriage

qualifying local commercial station’s 6 MHz signal. In parsing the word “primary,” which refers to a particular class of services rather than a single service (*see, e.g.*, NAB/MSTV/ALTV Petition for Reconsideration and Clarification, CS Docket No. 98-120, at 10-11 (Apr. 25, 2001)), the Commission ignored the clear direction of the statute. (Initially, the Commission had found the term referred to the most important video, which would have been a content-based interpretation of the statute.) Congress broadly provided that cable operators must carry broadcaster programming content, explicitly carving out certain specified “nonprogram-related material” that cable operators had the discretion not to retransmit. 47 U.S.C. § 534(b)(3)(A). In doing so, Congress intended that cable operators would not — as they propose to do here — be permitted to retransmit only part of a station’s free, over-the-air video programming content. Similarly, the 1992 Cable Act provides that “[t]he cable operator shall carry the entirety of the program schedule of any television station carried on the cable system . . .” 47 U.S.C. § 534(b)(3)(B). Rather than render the preceding section a nullity, as the *Order* states (at ¶ 34 n.135), the latter provision reinforces Congress’s intent that cable operators retransmit the entirety of a broadcaster’s free programming. If Congress intended to provide cable operators with the discretion not to carry certain free, over-the-air program services embedded in the station’s signal, certainly it could have done so explicitly. Besides mandating that cable operators carry broadcast content in its entirety, the statute also explicitly requires cable operators to carry “[t]he signals of local commercial television stations . . . without material degradation.” 47 U.S.C. § 534(b)(4)(A). Stripping the signal, as cable operators would if permitted to carry only particular broadcaster services, is degradation in the real-world sense of the word. Properly interpreted, the Act requires cable systems to carry all free multicast services.

¹⁴ *Order* at ¶ 33.

¹⁵ *Order* at ¶ 35 (citing *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)).

¹⁶ *Order* at ¶ 37 (emphasis added).

¹⁷ *Id.* These were the two governmental interests recognized by the majority in *Turner II* as justifying the analog carriage rules. 520 U.S. at 189-90

requirement unless it is “necessary” or “essential” to achieve a governmental interest is repeated throughout the Commission’s analysis.¹⁸

Necessity is not the proper test for the Commission to use regardless of whether it is interpreting a statute,¹⁹ determining whether the carriage requirement is constitutional under *Turner II* or assessing whether it is desirable public policy. The proper inquiry is whether the regulation “advances important governmental interests unrelated to the suppression of free speech” and whether these benefits outweigh the burden on cable systems.²⁰ The Commission need not find that the multicast carriage requirement is “necessary” or “essential.”²¹

By insisting that anti-stripping protections would have to be “necessary,” the Commission imposed a strict scrutiny test on what is in the first instance a matter of statutory interpretation, in the second instance a constitutional analysis of a content-*neutral* regulation to which intermediate, not strict, scrutiny applies,²² and in the third instance a matter of balancing

¹⁸ See *Order* at ¶ 38 (“Significantly, there is nothing in the current record to convince us that mandatory carriage of all multiple streams of a broadcaster’s transmission is *necessary* to achieve either of these goals.”) (emphasis added); *Order* at ¶ 41 (“Given the lack of a meaningful showing on the current record that mandatory carriage of more than one programming stream is *necessary* to achieve any of the goals discussed above, we determine not to impose such a requirement.”) (emphasis added). For use of “essential,” see *Order* at ¶ 38 (“[H]ere broadcasters fail to substantiate their claim that mandatory multicasting is *essential* to ensure station carriage or survival.”) (emphasis added); *id.* (“[B]ut they have not made the case on the record that these additional programming streams are *essential* to preserve the benefits of a free, over-the-air television system for viewers.”) (emphasis added).

¹⁹ *Chevron*, 467 U.S. at 843. The meaning of the statute turns on the text and context of the statute, not whether a carriage requirement is constitutional under *Turner II*.

²⁰ *Turner II*, 520 U.S. at 189 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)) (emphasis added).

²¹ See, e.g., *Chevron*, 467 U.S. at 843.

²² See *Turner II*, 520 U.S. at 189 (“We begin ... [by] applying the standards for intermediate scrutiny enunciated in *O’Brien*. A content-neutral regulation will be sustained ... if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”). By contrast, to justify a content-*based* regulation, “the [government] must show that its regulation is *necessary* to serve a compelling state interest and is narrowly drawn to achieve that end.” *Simon* (continued...)

policy benefits and disadvantages. Because use of the wrong standard taints the entirety of the *Order*, the Commission should reconsider the entire record through the lens of the proper standard, which is whether the rule would *advance* important governmental interests.

III. THE *ORDER* DID NOT GIVE ADEQUATE WEIGHT TO THE BENEFITS OF A MULTICAST REQUIREMENT FOR IMPORTANT GOVERNMENTAL INTERESTS AND FAILED TO TAKE INTO ACCOUNT ADDITIONAL GOVERNMENTAL INTERESTS THAT WOULD BE BENEFITED.

The *Order* considered three important governmental interests. It took two from the majority opinion in *Turner II*: “(1) preserving the benefits of free, over-the-air local broadcast television for viewers, and (2) promoting the widespread dissemination of information from a multiplicity of sources.”²³ The third was facilitating the digital transition.²⁴ The *Order* failed to give weight to the record evidence showing how a multicast carriage requirement would serve these three governmental interests. It also failed to consider other governmental interests that this requirement would serve. Additionally, the *Order* ignored developments that have occurred in the cable industry in the past 13 years, since adoption of the 1992 Cable Act, that make a multicast carriage requirement more important today to advance these governmental interests than when the requirement was adopted.²⁵

& Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) (internal citation omitted) (emphasis added).

²³ *Order* at ¶ 37 (quoting *Turner II*, 520 U.S. at 189).

²⁴ *Order* at ¶ 40.

²⁵ Besides developments that have increased the benefits of multicasting, as discussed in this section, on balance the case for multicast carriage is made even stronger because of the declining burden on cable systems, as discussed, *infra*, in Section IV.

A. The Commission Failed To Give Adequate Weight To Record Evidence Demonstrating That Important Governmental Interests Would Be Served By A Multicast Carriage Requirement.

1. Preserving the viability and health of free, universal and local television service and its ability to originate quality local programming.

The record contained ample evidence demonstrating the importance of multicast carriage for ensuring the economic vitality of the public's local broadcast service. In particular, the evidence showed that (1) local broadcast stations are hurting financially and are substantially weaker than they were in 1992,²⁶ and (2) multicasting will enhance the health of local broadcast services.²⁷ The *Order* overlooked the evidence available both in this record and elsewhere. On reconsideration, the Commission should take existing evidence into account, develop or ask for whatever additional evidence it feels it needs and weigh this evidence in the balance of the other factors at issue here.²⁸

First, substantial evidence demonstrates local broadcast services' growing vulnerabilities, particularly for stations in smaller markets and smaller stations in large markets. According to a 2003 National Association of Broadcasters study, in 1997 the average pre-tax *profit* of the fourth-rated station affiliated with a big four network in markets 51-175 was

²⁶ See note 29 and accompanying text.

²⁷ See discussion, *infra*, page 8.

²⁸ In other matters involving the digital transition, the Commission has required information from all related parties. See, e.g., DTV Transition Questionnaire, available at <<<http://www.fcc.gov/mb/dtv/dtvquestionnaires.html>>>; similarly, concurrently with the First Report and Order and Further Notice of Proposed Rulemaking in this docket, the Commission surveyed cable operators asking specific questions concerning retransmission consent and cable system channel capacity. *In re Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, First Report and Order and Further Notice of Proposed Rulemaking, CS Docket No. 98-120, 16 FCC Rcd 2598, ¶ 116 (rel. Jan. 18, 2001) ("*Initial Order*").

\$2,428,803. In 2001 these stations averaged a pre-tax *loss* of \$2,820,270.²⁹ Stations in markets 175-210 have suffered even more severely.³⁰ Nor do these statistics reflect the cost of constructing and operating digital facilities and the further sapping of station vitality by aggressive cable inroads into local advertising on which local stations increasingly depend.³¹ Economic losses led 42 local stations to cancel their local news over a four-year period ending in 2002, and considerably more have cancelled or reduced their news since then.³²

Second, multicasting may well be important to local broadcasters' ability to maintain the economic vitality of their services – main-channel services as well as multicast services. Nevertheless, the *Order*, in conclusory fashion, rejected that mandatory multicast carriage “is essential to ensure station carriage or survival.”³³ But the governmental interest which the Cable Act sought to protect was not merely the *survival* of local broadcast services, but rather their economic *health and viability* and their ability to originate quality local programming.³⁴ And the proper standard is whether mandatory carriage *advances* governmental interests, not whether it is *essential*.

²⁹ NAB, *The Declining Financial Position of Television Stations in Medium and Small Markets* at 5-9 (Dec. 2002) (submitted as Appendix C in Comments of NAB, MB Docket No. 02-277 (Jan. 2, 2003)); see Special Factual Submission in Support of Multicast Carriage by the NBC Television Affiliates Association, CS Docket Nos. 98-120, 00-96 & 00-2, at 16 (Jan. 8, 2004) (“NBC Affiliates Submission”); NBC Affiliates Submission, Declaration of Craig Dubow, President, Gannett Broadcasting Co. ¶ 11 (Jan. 7, 2004) (“Dubow Decl.”).

³⁰ See, e.g., BIA Media Access Pro Database.

³¹ See *infra* pp. 17-18. See also Special Factual Submission of the CBS Television Network Affiliates Association in Support of Multicast Carriage, CS Docket Nos. 98-120, 00-96 & 00-2, at 14 & n.33 (Jan. 13, 2004) (“CBS Affiliates Submission”).

³² See NBC Affiliates Submission at 16; Dubow Decl. ¶ 11.

³³ *Order* at ¶ 38.

³⁴ See 1992 Cable Act, § 2(a)(16); H.R. Rep. No. 102-628, p. 51 (1992) (the absence of must-carry “will result in a weakening of the over-the-air television industry and a reduction in competition”); S. Rep. No. 102-92, p. 62 (1991) (“Without congressional action, . . . the role of local television broadcasting in our system of communications will steadily decline . . .”), cited in *Turner II*, 520 U.S. at 192.

The *Order* never discussed, though it cited in passing,³⁵ the evidence demonstrating how multicasting will bolster the economic vitality of local broadcast stations. For instance, in the CBS Affiliates Submission, KFDM-TV/DT (Beaumont, Texas) explained that “Freedom stations have found that intense competition for advertising revenue is a primary threat to their viability as over-the-air broadcasters . . . With additional means of reaching local viewers, Freedom’s stations will be able to spread the high and rising costs of programming and supplement the weakening local advertising revenue stream that are their sole source of economic support. Multicasting is therefore necessary to the future viability and health of Freedom and its stations.”³⁶ This statement is representative of other evidence in the record,³⁷ none of which is acknowledged by the *Order*.

2. Promoting source diversity.

The *Order* erroneously concluded that multicast services offered by the same broadcaster would not enhance source diversity and might diminish it.³⁸ The record (ignored in the *Order*) demonstrated, however, that multicast carriage will increase source diversity.

³⁵ *Order* at 38, n.144.

³⁶ CBS Affiliates Submission, Declaration of Larry Beaulieu, General Manager of Freedom Broadcasting’s KFDM-TV/DT ¶ 5 (Jan. 6, 2004). Similarly, The New York Times Broadcast Group submitted evidence that the “use of multicast streams to allow advertisers to target particular geographic areas within a nation’s service area would even the playing field and help ensure the future health and viability of over-the-air broadcast stations like the New York Times stations.” CBS Affiliates Submission, Joint Declaration of Cynthia Augustine, President, and Bob Eoff, Divisional Vice-President, of The New York Times Broadcasting Group ¶ 7 (Jan. 4, 2004) (“Augustine/Eoff CBS Decl.”).

³⁷ *See, e.g.*, CBS Affiliates Submission, Declaration of Ed Trimble, President and Chief Operating Officer, Midwest Television, Inc. ¶¶ 10-11 (Jan. 8, 2004) (“Trimble Decl.”); CBS Affiliates Submission, Declaration of J. Henry Maldonado, Vice President and General Manager, WKMG-TV/DT, Orlando, Florida ¶ 7 (Jan. 8, 2004) (“Maldonado Decl.”); CBS Affiliates Submission, Declaration of Michael De Lier, General Manager, WIBW-TV/DT, Topeka, Kansas ¶ 12 (Jan. 8, 2004) (“De Lier Decl.”); NBC Affiliates Submission, Dubow Decl. ¶ 11.

³⁸ The Commission has traditionally counted cable as one distinct voice in a market, however, so carriage of multicast streams, even if it were in place of other cable channels, could not *diminish* source diversity.

In the current environment, independent producers that wish to launch a new channel with an audience reach sufficient to sustain niche programming have only one real option: cable operators. Multiple independent producers commented in this proceeding that they need additional means of access to the public for their programming, particularly for programming targeted to minority or other distinct and traditionally underserved segments of the community. Accordingly, they agree that multicast carriage will advance source diversity.

For instance, DIC Entertainment intends to create a free, over-the-air children's network for a variety of instructional children's programming, including feeds in Spanish to be distributed over stations' multicast services.³⁹ Similarly, the National Medical Association ("NMA"), which represents the interests of 25,000 African American physicians and the patients they serve, expressed interest in providing programming concerning minority health issues. It said: "there is very little health outreach programming directed to [underserved populations] in the communications medium most effective in these communities," and expressed the hope that multicasting would provide "the capability to disseminate content long neglected by current video distribution models."⁴⁰ Finally, the Black Education Network stated that "[m]ulticasting provides an unprecedented opportunity for the Commission both to increase access to the public airwaves for minority and other underrepresented groups and to expand the diversity of programming choices available to all viewers."⁴¹

³⁹ See *Ex Parte* Presentation of DIC Entertainment Corp., CS Docket No. 98-120 (Nov. 6, 2003); see also "DIC's Smart Move," *Broadcasting and Cable*, at 10 (April 18, 2005).

⁴⁰ See *Ex Parte* Submission of the National Medical Association, CS Docket No. 98-120 (March 25, 2004).

⁴¹ See *Ex Parte* Submission of Black Education Network, Inc., CS Docket No. 98-120 (Jan. 28, 2004). In the Media Ownership Proceeding, the Commission considered comments from the Coalition for Program Diversity to adopt a 25% independent producer rule, with the goal of increasing diversity. See *In re 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, MB (continued...)

Even though the licensee would, properly, retain ultimate control over the programming, multicasting will provide an opportunity for more, diverse programs, produced from a multiplicity of sources. The *Order* recognized this potential benefit, but said it would not consider taking a position until a “future record” is developed.⁴² It did not even note the submissions by DIC Entertainment, NMA, or the Black Education Network or ask for additional information. Instead, the *Order* preserved the status quo, leaving potential new programming sources like the Black Education Network with no real option but to continue to seek carriage from MSOs.

Multicast carriage will also increase source diversity by helping to sustain voices that might otherwise disappear or wither and atrophy. Smaller stations and stations in mid-sized and smaller markets, including minority-owned stations, are suffering financially. These local broadcasters, perhaps more than any others, would benefit from the additional revenue multicasting would provide to support their economic viability and help them provide quality service.⁴³ If these stations fail or continue to weaken, it would adversely affect source diversity.

3. Transition to digital.

The Commission also erroneously ignored evidence that multicast carriage will facilitate the digital transition. Multicasting will drive the digital transition because these appealing new programming services will provide incentives for viewers to purchase digital

Docket No. 02-277, 18 FCC Rcd 13,620, *aff'd in part, remanded in part, Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *pet. for cert. pending* 73 USLW 3466 (Jan. 28, 2005) (“Media Ownership Decision”), at ¶¶ 640-56.

⁴² *Order* at ¶ 39, n.148.

⁴³ *See Ex Parte* Submission of Minority Media and Telecommunications Council, CS Docket No. 98-120 (Jan. 30, 2004) (stressing that a multicast carriage requirement would assist the “nation’s 23 minority owned full power television stations [that] . . . are struggling economically”).

sets.⁴⁴ For example, WDBJ in Roanoke, Virginia, which currently provides two locally-oriented multicasting services to digital consumers, “is helping to stimulate consumer sales of digital tuners in our viewing area.”⁴⁵ To accelerate the digital transition, the station “has fostered two-way communication with viewers owning digital receivers and HDTV sets” by sending regular e-mail updates about WDBJ’s digital HD and multicast services to customers who have told the station they have digital sets.⁴⁶

Facilitating the transition in this way will help lessen viewer disenfranchisement at the end of the transition; expedite the availability of spectrum for public safety/Homeland Security use; free other surrendered spectrum for innovative uses; and permit the government to raise billions by auctioning the surrendered spectrum. By encouraging receiver sales, multicast carriage will also advance the time when cable operators can carry broadcast signals with half the capacity needed for analog signals and when broadcasters can migrate from the burden of operating two transmission facilities. The biggest winner of all will be consumers, whose valued broadcast service will keep pace with the digitization of all communication services.

B. The Commission Failed To Consider Other Important Government Interests.

The *Order*, correctly, did not limit its consideration of important governmental interests solely to those discussed by the Supreme Court in *Turner II*.⁴⁷ A number of important

⁴⁴ The NBC Affiliates noted in its submission that the Commission has explicitly made a finding to this effect. See NBC Affiliates Submission at 2 (citing *In re Advanced Digital Television Systems and Their Impact upon the Existing Television Broadcasting Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12827 (1997)).

⁴⁵ CBS Affiliates Submission, Declaration of Robert G. Lee, President and General Manager, WDBJ(TV)(DT), Roanoke, Virginia ¶ 5 (Jan. 8, 2004) (“Lee Decl.”).

⁴⁶ *Id.*

⁴⁷ See *Order* at ¶ 40.

governmental interests, laid out in the 1992 Cable Act and elsewhere, however, were not considered in the *Order* despite clearly being advanced by a multicast carriage requirement.

1. Localism.

Localism is a well-recognized, important governmental interest largely ignored by the *Order*. “Localism is rooted in Congressional directives to this Commission and has been affirmed as a valid regulatory objective many times by the courts.”⁴⁸ Clearly, multicast services offering local news, weather, sports and public affairs will advance localism by providing free, over-the-air programming that meets community needs and interests.⁴⁹

2. Competition.

Free, over-the-air television service is also important as the ultimate constraint on cable subscriber charges. Cable and satellite providers have effective duopoly power over consumers.⁵⁰ This power is kept in check at the margin by local broadcasting to which viewers may escape if cable and satellite rates become intolerable. The vitality of local broadcasters is therefore important not only for viewers who rely on over-the-air reception, but also for cable and satellite subscribers.

3. Viewpoint diversity.

Section 2(a)(6) of the 1992 Cable Act identified viewpoint diversity as an important governmental interest, which the Commission’s Media Ownership Decision described as promoting “[a] diverse and robust marketplace of ideas [which] is the foundation of our

⁴⁸ *Media Ownership Decision*, at ¶ 73.

⁴⁹ See *infra* Section VI for discussion of record evidence demonstrating the variety of multicasting programming already provided by broadcasters or in the works that will serve local needs.

⁵⁰ The Commission has recognized that a lack of competition for cable systems leads to higher subscriber rates. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 01-389, at ¶ 9 (rel. Jan. 12, 2002).

democracy.”⁵¹ Yet the *Order* failed to consider how multicast carriage would advance viewpoint diversity.

Broadcasters’ multicast services will target niche and underserved audiences.⁵² Market forces that are increasingly focusing broadcasters’ multicast offerings on locally-oriented services will also encourage them to present different viewpoints and cater to different community needs in order to reach new audiences. The Media Ownership Decision recognized this when it commented “that a single media owner may elect to present a range of different perspectives.”⁵³ In areas with high Spanish-speaking populations, local broadcasters have plans to multicast both original local-oriented Spanish programming and feeds from Spanish-language broadcast networks like Univision and Telemundo.⁵⁴ Multicasting is also enabling communities to receive emerging networks such as WB and UPN to which they would not otherwise have access.⁵⁵

⁵¹ *Media Ownership Decision*, at ¶ 19.

⁵² *See, e.g.*, CBS Affiliates Submission, Beaulieu Decl. ¶ 2 (“Multicasting . . . has the potential to improve dramatically television service to markets that are currently underserved.”); *see also* CBS Affiliates Submission, Declaration of Benjamin W. Tucker, President, Fisher Broadcasting Co. ¶¶ 5-6 (Jan. 8, 2004).

⁵³ *Media Ownership Decision*, at ¶ 174.

⁵⁴ KFDM in Beaumont, Texas plans to multicast local news streams in Spanish, and Liberty Corp. would like to “reach out to its culturally diverse audiences” in Harlingen, Texas by multicasting language training, employment updates, and immigration information. CBS Affiliates Submission, Beaulieu Decl. (KFDM) ¶ 3; NBC Affiliates Submission, Declaration of Jim Keelor, President and Chief Operating Officer, Liberty Corporation ¶ 4 (Jan. 7, 2004) (“Keelor Decl.”). Such multicasts will contribute both to localism and viewpoint diversity. The same stations may also multicast streams from Spanish-language broadcast networks. Beaulieu Decl. ¶ 2; Keelor Decl. ¶ 4.

⁵⁵ *See* CBS Affiliates Submission, Beaulieu Decl. ¶2; NBC Affiliates Submission, Keelor Decl. ¶ 3; *see also* CBS Affiliates Submission, Tucker Decl. ¶¶ 5-6. In addition, because UPN, for example, only provides a limited amount of programming, some stations multicasting UPN will carry local news in addition to UPN programming through that multicast service.

IV. THE *ORDER* FAILED TO CONSIDER THE SUBSTANTIAL EVIDENCE, LARGELY UNREBUTTED, THAT THE BURDENS ON CABLE OF A MULTICAST CARRIAGE REQUIREMENT WOULD BE NEGLIGIBLE.

The burden that carrying a local broadcast station's full digital signal places on cable systems must be a key component in analyzing whether a multicast requirement would be a reasonable application of Congress's directive to the Commission to adapt its analog carriage rules to digital. The Commission simply ignored this aspect of the analysis, despite the fact that the record unequivocally demonstrated that the burden of digital carriage, including multicast carriage, would be far less than the burden of analog carriage upheld in *Turner II*.

First, cable systems can carry *two* 6 MHz digital broadcast signals in a single 6 MHz cable channel, rather than only *one* 6 MHz analog broadcast signal in that same 6 MHz cable channel.⁵⁶ And the imposition on cable is, of course, essentially the same regardless whether a local broadcaster elects to provide one high definition signal encompassing 6 MHz or whether the station multicasts within that 6 MHz signal or does a combination of both. *Second*, cable capacity has doubled and tripled since the analog carriage rules were adopted.⁵⁷ *Third*, multicast carriage would add only negligibly to the modest capacity cable uses for local broadcasters.⁵⁸ The burden of digital carriage including multicast carriage is clearly less today than it was in 1992.

The *Order* failed to acknowledge these facts. It also failed to consider the showings supporting these facts in the *Cable Capacity White Paper*, the showings by MSTV and NAB (January 27, 2005), and the showings supplied by APTS and PBS (March 20, 2003). The

⁵⁶ See, e.g., *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, at ¶ 24, n.72 (rel. Feb. 4, 2005) ("*Eleventh Annual Report*").

⁵⁷ See *id.* ¶ 24, Table 3 (capable capacity averages 153 *digital* channels); *Ex Parte* Submission of NBC Television Affiliates Group, NBC Television Stations, CBS Television Network Affiliates Association, and ABC Television Affiliates Association, CS Docket No. 98-120 (April 16, 2004) ("*Cable Capacity White Paper*").

⁵⁸ See *Cable Capacity White Paper*.

cable industry's counter arguments as to burden completely failed to undercut the showing of reduced burden, and the Commission should also have recognized this in the *Order*.⁵⁹

V. THE *ORDER* INCORRECTLY CONCLUDED THAT COMMERCIAL STATIONS WILL BE ABLE TO NEGOTIATE FOR MULTICAST CARRIAGE.

In January 2003, the CBS and NBC Affiliates filed 160 pages of information that demonstrated, among other things, both the need for cable carriage for multicast services to have a chance in the marketplace and the imperative of a multicast carriage *requirement* because of carriage denials prior to that date and the inherent power and anti-competitive incentives of cable systems, which have grown since 1992.

First, there is little, if any, dispute that cable carriage is necessary for multicast programming to have the opportunity to succeed. With cable penetration of roughly 67.4%, cable has bottleneck control over multicasting's access to viewers.⁶⁰ As a result, if cable is given the authority to, and in fact does, strip multicast programming, these services cannot be sustained, and will not be launched, or, if launched, will fail. The record evidence is clear on this point, and the *Order* did not dispute it. Thus, "[d]istribution of Gannett multicast programming solely to our over-the-air viewers in our markets . . . is not sustainable."⁶¹ Similarly, LIN Television stated that "[l]ack of cable carriage for multiple streams of video programming is a substantial deterrent to our stations expanding beyond their primary digital channels to launch

⁵⁹ The Commission's 33% cap on capacity devoted to broadcast carriage would remain in place, *see* 47 C.F.R. § 76.56(b), and the record contains broadcasters' suggestions for lowering it.

⁶⁰ National Cable and Telecommunications Association, Cable Telecom. Industry Overview 2003 Mid-Year 24 (2003) (citing cable penetration rate of U.S. television households as 67.4 percent).

⁶¹ NBC Affiliates Submission, Dubow Decl. ¶ 9. The New York Times Broadcasting Group emphasized that since programming that is not carried on cable reaches as few as fifteen percent of viewers, it "is insufficient to justify a significant investment." NBC Affiliates Submission, Joint Declaration of Cynthia Augustine, President, and Bob Eoff, Divisional Vice-President, of the New York Times Broadcasting Group ¶ 5 (Jan. 7, 2004) ("Augustine/Eoff NBC Decl.").

one or more multicast streams, even if those streams would provide valuable service to our viewers.”⁶²

Second, evidence both in this record and otherwise available is clear that, without a carriage requirement, many cable operators will *not* carry multicast services. The *Order* simply does not address, let alone rebut, the numerous instances documented in the record where broadcasters were unable to obtain multicast carriage — evidence which shows the need for a *requirement*. For example, LIN Television declared that “[s]everal cable operators have already told us that they will carry only the stations’ main digital feeds.”⁶³ The New York Times Broadcasting Group was “unsuccessful” in “many of the efforts of our stations to negotiate transmission consent agreements that include carriage of multicast streams.”⁶⁴ If the Commission believes it needs additional information about cable’s denial of multicast carriage, it should survey the industry or open a new round of pleadings to supplement the record, as it did in 2001.⁶⁵

A carriage requirement is more justified today than it was when Congress passed the analog carriage requirement. In 1992, 98% of the public had analog receivers and 97% of

⁶² CBS Affiliates Submission, Declaration of Paul Karpowicz, Vice President, Television, LIN Television Corporation ¶ 8 (Jan. 8, 2004).

⁶³ *Id.* ¶ 8.

⁶⁴ Augustine/Eoff NBC Decl. ¶ 6. Similarly, Hearst-Argyle Television reported only “limited success” in negotiating multicast carriage agreements and noted that some cable companies “have been remarkably candid in stating they will not carry multicast programming that is, or may be, competitive with cable programs they offer.” NBC Affiliates Submission, Declaration of David J. Barrett, President and CEO, Hearst-Argyle Television, Inc. ¶ 7 (Jan. 7, 2004).

⁶⁵ In distributing the survey to cable operators in 2001, the Commission noted that “the National Association of Telecommunications Officers and Advisors (‘NATOA’) commented that the Commission should carefully study channel capacity and retransmission consent issues before acting on the issue of dual carriage.” *Initial Order*, ¶ 116, n.344. That was four years ago. Now there are over 300 stations multicasting involving hundreds and hundreds of cable systems. Because of the state of the record and the substantial issues raised by the affiliates’ submissions, the Commission should solicit the facts it previously thought necessary to resolve these issues.

broadcasters' analog signals were being carried voluntarily. Even under those circumstances, Congress passed and the Commission implemented the carriage requirements which the Supreme Court upheld. Today, fewer than 2% of American homes have digital sets; cable carriage of broadcasters' digital signals though increasing is very spotty especially for smaller, rural and minority stations; and cable's record of multicast carriage denials is even worse.

Other industry developments since passage of the 1992 Cable Act fortify the conclusion that without a requirement, cable will strip out multicast services. The cable industry has far more power and economic incentive to deny carriage today. Cable systems are significantly more clustered than they were in 1992.⁶⁶ As cable systems cluster, there is less consumer pressure on the systems to carry multicast services carried by neighboring systems.

Further, cable systems have been aggressively targeting local advertising in the years since the 1992 Cable Act, increasing revenue from these sources by 367% through 2003.⁶⁷ Consequently, cable operators have even greater incentives today to withhold carriage of broadcasters' multicast services. The Supreme Court prophesied this result in the analog context, noting that "cable operators had considerable and *growing* market power over local video programming markets" and that "[e]vidence indicated the structure of the cable industry

⁶⁶ In the recent *Eleventh Annual Report*, at ¶ 141, the Commission noted that "[c]able operators continue to pursue a regional strategy of 'clustering' their systems. Many of the largest MSOs have concentrated their operations by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country." *See also* Dubow Decl. ¶ 9 ("Increasingly, due to clustering, one cable MSO controls most of the subscribers in Gannett markets."). Further, cable systems' overall penetration has increased to roughly 67% today, *see supra* note 60, and therefore they have commensurately greater bottleneck power over broadcasters with respect to multicast carriage.

⁶⁷ *See* National Cable & Telecommunications Association, *Cable Developments 2004*, at 14 (2004). The industry's revenue from local advertising increased an estimated 13.5% from 2003 to 2004. *See Eleventh Annual Report*, at ¶ 29, Table 4.

would give cable operators *increasing* ability and incentive to drop local broadcast stations from their systems . . .”⁶⁸

Implication of PBS-NCTA Agreement. The *Order* also placed great reliance on the recent agreement between the Association of Public Television Stations, Public Broadcasting Service and the National Cable and Telecommunications Association (the “PBS-NCTA Agreement”) for carriage of all *public* stations’ multicast programming, up to four unduplicated services, as evidence that *commercial* stations can also negotiate for multicast carriage.⁶⁹ But cable does not compete against public stations for local advertising dollars, as it does against commercial stations. It is this commercial incentive that will cause and has caused cable to deny multicast carriage to their commercial competitors but not to public stations. Moreover, the PBS-NCTA Agreement took years to negotiate, and such a national agreement would be a questionable undertaking for commercial broadcasters because of the nation’s antitrust laws.

While the PBS-NCTA Agreement fails to show that commercial stations will be sufficiently able to negotiate successfully for multicast carriage, it may provide a model for a *requirement* that cable carry the multicast services of all non-duplicating must-carry commercial stations, including up to four multicast services.⁷⁰ It also demonstrates that cable carriage of multicast services is not a prohibitive burden. But any such multicasting carriage arrangement for commercial stations would have to be codified in a Commission regulation because of cable’s incentives, as well as power, to stifle commercial stations’ multicasting services.

⁶⁸ *Turner II*, 520 U.S. at 197 (plurality opinion) (emphasis added).

⁶⁹ *Order* at ¶ 38.

⁷⁰ This assumes that the requirement would apply to each different type of commercial station, *e.g.*, CBS affiliates separate from NBC affiliates.

VI. THE RECORD SHOWS THAT CONCERN ABOUT WHETHER BROADCASTERS' MULTICAST SERVICES WILL BENEFIT THE PUBLIC IS WITHOUT FOUNDATION. INSTEAD OF THWARTING THESE SERVICES ALTOGETHER, THE COMMISSION SHOULD ADDRESS THEM IN THE PENDING PUBLIC INTEREST PROCEEDING.

Multicasting is already enabling broadcasters to offer a wide range of additional programming – including local news, weather, traffic, sports and local government coverage – that has increased the amount and diversity of programming, including locally-oriented programming, available to viewers.

Nevertheless, two Commissioners expressed concern that commercial broadcasters may fail to provide public interest programming in their multicast services. Commissioner Adelstein suggested that these program services are “largely unknown and remain unaccountable to the public,” and he sought “assurance that each programming stream would indeed serve its local community through the imposition of concrete and meaningful public interest requirements.”⁷¹ In doing so, he also raised the possibility that “the government could theoretically be mandating carriage of 24-hour a day infomercials,”⁷² echoing the cable industry’s position that carriage could lead to broadcasters producing multicasts of “infomercials, home shopping, or other low value content.”⁷³ And he noted that the Commission has pending a proceeding to address public interest obligations for digital broadcasting.⁷⁴ Commissioner Copps expressed disappointment that the Commission and broadcasters have failed to engage in

⁷¹ *Order*, Separate Statement of Commissioner Jonathan S. Adelstein (“Adelstein Statement”).

⁷² *Id.*

⁷³ *Order* at ¶ 40 (citing Letter from NCTA to Members of Congress, at 2 (Feb. 7, 2005)).

⁷⁴ *Order*, Adelstein Statement at n.4. *See In re Public Interest Obligations of TV Broadcast Licenses*, Notice of Inquiry, MM Docket No. 99-360 (rel. Dec. 20, 1999).

sufficient dialogue on digital public responsibilities but thought a carriage requirement could be a “boon to localism, diversity and competition” in the case of quality multicast programming.⁷⁵

Despite these concerns, Joint Petitioners are not aware of any stations out of the approximately 300 commercial stations multicasting that are airing primarily infomercials or home shopping programs or any that have intentions to do so. Instead, as the record evidence demonstrated, stations already multicasting and those intending to multicast are providing programming or plan to provide programming that will serve local needs, add diversity or otherwise benefit the public in valuable ways that are not possible with a single analog program service. For example, the NBC television affiliates and the NBC-owned stations are moving forward with a multicast weather channel that provides primarily local and some national extended weather coverage, as well as local alerts (*e.g.*, AMBER and terror alerts) and traffic and travel-related information.⁷⁶ CBS affiliates in San Diego, Orlando, Topeka and Roanoke have stated plans to broadcast local government events.⁷⁷ Belo Corp.’s NBC affiliate in Boise, Idaho, already offers a 24 hour local news service on a multicast channel,⁷⁸ and Gannett is considering offering a multicast channel that would cover local government affairs, including gavel-to-gavel coverage of city council meetings, meetings of local commissions and boards, and local elections.⁷⁹ Other Belo stations offer local weather information on multicast channels.⁸⁰ The New York Times Broadcast Group has said it will expand its news offerings to over-the-air

⁷⁵ *Order*, Separate Statement of Commissioner Michael J. Copps.

⁷⁶ *See* NBC Affiliates Submission at 8.

⁷⁷ *See* CBS Affiliates Submission at 5-6; Trimble Decl. (KFMB); Maldonado Decl.(WKMG); De Lier Decl. (WIBW); Lee Decl. (WDBJ).

⁷⁸ *See* NBC Affiliates Submission at 8-9; NBC Affiliates Submission, Declaration of Jack Sander, President/Media Operations, Belo Corp. ¶ 3 (KTVB) (Jan. 7, 2004) (“Sander Decl.”).

⁷⁹ *See* NBC Affiliates Submission at 9; NBC Affiliates Submission, Dubow Decl. ¶ 7.

⁸⁰ *See* NBC Affiliates Submission, Sander Decl. ¶ 3.

audiences by multicasting a local news channel.⁸¹ It also will be targeting local content to highly localized sectors of their stations' service areas (*e.g.*, particular towns and counties).⁸² Liberty Corp. stations are considering distributing the signals of additional networks to smaller markets that do not receive them, and may provide the signals of Spanish language broadcast networks in markets with high percentages of Spanish speakers.⁸³ In enacting the 1992 Cable Act, Congress noted that broadcast television is "an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."⁸⁴

Yet, the *Order* contained no discussion of the substantial evidence entered into the record of locally-oriented multicasting serving the public interest. At the most, the record provides powerful evidence of an industry committed to utilizing multicasting for purposes that will serve their communities. At a minimum, it offers a snapshot of various broadcasters, often in smaller markets, taking a leading role in making extensive, localized multicast programming a reality. Only Chairman Martin responded directly to the extensive record evidence submitted by local broadcasters, stating that "[t]he record is replete with examples of the free programming services broadcasters want to provide or expand, including local news, local weather, local sports, coverage of local elections and government proceedings, and foreign language programming."⁸⁵

⁸¹ See Augustine/Eoff NBC Decl. ¶ 2; Augustine/Eoff CBS Decl. ¶ 2.

⁸² See NBC Affiliates Submission at 9-10; Augustine/Eoff NBC Decl. ¶ 2; CBS Affiliates Submission at 7; Augustine/Eoff CBS Decl. ¶ 2.

⁸³ See NBC Affiliates Submission, Keelor Decl. ¶¶ 3-4 (Jan. 7, 2004); NBC Affiliates Submission at 9; CBS Affiliates Submission at 6-7. See *supra* n.54.

⁸⁴ 1992 Cable Act, § 2(a)(11). See *Turner I*, 512 U.S. at 648. The record makes clear that multicast services, if not stifled by the cable industry, will serve this function. See, *e.g.*, NBC Affiliates Submission at 7-10; CBS Affiliates Submission at 5-9.

⁸⁵ *Order*, Separate Statement of Commissioner Kevin J. Martin Dissenting in Part and Approving in Part.

All broadcast programming, whether analog or digital, is subject to broadcasters' public interest responsibilities.⁸⁶ Any additional obligations for multicast services should be reasonable and flexible, thereby facilitating broadcaster innovation and adaptability in the new multicast environment. They should not be applied on a programming-service by programming-service basis. An all-news multicast service should not have to include children's programming. And the focus should be on overall service to the community. If one station or multicast channel focuses on local governmental activities, another should be free to focus on local weather or children's programming.

If the Commission believes, as Commissioners Copps and Adelstein did, that resolution of the public interest proceeding should precede resolution of the multicast issue, the proper course is to vacate this *Order* and reconsider this issue after the public interest issues have been decided. The proper response is not to stifle multicasting as this *Order* threatens to do.

* * *

Congress wanted broadcasters to determine on a dynamic basis the best use for their digital spectrum, as has been the case with their analog channels. Individual local broadcasters, on the basis of their community's interests and needs, will assess the best use of their digital spectrum. Many broadcasters will choose a mix of high definition and multicast services as the best way to serve their respective communities. If cable systems can strip multicast services from broadcasters' digital signals, however, many broadcasters will forgo multicasting and instead broadcast in high definition service all the time. Ironically, if this were the case, cable systems would gain very little additional capacity – which is the basis for their insistence on being allowed to strip multicast services. The *Order*, therefore, has broad, intrusive

⁸⁶ See NBC Affiliates Submission at 10.

and undesirable consequences for broadcasters' freedom to choose the programming mix that best serves their communities and is, as a consequence, drastically at odds with the most fundamental principle of broadcast regulation – local licensee discretion.

VII. CONCLUSION

The Commission rushed into deciding the multicast carriage issue while several other important, carriage-related issues remain pending in addition to the public interest issue pending in another proceeding. In doing so, the *Order* makes numerous legal and factual errors and should be reconsidered for, at minimum, the following reasons:

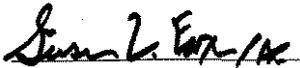
- the *Order* used the wrong legal framework;
- the *Order* did not adequately consider record evidence on the importance of a multicast carriage requirement to advance important governmental interests;
- the *Order* did not consider whether a multicast requirement would advance several other important governmental interests;
- the *Order* did not take into account the showings in the record that the burden on cable systems would be negligible;
- the *Order* did not acknowledge the extensive evidence in the record that private negotiations will not result in adequate carriage of valuable multicast programming and did not address the increased power and incentives of cable systems to deny carriage; and
- the *Order* rushed to a decision about multicast carriage, severing this issue from the many other important digital carriage issues, including the public interest proceeding, and it did so without an up-to-date record.

Respectfully submitted,

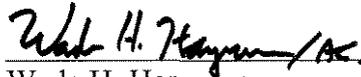


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