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

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

**OPPOSITION OF DISCOVERY COMMUNICATIONS, INC.
TO PETITIONS FOR RECONSIDERATION**

Discovery Communications, Inc. (“Discovery”) submits this Opposition in response to the Petitions for Reconsideration of the Commission’s Second Report and Order and First Order on Reconsideration in the above-captioned proceeding.^{1/} Discovery’s family of U.S. networks includes: Discovery Channel, TLC, Animal Planet, Discovery Health Channel, Travel Channel, BBC America, Discovery Kids, The Science Channel, Discovery Times Channel, Military Channel, Discovery Home Channel, Discovery en Espanol, FitTV, and Discovery HD Theater. Discovery Channel is the United States’ most heavily penetrated cable television network, serving 89 million households across the nation with the finest in informative entertainment.

^{1/} In the Matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules, *Second Report and Order and First Order on Reconsideration*, FCC 05-27 (rel. Feb. 23, 2005) (“*Second Report and Order*”). Petitions for Reconsideration were submitted by Paxson Communications Corporation (“Paxson”), the National Association of Broadcasters/Association for Maximum Service Television, Inc. (“NAB/MSTV”), ABC Television Affiliates Association, CBS Television Network Affiliates Association, NBC Television Affiliates, ABC Owned Television Stations, NBC and Telemundo Stations (the “Network Stations”), the Minority Media Telecommunications Council (“MMTC”) and DIC Entertainment Corporation (“DIC”).

INTRODUCTION AND SUMMARY

There is no need for the Commission to undertake a reevaluation of arguments that already have been considered fully and rejected multiple times. There was extensive evidence in the record to support the Commission's interpretation of the must-carry requirements and its conclusion that denying dual carriage and multicast must-carry rights would best advance Congress's goals.

The broadcasters' arguments that cable operators would not be harmed by multicast must-carry ignore the extensive burden that such requirements would place on programmers. Given the fierce competition for available channel capacity on cable systems, programmers already assume significant risk every time they invest in digital and HD programming with no guarantee of carriage. If broadcasters, who together with their affiliated programming networks already occupy a significant portion of available channel space, are given the right to program even more channels, independent programmers like Discovery will face even greater difficulty obtaining carriage of existing networks and launching new networks.

Faced with such an imbalanced regulatory environment, Discovery's incentive to keep investing in its digital networks would plummet. The loss of compelling content on those networks would diminish consumer interest in the digital transition, and broadcast content could not be expected to compensate consumers for this loss, since broadcasters' incentives to work hard to assemble innovative digital programming would evaporate as soon as they were guaranteed carriage. The lessening of Discovery's voice on the cable system and an accompanying rise in broadcaster-controlled channels would decrease viewpoint diversity to the detriment of subscribers. The Commission correctly concluded that these results would harm, not advance, Congress's goals for must-carry. The Commission should reaffirm its decision in

the *Second Report and Order* and deny the Petitions for Reconsideration.

DISCUSSION

I. THE COMMISSION CORRECTLY CONCLUDED THAT THE ACT DOES NOT MANDATE DUAL CARRIAGE OR MULTICAST MUST-CARRY

The Petitions for Reconsideration rely on arguments already raised and rejected, and on erroneous interpretations of the law. As such, they must be dismissed.

A. The Petitions Raise No Arguments Warranting Reconsideration.

None of the petitions presents an argument warranting reconsideration of the *Second Report and Order*. Rather, each presents only arguments that have already been considered and, after examination of a thorough and lengthy record, rejected -- in some cases, twice.

Several Petitioners attack the Commission's conclusion that the Act does not mandate dual carriage of both analog and digital signals during the transition.^{2/} This is the second time the Commission has been asked to reconsider this decision, which was originally made in 2001. The Commission noted in the *Second Report and Order* that "[t]he arguments that the parties have presented in support of a statutory reading to require dual carriage essentially are no different from those that have previously been submitted, considered and rejected in the *First Report and Order*."^{3/} The same could be said of this second request for reconsideration. Petitioners do not present any arguments in favor of dual carriage that have not already been evaluated at length and found unpersuasive.

Similarly, Petitioners' requests that the Commission reconsider its decision not to impose multicast must-carry requirements by reevaluating its definition of "primary video" reiterate the

^{2/} *Second Report and Order* ¶¶ 11-13.

^{3/} *Id.* ¶ 13.

same arguments already made and rejected.^{4/} That Petitioners do not agree with the result is no reason for the Commission to be required to devote scarce time and resources to evaluating the same issue over and over again for a period of five years.^{5/} The Petitions should be dismissed for this reason alone.^{6/}

B. The Commission’s Interpretation of “Primary Video” Was Reasonable.

If the Commission determines that it should once again consider these issues, then it should reject the petitions for legal error. Petitioners’ arguments against the Commission’s conclusion that the statutory term “primary video” does not require multicast must-carry are

^{4/} See *Second Report and Order* ¶¶ 30-34 (acknowledging broadcasters’ arguments that the term “primary video” was meant to refer to all video included in the digital signal (Paxson’s current argument), or all video provided free of charge to subscribers (NAB/MSTV’s current argument), but nonetheless finding no multicast requirement because Congress “did not expressly compel a particular result with respect to the application of ‘primary video’ to digital television generally and multicasting specifically”).

^{5/} Ironically, while the broadcasters request a “fresh look” at the issues they have raised and the Commission has rejected repeatedly, they simultaneously complain that the Commission is failing in its duty to “finally resolve” these issues. See, e.g., Paxson at 2-5. Contrary to Paxson’s assertions, the Commission has not left the question of digital multicast must-carry obligations “open” simply by stating that its decision is based on the “current record” before it. All FCC decisions, by definition, are based on the “current record,” but that does not suggest an intent to continuously revisit an issue. Indeed, the only reason these questions continue to be discussed is that the broadcasters refuse to accept the result.

^{6/} See, e.g., Glendale Electronics, Inc., File No. 9806D142824, *Order on Reconsideration*, 05-523, ¶ 11 (rel. Mar. 2, 2005) (“It is well-settled Commission policy that petitions for reconsideration will not be granted merely for the purpose of again debating matters on which the Commission has once deliberated and spoken.”); Revision of Part 15 of the Commission’s Rules Regarding Ultra-Wideband Transmission Systems, ET Docket No. 98-153, *Second Report and Order and Second Memorandum Opinion and Order*, FCC 04-285, ¶ 94 (rel. Dec. 16, 2004) (“Indeed, SIA presents no new information to substantiate its claims but only continues to argue against the Commission’s decision. Accordingly, SIA’s current Petition for Reconsideration can be considered repetitious of its earlier Petition for Reconsideration of the 1st R&O and this petition is therefore dismissed.”); Communications and Control, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 13448, 13451 ¶ 10 (2003) (“The Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented . . . It is settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.”).

without merit. The Commission's interpretation of "primary video" best effectuates Congressional intent.^{7/}

There was extensive evidence in the record to support the Commission's conclusions that (1) "primary video" was not meant to cover all possible use of a digital signal, but rather Congress used the term to signify that some video is "primary" while other is not, and (2) because the Act did not specify which video was "primary," it left that decision to the Commission.^{8/} As Discovery has argued, this interpretation finds support in the legislative history of Sections 614 and 615.^{9/} Because Congress meant must-carry to preserve existing broadcast options and promote source diversity, not to serve as a tool for continuously increasing broadcast network wealth by guaranteeing them multiple new businesses, "primary video" is best interpreted (indeed, Discovery would argue can *only* be interpreted) to mean carriage of one video programming stream. It would be irrational to interpret "primary video" to mean "multiple video," particularly when unnecessary to advance either of the goals Congress stated the language was meant to achieve.

Broadcaster arguments that the Act is not ambiguous and leaves no room for Commission interpretation are baseless. Indeed, the broadcasters themselves cannot agree what the language they all assert is "plain" requires -- some arguing it requires carriage of all free video

^{7/} Although Discovery believes the Commission's decision is fully supported by its statutory analysis and did not need to reach the constitutional questions presented (*see* n.11, *infra*), Discovery also agrees with the Commission that dual carriage and multicast must-carry requirements would violate the First Amendment rights of cable programmers by burdening their right to speak to their intended viewers. *Second Report and Order* ¶¶ 15-25.

^{8/} *Id.* ¶¶ 33-44.

^{9/} *See, e.g., Carriage of Digital Television Broadcast Signals*, CS Docket Nos. 98-120, 00-96 and 00-2, Ex Parte Letter of Discovery Communications, Inc. to FCC Chairman and Commissioners, dated November 18, 2003, at 3-4. *See also Second Report and Order* ¶ 36 (noting legislative history indicates that "the must carry provisions were not intended to cover all uses of a signal").

programming streams,^{10/} others arguing it requires carriage of “all of a broadcaster’s signal except certain material that Congress specified,^{11/} and others arguing it must be read to dramatically expand must-carry rights to currently unqualified stations.^{12/} However, just because broadcasters can envision different interpretations of what video might be primary -- interpretations they consider preferable -- does not make the Commission’s reasonable interpretation erroneous.

Contrary to the broadcasters’ arguments, moreover, whether or not broadcasters agree or are made to provide more local programming does not control the extent of their must-carry

^{10/} Paxson at 12 (distinguishing between mandatory carriage of all free video content and “ancillary or supplementary services” exempt from mandatory carriage).

^{11/} Network Stations at 2. The Network Stations’ attempt to characterize the Commission’s multicast decision as based entirely on a constitutional argument rather than a statutory analysis (Network Stations at 3) misconstrues the discussion contained in the *Second Report and Order*. See *Second Report and Order* ¶¶ 34-36. That the Commission took constitutional arguments into account when selecting the interpretation it believed most accurately reflected Congressional intent does not mean multicast must-carry was rejected on the basis of constitutional arguments. The Commission, when carrying out its duty to interpret the Act, is charged with selecting the interpretation that best avoids any constitutional problem. See *WXTV License Partnership, G.P., Memorandum Opinion and Order*, 14 FCC Rcd 6482, 6501 ¶ 46 (1999) (the Commission “has the obligation to construe statutes it enforces in a constitutional manner.”); see also *Edward J. DeBartolo Corp. v Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); *Williams v. Babbitt*, 115 F. F.3d 657 (9th Cir. 1997), *cert. denied sub nom. Kawerak Reindeer Herders Association v. Williams*, 523 U.S. 1117 (1998) (“[J]ust as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so. At the core of *DeBartolo* lies the presumption that, if Congress means to push the constitutional envelope, it must do so explicitly.... *DeBartolo* does constrain agency power by precluding some policy options because they raise serious constitutional questions, even though they may ultimately turn out to be constitutional.”).

^{12/} MMTC argues that the Commission should interpret the term “primary video” so as to “foster minority ownership and strengthen America’s only television broadcasters that, by definition, must provide local service -- Class A LPTVs.” MMTC at 1. While Discovery does not address MMTC’s arguments fully here, it notes that LPTV must-carry rights are defined by statute. See 47 U.S.C. §§ 614(a) (carriage of low power stations required only “as provided by this section”), 614(b)(2), (c) (specifying conditions of carriage). The relief MMTC seeks is beyond the Commission’s authority to grant.

rights.^{13/} Despite the broadcasters' insistence that the two issues are legally tied together,^{14/} the requirements of Sections 614 and 615 cannot be expanded beyond the primary video stream by adding local content to one or more additional programming streams. That localism was the predicate for Congress's decision to confer must-carry rights^{15/} does not mean that all local programming is entitled to must-carry.^{16/}

II. MULTICAST MUST-CARRY WOULD SLOW THE DIGITAL TRANSITION AND HARM SOURCE DIVERSITY

The Petitions for Reconsideration all argue against multicast must-carry requirements based on their assertion that cable operators would not be harmed.^{17/} None addresses the significant harm that a multicast must-carry requirement would inflict on cable programmers, despite extensive evidence in the record on this point, and none addresses the fact that depriving programmers of a fair opportunity for carriage will inhibit investment in digital content and thereby retard the digital transition.

^{13/} Paxson at 3-8; MMTC at 3-5; NAB/MSTV at 21-24.

^{14/} Paxson at 3-4; Network Stations at 2; NAB/MSTV at 22-24.

^{15/} 1992 Cable Act § 2(a)(10) (“A primary objective and benefit of our Nation’s system of regulation of television broadcasting is the local origination of programming. There is a substantial government interest in ensuring its continuation”); (a)(11) (“Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate”).

^{16/} In any event, while Discovery does not take a position on what the local programming requirements for broadcasters should be, it notes that the petitions do not suggest that broadcasters intend to undertake any meaningful obligations in this area. *See, e.g.*, Paxson at 5-7 (arguing that broadcasters’ local programming obligations should be imposed by means of a “basic voluntary programming code,” and that broadcasters should be allowed to place all local programming on one channel rather than be subject to local programming obligations on all programming streams).

^{17/} Network Stations at 15-16; Paxson at 14-16; NAB/MSTV at 11-15. In addition to the extensive harm to cable programmers that this argument ignores, the broadcasters are wrong. As the Commission recognized, the record evidence demonstrated extensive harm to cable operators that would result from the expansion of must-carry requirements. *See Second Report and Order* ¶ 32 (summarizing the arguments made by NCTA, Time Warner and other cable operators, as well as the analysis of Professor Lawrence H. Tribe that concluded cable operators would suffer extensive harm from multicast must-carry requirements).

A. Multicast Must-Carry Requirements Would Harm the Digital Transition.

The broadcasters claim that without guaranteed carriage, they cannot risk investing resources in digital programming.^{18/} However, this is precisely the risk that Discovery faces -- and assumes -- every day. The necessary investment and efforts to develop Discovery's digital networks and make them widely available to subscribers require a substantial dedication of resources. Digital networks targeted to particular themes or audiences are particularly resource-intensive because a large portion of the programming on those networks must be originally produced, rather than acquired. If those networks cannot compete fairly for carriage based on the merits of their programming, however, Discovery will have significantly reduced incentives to continue making this tremendous investment and taking these risks. These types of expenditures of time, money and energy -- which under the best circumstances, often do not bring a return for a number of years -- simply cannot be justified when the end result is wholly unrelated to the quality or popularity of the programming.

In a multicast must-carry environment, Discovery will have to reexamine whether it makes business sense to continue investing in digital and HDTV programming given the imbalanced negotiating leverage in the marketplace. If Discovery and other independent programming networks begin pulling resources away from their digital networks, less quality digital content will exist in the marketplace, consumer interest in digital programming will wane, and the digital transition will suffer.

Nor will consumers be left with a quality digital programming product from broadcasters. Broadcasters' claims that multicast must-carry will incent them to invest in the digital transition are contrary to common sense. If broadcasters know that carriage of their new programming

streams is guaranteed, their incentive to produce an innovative, high-quality product will drop dramatically. Only by requiring broadcasters to compete for distribution under normal market terms will the Commission best ensure development of compelling offerings that attract consumers and incent them to embrace the digital transition.

Multicast must-carry would further harm the transition because it will result in digital spectrum -- which Congress meant to promote high-definition television, a truly new and different consumer offering -- being used to provide thousands of standard-definition broadcast channels. If digital programming does not provide something new from a consumer perspective, consumers will not appreciate the value of the transition and will be unwilling to accept the costs that accompany it.

B. Multicast Must-Carry Requirements Would Harm the Diversity of Voices.

If Discovery and other independent networks cannot gain access to cable subscribers, diversity on the cable system will be significantly reduced. Given the constraints on cable capacity, Discovery already has no guarantee of carriage even of its most popular networks. Its digital networks face even greater risk. Multicast must-carry requirements would hinder Discovery's attempt to speak to its subscribers even further.

While the broadcasters insist that cable systems have unlimited capacity to carry any programming they want,^{18/} that is not the case. Available programming options far exceed available channel space. As a result, despite their high quality and popularity with viewers, Discovery's networks must compete vigorously to obtain carriage. For example, in the Manhattan market, Discovery has been unable to gain carriage on the expanded basic level of

^{18/} NAB/MSTV at 17-18.

^{19/} Network Stations at 15; NAB/MSTV at 9-16.

service of either Animal Planet or the Travel Channel, two of Discovery's leading and consistently highly valued networks,^{20/} due to large numbers of broadcasters on the system occupying extensive channel space.^{21/} Yet these are the very broadcasters that are claiming they need even greater government incentives to make investments in programming worthwhile.

Unlike broadcast-affiliated programming networks that force their way onto cable systems through retransmission consent leverage, Discovery must compete for channels with all other new programming networks and grow a subscriber base slowly. Across the country, statistics show that gaining carriage is not as easy for quality programmers as the broadcasters portray. Although Discovery Channel now reaches 89 million subscribing U.S. households, its other networks have not achieved this level of penetration. The Travel Channel, for example, reaches only 80 million households and Discovery Kids reaches 38 million, even though both are popular with viewers.^{22/} Discovery's efforts to secure carriage deals for its new Spanish-language networks (discussed below) have been hindered because of capacity constraints on cable systems.

Despite these difficulties, since 1996, Discovery has invested over \$500 million to develop and launch digital channels targeted to particular audiences. Today, Discovery offers seven such networks: Discovery Times Channel, Discovery Home Channel, Discovery Kids,

^{20/} In the 2005 Beta Research Brand Identity of Basic Cable/Broadcast Networks Study, Animal Planet was ranked as the #2 family-oriented network and Travel Channel earned top ten rankings in key measures including distinctive, fun and informative. In the most recent EquiTrend brand study, Animal Planet and Travel Channel ranked among the top 20 television network brands, and the number of Discovery Communications brands in the study exceeded all other media companies.

^{21/} See Letter from Bill Goodwyn to W. Kenneth Ferree, *In the Matter of A la Carte Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207 (filed Oct. 19, 2004)(noting that 60 percent of the programming on the tier where Discovery is excluded is broadcast-affiliated and the total line-up, including digital programming, is 43 percent occupied by broadcast stations and their affiliated networks).

^{22/} See n.20, *supra* & n.26, *infra*.

The Science Channel, Military Channel, Discovery en Espanol and FitTV. In 2002, in response to the Commission's calls for high-definition programming, Discovery created the first 24-hour, seven days-a-week high definition channel, Discovery HD Theater. All of these were developed and launched at great cost without any government assurances of success. But if broadcasters' multiple digital programming streams were required to be carried, these networks would face a substantial risk of being dropped or being moved to substantially less penetrated tiers.

The broadcasters' claim that multicast must-carry requirements would increase diversity is not believable.^{23/} As noted above, much of cable system line-ups are already occupied with broadcast signals and broadcast-affiliated programming networks that are able to use retransmission consent to force their way onto the system. The "Big Four" broadcast networks control ten of the fifteen top-rated cable channels and twelve of the top twenty most widely distributed networks.^{24/} Broadcasters own over 50 national networks and over a dozen regional networks. Their multicast streams will speak with one voice.

The only evidence of independent voices broadcasters offer is a purported intent to enter into carriage agreements with programmers that have been rejected by cable systems.^{25/} Even if true -- which seems unlikely, given the broadcast networks' affiliation with large content companies such as News Corp. and Disney -- this would offer little value to cable subscribers. Diversity would not be enhanced by forced carriage of a voice that already has lost in the

^{23/} NAB/MSTV at 20-25; Network Stations at 13-14; Paxson at 16-17.

^{24/} In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, 2005 FCC LEXIS 634 (rel. Feb. 4, 2005) at 147-148, Tables C-6, C-7.

^{25/} Paxson at 16; NAB/MSTV at 21-24. The Network Stations rely only on the argument that a single owner can present different viewpoints. Network Stations at 14.

marketplace, particularly when it comes at the expense of independent programming networks that subscribers value -- like those Discovery offers.

Broadcasters' purported interest in serving minority interests is also not a reason to impose multicast must-carry requirements. Many programmers, including Discovery, have created digital offerings specifically targeting minority audiences. Discovery En Espanol, for example, which launched in 1996, offers Spanish-speaking viewers the very best in real world entertainment. Discovery has put its international expertise to work and created culturally significant content that features a mix of original productions and popular U.S. Latin American and other programs created specifically to serve the culture of the U.S. Hispanic audience. In June 2005, Discovery plans to expand its Spanish language offerings by launching two additional networks for Spanish-speaking viewers. Discovery Travel and Living (Viajar y Vivir) will provide an eclectic mix of programming that explores travel, food, design and decor, and Discovery Kids En Espanol, which will focus on three viewing audiences (preschoolers, tweens and families), will provide fun, high-quality programs that help inspire and satisfy curiosity.

The response to Discovery's digital networks has been quite positive.^{26/} However, despite the high-quality, innovative content of those networks, if cable operators are forced to carry multiple multicast channels targeted at the same minority group or audience, Discovery's digital networks could get dropped to allow the operator to diversify programming options, even if the cable operator believes subscribers would prefer the Discovery product. For example, DIC states that it "intends" to create a digital children's programming service using broadcast digital

^{26/} This year, Discovery Kids Channel won three Parents' Choice awards. Discovery Times Channel has won multiple industry awards for its breakthrough programming from award-winning filmmakers. In the most recent EquiTrend brand study, Discovery Home Channel, Discovery Times Channel and The Science Channel all ranked among the top 25 media brands, and Discovery Home Channel, Discovery Times Channel and The Science Channel all ranked among the top 20 TV brands.

spectrum and that should multicast must-carry rights be established, it would make the necessary investments and “has the capacity to begin operations quickly.” Discovery Kids, however, is *already* available in the U.S. market. And while DIC states it will be advertiser-supported, Discovery Kids has chosen to make its READY SET LEARN! programming block commercial-free. Discovery Kids’ programming already has won two Daytime Emmy Awards (after receiving a record ten nominations) and many new series are planned for 2005. But despite this positive record, Discovery Kids faces a real risk of being dropped if cable operators are forced to carry another programming stream targeted at children’s programming (especially one that is free), even if the Discovery product is far superior.

The only certain result of giving broadcasters the right to claim a percentage of capacity every time technology allows for increased compression is that capacity will be occupied by more and more broadcast channels of questionable value, consumer preferences will be increasingly marginalized, and new voices will have trouble emerging to speak in the marketplace in response to consumer needs and interests. Quality independent programming will be replaced by government-mandated broadcast programming, no matter what its merit. The best way to ensure true diversity of voice is to let all networks compete for available channel space to the greatest extent permissible under law.

CERTIFICATE OF SERVICE

I, Christopher R. Bjornson, hereby certify that on this 26th day of May 2005, I caused copies of the foregoing "Opposition of Discovery Communications, Inc. to Petitions for Reconsideration" to be sent to the following by electronic mail:

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