

**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)

**REPLY OF
PAXSON COMMUNICATIONS CORPORATION**

Paxson Communications Corporation ("PCC") hereby submits this Reply to the Oppositions to the Petitions for Reconsideration in the above-referenced docket.¹

INTRODUCTION

As PCC showed in its Petition,² the Commission's reconsideration of its *Multicast Order* is legally and factually necessary to: (1) conform the Commission's rules to Congress's unequivocal command that all local broadcast signals be carried in their entirety; (2) fulfill a number of compelling government and public interests; and, (3) ensure that over-the-air broadcast television retains its capacity to serve the public interest following the DTV transition. There has been more than enough ink spilled about whether Section 614 requires full digital multicast must-carry.³ PCC firmly believes that it does, but that issue may ultimately be decided by the courts if the Commission continues to ignore the plain language of the 1992 Cable Act.

¹ Petitions for Reconsideration of Action in Rulemaking Proceedings, *Public Notice*, Report No. 2706 (rel. May 3, 2005); Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, *Second Report and Order and First Order on Reconsideration*, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005) (the "*Multicast Order*").

² Petition for Reconsideration of Paxson Communications Corporation, MB Docket No. 98-120, filed Apr. 21, 2005 ("PCC Petition").

³ 47 U.S.C. § 544.

In any case, the Commission has found that the language of Section 614 would support full digital multicast must-carry even if it does not require it.⁴ Thus, the heart of the issue on reconsideration consists of two questions: (1) whether full digital multicast must-carry will further compelling governmental and public interests; and (2) whether only full digital multicast must-carry will ensure that Congress's Supreme Court-approved vision of a vibrant, full-throated over-the-air broadcasting system continues in the digital age. The answer to both of these questions is unequivocally yes.

As described below, Congress and the Commission have made considerable efforts to promote digital children's television, digital public interest programming, broadcast localism, spectrum efficiency, and the DTV transition. All these compelling government and public interests would be furthered by full digital multicast must-carry, and, in fact, will be stifled without it. Through these policy initiatives, Congress and the Commission have created a roadmap that PCC has shown will lead to an explosion of diverse local programming if the Commission provides an outlet for that programming through full digital multicast must-carry. On the other hand, all these efforts and each of these policies will come to naught if the *Multicast Order* stands and broadcasters are left with no viable means of providing video services on their multicast program streams.

The parties filing oppositions largely ignore the tremendous public benefits of full digital multicast must-carry, preferring to argue arcane procedural points about repetitious filings⁵ or to question the wisdom of Congress's decision to grant must-carry to broadcasters

⁴ *Multicast Order*, ¶¶ 33-35.

⁵ See, e.g., Time Warner Cable's Opposition to Petitions for Reconsideration, CS Docket No. 98-120, filed May 26, 2005, at 1; Opposition of Comcast Corporation to Petition for Reconsideration, CS Docket No. 98-120, filed May 26, 2005, at 4-6.

and not to cable-only channels.⁶ Indeed, a few cable operators even trot out the old saw that they have insufficient cable capacity to carry broadcasters' multicast program streams,⁷ but that myth was put to bed a long time ago⁸ and was always silly given that the Supreme Court-approved Congress's 33% statutory cap on must-carry bandwidth.⁹ In addition, despite the numerous public and governmental interests demonstrated by broadcasters throughout this proceeding, cable operators and cable programmers line up once again to repeat their claim that full digital multicast must-carry would not further any compelling government or public interest.

But the Commission cannot ignore the public interest and it cannot ignore the fundamental governmental interests that Congress has directed it to further through its regulation of broadcasting and cable television. Unfortunately, the *Multicast Order* finds the Commission doing exactly that,¹⁰ and the result is an incoherent policy that is far removed from the vision Congress enacted through the must-carry provisions of the 1992 Cable Act. The Commission should maximize this opportunity to advance these significant public interests by rejecting the oppositions and reconsidering its denial of broadcasters' full digital multicast must-carry rights.

⁶ See Courtroom Television Network, LLC's Opposition to Petitions for Reconsideration, CS Docket No. 98-120, filed May 26, 2005, at 6-11.

⁷ See, e.g., Opposition of the National Cable and Telecommunications Association, CS Docket No. 98-120, filed May 26, 2005, at 20-22; Opposition of Comcast Corporation to Petitions for Reconsideration, CS Docket No. 98-120, filed May 26, 2005, at 12-14.

⁸ See, e.g., *Multicast Order*, Separate Statement of [Then-] Commissioner Martin.

⁹ *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 187, 216 (1997) ("*Turner II*").

¹⁰ *Multicast Order*, ¶¶ 37-41.

I. THE PREPONDERANCE OF PUBLIC AND GOVERNMENTAL INTERESTS DEMAND FULL DIGITAL MULTICAST MUST-CARRY.

As the Commission knows, must-carry originally was enacted to ensure a strong, vibrant over-the-air broadcasting system that delivers diverse programming designed to serve local interests and that reaches all viewers regardless of whether they receive their programming over-the-air or by cable.¹¹ Congress reserved one-third of the capacity of most cable systems for must-carry to ensure that over-the-air broadcasting remains a viable alternative for viewers, thus promoting the widespread dissemination of information from a multiplicity of sources.¹² And as the Supreme Court recognized, one of the reasons Congress has shown this special solicitude for over-the-air television broadcasting is precisely because of the historically essential role that it has played in the national communications system and in the life of the nation.¹³ Indeed, the Supreme Court left no doubt where it stood on this subject, stating that:

Though it is but one of many means of communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.¹⁴

It is as true today as it was the day the Supreme Court upheld Section 614 that only over-the-air broadcasting, coupled with must-carry of all local broadcast signals, can fulfill Congress's avowed interest in "preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe

¹¹ See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 649 (1994) ("*Turner I*"). As DBS became an increasingly important conduit for delivering video programming, Congress enacted must-carry requirements for those providers through the Satellite Home Viewer Improvement Act of 1999. Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

¹² *Turner I* at 649. The one-third limitation was designed to permit both broadcasters to thrive while permitting cable operators to continue to grow.

¹³ *Turner II* at 216.

¹⁴ *Id.* at 194.

to cable.”¹⁵ And it is equally true that the only way to uphold these values and congressionally-recognized governmental interests is by construing the must-carry law to require full digital multicast must-carry.¹⁶

Indeed, without full digital multicast must-carry, much of Congress’s and the Commission’s broadcast television policy would founder. Full digital multicast must-carry is not only consistent with, but is actually the only interpretation of the Cable Act that furthers the following interrelated Congressional policies designed to further compelling governmental and public interests.

1. Children’s Programming. Congress directed the Commission to adopt children’s programming rules¹⁷ and the Commission has extended these rules to television stations that are multicasting.¹⁸ By doing so, both Congress and the Commission affirmed that promoting children’s programming is a vital governmental and public interest. Surely, if the Commission judged multicast channels to be within the class of channels on which Congress chose to promote children’s television, then it hardly can deny that ensuring all viewers have access to these channels “on an equal footing” is the only way to guarantee fulfillment of the compelling governmental and public interests underlying the children’s television statute and rules.

¹⁵ *Id.*

¹⁶ As Chairman Martin pointed out in his Separate Statement, “Finally, it should be kept in mind that this decision will have the most adverse impact on small, independent, religious, family-friendly and minority broadcasters. . . . Must carry was designed for these smaller broadcasters that in the past have been unable to negotiate with larger cable operators. These broadcasters play an important part in their communities, and we should not be hindering them from investing in new, free programming for viewers.”

¹⁷ 47 U.S.C. § 303a.

¹⁸ Children’s Television Obligations of Digital Television Broadcasters, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 22943, 22949-56 ¶¶ 15-35 (2004).

2. Public Interest Programming. The Commission has been considering the public interest obligations of DTV broadcasters for over 6 years, though it has yet to conclude those proceedings.¹⁹ The proposed public interest requirements flow from Congressional directives that the Commission require television broadcasters to operate their stations in the public interest.²⁰ To fulfill Congress's intent, the Commission must finally issue public interest regulations for DTV broadcasters – sooner rather than later²¹ – and it must ensure that whatever programming the new regulations require is available to all television homes “on an equal footing.” The Commission's DTV public interest programming requirements should and likely will apply to multicast channels. Thus, the only way to ensure that all viewers will have access to this public interest programming will be to ensure full digital multicast must-carry.

3. Broadcast Localism. In line with its Congressionally-mandated responsibilities described above, the Commission currently is conducting a proceeding to determine what constitutes “localism” for television broadcast stations and to ensure that broadcasters are fulfilling their local obligations.²² Here again, whatever requirements emerge from this proceeding should and likely will apply to broadcasters' multicast channels. It plainly is in the government's and the public's interest to be sure that however localism is defined and implemented for multicast channels, all viewers have equal access to the benefits that result.²³

¹⁹ See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *Notice of Proposed Rulemaking*, 15 FCC Rcd 19816 (2000); Public Interest Obligations of TV Broadcast Licensees, *Notice of Inquiry*, 14 FCC Rcd 21633 (1999).

²⁰ 47 U.S.C. § 309(k). This public interest requirement goes back to the Radio Act of 1927, 44 Stat. 1162, and was carried over by Congress in the Communications Act of 1934, 48 Stat. 1064.

²¹ PCC Petition at 5-8.

²² See Broadcast Localism, *Notice of Inquiry*, 19 FCC Rcd 12425 (2004).

²³ As the Supreme Court noted, one of Congress's chief goals in mandating must-carry was to preserve the local origination of programming. *Turner II*, 521 U.S. at 192-93.

4. The DTV Transition. Congress appears ready to end the DTV transition by December 31, 2008.²⁴ Once the transition is complete, DTV signals will be the only broadcast signals available to viewers. This transition will not be successful until all viewers have access to free over-the-air DTV programming.²⁵ Congress has directed, however, that the Commission make whatever technical adjustments are necessary to ensure that carriage of local broadcast signals continues after the transition.²⁶ That requires the Commission to replicate the analog world – where viewers receive all free over-the-air broadcast programming – in the digital world – where receiving all digital programming will mean receiving all multicast program streams. Without multicast must-carry it is unlikely that most viewers will realize or wish to undertake the necessity or expense of buying an antenna and digital converter (in addition to their cable connections) to view multicast programming.²⁷ Accordingly, the only way to further the governmental and public interest in universal access to free over-the-air programming following the DTV transition is to ensure full digital multicast must-carry.

5. Spectrum Efficiency. Digital technology will allow broadcasters to multicast up to six channels over-the-air using the same amount of spectrum as currently used by the single-channel analog broadcasters. That means when a broadcaster is broadcasting its flagship programming using a standard definition signal – as many broadcasters will most, if not all, of the time – as much as 5/6 of that station's spectrum will either be unused, used to

²⁴ See Bill McConnell, *Dual Carriage Revisited: Draft Bill Sets Digital Transition for 2009*, BROADCASTING & CABLE, May 30, 2005, at 14.

²⁵ Under current law, the transition would be extended where the percentage of households with access to over-the-air DTV is below 85%, 47 U.S.C. § 309(j)(14)(B), but the coming legislation is expected to eliminate that exception. See McConnell.

²⁶ 47 U.S.C. § 614(b)(4)(B).

²⁷ Indeed, the Supreme Court itself has acknowledged and accepted Congress's finding that expecting viewers to maintain both a cable and antenna hookup is unreasonable. *Turner II*, 521 U.S. at 220-21.

broadcast services that are not free over-the-air television, or if so used, seen by few if any viewers. To avoid this tremendous waste of spectrum, it clearly is in the public's and the government's interest to require that multicast channels used for free over-the-air programming also be carried by cable.

These broad, structural, policy-based supports for multicast must-carry in Congressional Acts and Commission rules are separate from and in addition to the substantive positive impact on television programming that PCC and other broadcasters have pointed out in numerous submissions over the past six years. Multicast must-carry would serve Congress's values like localism and diversity by vastly expanding the amount of programming broadcasters could provide. For the first time in years, large amounts of airtime would become available for innovative local news, weather, and sports services. Programming aimed at minority, foreign-language, and other underserved audiences finally would gain the outlets that have eluded them due to limited broadcast time and the high start-up costs associated with founding new cable programming networks. Moreover, full digital multicast must-carry rights would accelerate the DTV transition by giving broadcasters and the viewing public the incentives they need to complete the transition as quickly as possible. This represents the highest and best use of the spectrum, as the Commission was directed to accomplish by the Communications Act.

The combination of structural and substantive governmental and public interests that full digital multicast must-carry would serve is truly astonishing, giving the lie to the cable industry's arguments to the contrary and making the Commission's decision to deny broadcasters' rights entirely unreasonable.

II. CABLE PROGRAMMERS' CLAIMS OF COMPETITIVE HARM AND CABLE OPERATORS CLAIMS OF BANDWIDTH SCARCITY PROVIDE NO BASIS FOR DENYING FULL DIGITAL MULTICAST MUST-CARRY.

Both the cable operators and programmers also continue to argue that the cable industry will suffer competitive harm if multicast must-carry is adopted, but neither has identified even a single Congressional pronouncement that the Commission should promote cable subscription or access to cable programming at the expense of access to free over-the-air stations. Indeed, the proliferation of non-local satellite delivered channels in no way furthers Congress's policies and has the potential to defeat them if cable channels keep broadcast channels that do offer local, children's, and/or public affairs programming off cable systems and hidden from most viewers.

Moreover, the ideas that (1) cable operators' business decisions create an irresolvable First Amendment issue and that (2) the bandwidth limitations that result from their business decisions somehow make their systems "channel-locked" and their bandwidth "scarce" are the two Great Red Herrings of this proceeding. As cable operators devote less and less of their bandwidth to traditional video services and more and more of their bandwidth to blatantly obscene hard-core pornography²⁸ and non-video services like telephone and high-speed Internet, they are leaving less and less room on their systems for both broadcast and cable programming. Cable operators are not permitted to shirk their obligations merely because they would prefer to introduce their new non-video and pornography services. If, after fulfilling their must-carry duties, they choose to drop non-pornographic cable channels, neither broadcasters nor the must-carry statute are to blame.²⁹

²⁸ See, e.g., David Lazarus, *Comcast Cashing in on Pornography*, S.F. CHRONICLE, Feb. 13, 2004, at B-1.

²⁹ When cable operators built their modern systems, they were aware that they could be required to make up to one third of their expanded channel capacity available to over-the-air broadcasters, so their claim that broadcast use of their bandwidth constitutes a taking is meritless.

By seeking the Commission's blessing for their refusal to carry multicast programming, the cable industry is seeking Commission approval for a business decision – refusing to carry broadcast programming in favor of cable programming and other services – that Congress foreclosed for a good reason. Even with diminished subscriber levels and DBS competition, cable operators remain the chief gatekeepers to local television households and they continue to hold the key to the future of free over-the-air broadcasting in America. Only the major networks and their affiliates have the market power to induce cable operators to enter into retransmission consent agreements for carriage of multicast digital programming. So, without must-carry, the vast majority of broadcasters will be relegated to broadcasting a single stream of digital programming in an increasingly crowded video marketplace. Consigning broadcasters to this fate so that cable operators can continue to manipulate local video markets is contrary to Congressional law and Commission policy, but that will be the result if the Commission affirms the *Multicast Order*.

CONCLUSION

Full digital multicast must-carry is demanded by Section 614 of the Act. Additionally, the preponderance of public and governmental interests, including children's programs, public interest programming, broadcast localism, and the DTV transition, demand full digital multicast must-carry. Accordingly, the Commission must reconsider its decision in this proceeding and order full digital multicast must-carry without further delay.

Respectfully submitted,

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