

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 05-255
Competition in the Market for the)	
Delivery of Video Programming)	

REPLY COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

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Dated: October 11, 2005

SUMMARY

As in years past, the most important issue broadcasters face as competitors in the market for the delivery of video services is anti-competitive conduct by cable operators who steadfastly refuse to carry most broadcasters' multicast DTV program streams without an FCC mandate. Broadcasters have spent billions of dollars on the government-mandated DTV transition and 90% of broadcasters are on the air with DTV. But no one is watching because most customers now receive their television programming through cable, cable operators have committed themselves to carrying only those DTV signals that they are forced to carry by government mandate or the few broadcasters with the clout to force carriage, and the FCC has failed to require cable operators to carry out their statutory duty by carrying the entirety of broadcasters digital programming, including multicast program streams.

Indeed, the biggest single obstacle to robust competition in the market for delivery of video programming is the Commission's denial, earlier this year, that the Cable Act requires full digital multicast must-carry. That conclusion was plainly wrong and it contradicts the plain language of the statute. Moreover, it ratifies the systematic and anticompetitive exclusion of broadcasters' DTV signals from cable systems that the cable industry has made its collusive policy since the DTV transition began. The result of this cable operator intransigence and FCC inaction is a greatly weakened over-the-air broadcasting system that cannot play either the competitive role or the public interest role that Congress always has envisioned.

At this point, broadcast television is a compromised competitor in the video programming market and the only way to restore broadcasters' competitive position is to

require full digital multicast must-carry. Most recently there has been a great deal of talk that Congress will require some form of multicast must-carry as part of its DTV transition legislation. **Perhaps Congress will adjust those requirements in new legislation, but the fact is that Congress already has ordered full digital multicast must-carry through Section 614 of the 1992 Cable Act!**

Congress entrusted the Commission with the task of promoting competition in the video delivery market and of protecting and preserving the historic role that broadcasters have played both as competitors and as providers of essential information and entertainment to generations of Americans. Unless it ensures that cable operators will carry broadcasters' full digital multicast signals, it will fail in both of those tasks. Accordingly, the Commission should recognize the evidence in this proceeding demonstrating that robust competition in the market for video programming requires full digital multicast must-carry and commit itself to moving forward with granting petitions for reconsideration requesting reversal of the *Multicast Order*.

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Paxson Communications Corporation (“PCC”)¹ hereby files these reply comments in response to the Commission’s *Notice of Inquiry* in the above-captioned proceeding.²

INTRODUCTION

As common sense and many of the comments in this proceeding show, any discussion of competition in the market for delivery of video programming or the role of broadcast television in that market leads inevitably to the critical need for full digital

¹ PCC owns and operates the largest broadcast television station group in the U.S., as measured by the number of television households in the markets PCC stations serve. PCC’s 60 owned or operated stations reach the top 20 and 40 of the top 50 U.S. Markets, and programming on PCC stations is available to 84% of prime time television households in the country. PCC recently rebranded its emerging programming network as i to emphasize the network’s commitment to providing a platform for independent program producers and syndicators desiring to reach a national audience. Although PCC has rebranded its network, it has not abandoned the values that underlied its previous incarnation as the family-oriented PAXTV. Indeed, PCC remains committed to fostering decent programming that is appropriate for people of all ages and it strongly encourages the Commission to move forward on issues like the broadcaster code of contact that PCC long has advocated.

² Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Notice of Inquiry*, FCC 05-155, MB Docket No. 05-255 (rel. Aug. 12, 2005) (the “NOI”).

multicast must-carry to restore competitive balance between broadcasters and MVPDs. Broadcasters have spent billions of dollars in the past few years to transition broadcast television from analog to digital transmission and now nearly 90% of stations are broadcasting DTV signals.³ PCC itself has constructed DTV facilities for every one of its stations that has been granted a construction permit and is multicasting multiple digital program streams on 47 of those stations. Given the remarkable capabilities of digital broadcasting and the opportunities it provides for airing additional streams of diverse, local programming, this should be the dawning of a golden age for broadcasting and an era of robust competition in the video delivery market.

Instead, next to no one is watching DTV (particularly over-the-air DTV) and broadcasters' competitive position continues to erode compared to cable programming networks carried by the increasingly consolidated cable industry. Why? Chiefly, this is because: (1) the cable and satellite industries have chosen to take the opportunity of broadcasters' DTV transition to gain a competitive advantage by refusing to carry broadcasters' new digital programming; and (2) the Commission has failed to fulfill its statutory duty to ensure that the signals of all local broadcasters are carried in their entirety on local cable systems and on satellite systems that carry local programming in a particular market. Because their DTV programming has such a small potential over-the-air audience, most broadcasters have little incentive to invest in providing new DTV services. Because those new services are unavailable, consumers have little incentive to invest in the still extremely expensive equipment necessary to view DTV signals.

³ <http://www.fcc.gov/mb/video/files/dtvonairsum.html> (updated July 18, 2005).

At the same time, cable operators have vastly expanded their channel capacity through the construction of immediately profitable digital cable systems and it has stocked those additional channels with a plethora of specific-interest programming channels that have diluted the presence of broadcast programming and diminished broadcasters' ability to serve the changing needs and expectations of television viewers.

The need for full digital multicast must-carry to remedy these competitive imbalances brought on by the transition to DTV and the explosion of cable channel capacity remains the single biggest regulatory issue facing the video programming delivery market. **During last year's video competition proceeding, the problem was that the Commission had yet to decide whether to recognize broadcasters' full digital multicast must-carry rights under Section 614 of the Act. This year, the problem is that the Commission decided the multicast issue incorrectly.**

Because cable operators have steadfastly refused to carry broadcast DTV signals in the absence of mandated cable carriage, broadcasters likely will be forced to abandon their well-documented plans to offer significant amounts of new free over-the-air programming⁴ and instead explore subscription services and other alternative uses

⁴ See, e.g., Special Factual Submission in Support of Multicast Carriage by the NBC Television Affiliates Association, CS Docket No. 98-120, filed Jan. 8, 2004; Special Factual Submission by the CBS Television Network Affiliates Association in Support of Multicast Carriage Requirement, CS Docket No. 98-120, filed Jan. 13, 2004; Update on ABC Owned Station's Multicasting Plans, CS Docket No. 98-120, filed Nov. 20, 2003; Letter from F. William LeBeau to Marlene H. Dortch, CS Docket No. 98-120, filed Nov. 7, 2003 (detailing multicasting plans of NBC and Telemundo); Letter from Lowell W. Paxson to Chairman Michael K. Powell, CS Docket No. 98-120, at 2-3 (describing multicast efforts underway at 17 PCC stations).

of their DTV spectrum. Although Congress has authorized ancillary and supplementary uses of DTV spectrum, encouraging broadcasters to take this course would be contrary to Congress's intent that the strongest possible free over-the-air broadcasting system be preserved and fostered. While such services might buoy broadcasters' ability to compete by supplementing resources that could be used for their broadcast operations, the diminution in free over-the-air programming would damage viewers who have come to expect and rely upon free over-the-air television.⁵

Of course, the Commission still has the power and the congressional mandate necessary to reverse its current policy and avoid causing permanent competitive harm to television broadcasters and the viewers they serve by reconsidering its mistaken decision regarding full digital multicast must carry. Recent Commission pronouncements indicate that the Commission has begun to appreciate the important competitive and other public interest benefits that multicast must-carry would bring.⁶ PCC offers these reply comments to rebut the claims of some cable operators that "voluntary" carriage of some broadcasters' multicast program streams will be sufficient to protect competition and to show the Commission that multicast must-carry of all broadcasters' digital program streams is central to the future of broadcasters'

⁵ As the Commission recognizes, 13-19% of households still rely exclusively on free over-the-air broadcast television and countless more households rely at least in part on over-the-air reception. *NOI*, ¶ 66. Even NCTA acknowledges that a significant number of television viewers continue to rely on over-the-air television reception. NCTA Comments at 15.

⁶ Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act, *Report and Order*, FCC 05-159, MB Docket No. 05-181 ¶¶ 14, 18-19 (rel. August 23, 2005) (the "*SHVERA Order*")

competitive position in the video delivery marketplace and to encourage the Commission to do what is necessary to ensure that broadcasters have the opportunity to reach their full DTV potential. In this proceeding the Commission should recognize that competition in the market for video programming requires full digital multicast must-carry and commit to moving forward with granting petitions for reconsideration requesting reversal of the *Multicast Order*.⁷

I. The Competitive Position of Broadcasters Continues to Decline in the Absence of Full Digital Multicast Must-Carry.

The Commission sought comment on the competitive position of broadcast television compared with that of cable and satellite MVPDs.⁸ Cable and satellite MVPDs claim that broadcasters are healthy competitors and that, in fact, MVPDs need to be protected from broadcasters exercising retransmission consent and mandatory carriage rights.⁹ Nothing could be further from the truth. While some broadcasters unquestionably continue to thrive and expect cable operators to provide fair compensation for carriage of their signals, the small, independent, faith-based, and foreign language broadcasters are struggling to maintain their competitive position. Far from needing regulatory relief from the must-carry requirements that the commission already has recognized, the cable and satellite MVPDs need to be forced by the

⁷ As PCC has explained, if the Commission feels that it must resolve its DTV public interest programming proceeding before it grants full digital multicast must-carry, then it should resolve the public interest proceeding based on the best evidence and reasoning it has available without further delay. Petition for Reconsideration of Paxson Communications Corporation, CS Docket No. 98-120, filed April 21, 2005, at 3-7.

⁸ *NOI*, ¶ 64.

Commission to do their part in the DTV transition by carrying all broadcasters' full DTV signals, including multicast program streams.

In analyzing broadcast television's competitive position within the market for delivery of video programming, it is essential that the Commission keep in mind that Congress has directed it to preserve the competitiveness of the broadcast industry as a whole, not just that of the major network affiliates in the major markets. And it is equally important to remember that Congress was especially interested in preserving and protecting the system of free over-the-air broadcasting, not just the availability of some broadcasters' programming through cable and satellite outlets. With these twin congressional goals in mind, the Commission must review the competitive landscape as it looks to the independent, faith-based, and foreign language broadcasters as well as the emerging networks like PCC's i network just as closely as it does the competitive position of the major-market network affiliates.

If the Commission seriously engages in this analysis, it will have no choice but to determine that the competitive position of most over-the-air broadcasters outside the major-market network affiliates is grim, and the picture has only gotten worse since the Commission's last inquiry into the video delivery market. The Commission's refusal to recognize broadcasters' statutory full digital multicast must-carry rights, which it reaffirmed earlier this year,¹⁰ has forced stations across the country to endure yet

⁹ Echostar Comments at 20-21; DirecTV comments a 7-9; American Cable Association Comments at 5-9. See also Disney Comments at 40-41.

¹⁰ Carriage of Digital Television Broadcast Signals, *Second Report and Order and First Order on Reconsideration*, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005) (the "Multicast Order").

another year of high-cost, no-revenue DTV operations, generating digital signals that are viewed by next to no one. These spiraling costs and flat revenues have been accompanied by another year of declining television audience and advertising revenue shares for most broadcasters. Multicast must-carry could have alleviated these hardships, which place a competitive drain on broadcasters that cable operators and satellite providers simply do not face, by creating additional revenue streams that would allow broadcasters to begin to recover the enormous costs of building and operating DTV facilities.

In addition, cable operators have had another year to control and constrain the level of competition they face in local television markets by deciding what digital television programming to carry without the constraints that Congress intended to build into this process through its enactment of must-carry. Unsurprisingly, cable operators overwhelmingly have decided to carry digital cable programming, forgoing most broadcasters' DTV and multicast offerings. NCTA and Comcast trumpet their "voluntary" carriage of some multicast program streams, claiming that cable operators (rather than Congress or viewers) should get to decide what broadcast programming viewers should be permitted to see.¹¹ But the cable industry's position blatantly contradicts Congress's intent that **must-carry would eliminate cable operators' bottleneck control over what viewers see, but the Commission's denial of full digital multicast must-carry has resurrected cable operators' power.** By all appearances, cable operators are attempting to ensure that digital television is seen by

¹¹ NCTA Comments at 27-29; Comcast Comments at 45.

viewers as a cable rather than a broadcast product, further inhibiting broadcasters' ability to compete over the long-term.

Worst of all for television viewers and for the future of over-the-air broadcast television, it was another year without substantial progress in the DTV transition. And it was another year when the likelihood that the DTV transition would lead to large amounts of additional free over-the-air programming became increasingly remote. While policymakers debate the "hard date" that will mark the end of the DTV transition, broadcasters still are awaiting a regulatory framework that can make DTV business plans featuring substantial additional free over-the-air programming make any sense at all. Without full digital multicast must-carry, however, that framework never will materialize and broadcasters will be forced to consider uses of portions of their digital spectrum that do not involve the provision of free over-the-air programming.

In summary, broadcasters are weaker competitors in the video marketplace today than they were a year ago and, without Commission action, they promise to be weaker competitors a year from now. But cable operators and satellite programmers still want more. The American Cable Association asks the Commission to relieve small cable operators of its statutory responsibility to provide broadcast signals to every viewer on the basic cable service tier.¹² Echostar and DirecTV argue against multicast carriage and ask for the right to downconvert even broadcasters' high-definition program feeds.¹³ The vultures are circling, but the Commission has been instructed by Congress to keep over-the-air broadcasting alive and well. To accomplish this, the

¹² American cable Association Comments at 5-9.

¹³ Echostar Comments at 20-21; DirecTV Comments at 7-9.

Commission must ignore the pleas of the MVPDs for additional regulatory relief. Instead, it should fully recognize broadcasters must-carry rights and require cable and satellite operators to carry broadcasters' multicast program streams. In addition, as the Association of Public Television Stations notes, the Commission should clarify that broadcasters' carriage rights extend to new video services now being offered by telephone companies that have deployed fiber-to-the-home facilities.¹⁴

II. Digital Multicast Must-Carry Is Necessary To Ensure All Broadcasters' Ability To Provide the Competitive, High-Quality, Diverse, Local Service that Viewers Have a Right To Expect.

The Commission asked what success broadcasters have had gaining carriage of their DTV signals on cable and DBS systems.¹⁵ The MVPDs claim that they are "voluntarily" carrying all "compelling" multicast programming. If the Commission looks behind these claims, however, it will find that the only multicast programming being carried is from major network affiliates and pursuant to the politically expedient deal that the cable industry struck with public broadcasters last year. PCC, along with most other independent, emerging network, faith-based, and foreign language broadcasters, has had a vastly different experience. PCC operates DTV stations in markets of all sizes across the entire country and we currently provide over-the-air multicast programming on 47 of those stations. Yet, not a single cable operator in any market ever has agreed to carry PCC's DTV signal on their cable or satellite system and no cable or satellite operator has ever agreed to carry even a part, let alone all, of the additional free over-the-air multicast programming that PCC has offered. PCC's experience is shared by

¹⁴ Association of Public Television Stations comments at 25-31.

¹⁵ NOI, Para. 64.

most broadcasters who are not affiliated with public broadcasting or the major networks. As cable operators market their own digital programming services, they have left independent, emerging network, faith-based, foreign-language, and small market broadcasters out in the cold.

In last year's video competition inquiry, the cable industry trumpeted its then-recent DTV cable carriage agreement with public broadcasters as proof that they were willing to negotiate such agreements.¹⁶ PCC argued to the contrary that the few multicast carriage deals that the cable industry had allowed were mostly concluded for political gain or as part of a retransmission consent deal between cable operators and network affiliates and that cable operators' conduct in those cases bore no resemblance to their conduct of (or more accurately, refusal to conduct) multicast carriage negotiations with most local broadcasters. The Commission took the cable industry at its word, but a year later, nothing has changed. Cable operators continue to refuse to discuss multicast carriage with non-network, non-major market stations.

As the Commission recognized in the *NOI*, a broadcaster's ability to compete in the video market place is dependent on his ability to access an audience. In today's world, where 80% or more of television households rely on MVPDs for delivery of television service, that means that to compete, broadcasters must have some form of guaranteed access to cable and satellite viewers. Congress enacted must-carry to ensure that the imbalance created by broadcasters' need for cable carriage did not

¹⁶ Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of Competition in the Market for the Delivery of Video Programming), *Eleventh Annual Report*, 20 FCC Rcd 2755, ¶ 43 (2005).

impair their ability to compete with non-broadcast cable programming for viewers and advertising revenues. During the DTV transition, however, cable operators have given most broadcasters the opposite: (1) a guarantee of *non-carriage* for their DTV signals and multicast program streams; and (2) a competitive thumb on the scale in favor of non-broadcast cable network programming. Carriage of the multicasting efforts of network affiliates and public broadcasters simply does not satisfy the guaranteed viewer access requirements Congress established in section 614 of the Act.

Congress also enacted must-carry to ensure the continuation of the diverse local programming that broadcasters historically have offered and to maintain the competitive balance between cable, satellite, and broadcast that is necessary to a robust and innovative market for video programming. By failing to enforce Section 614 and the similar provisions in the Satellite Home Viewer Improvement Act, however, the Commission has failed to ensure that broadcasters will maintain their ability to meaningfully contribute to the rich mix of diverse programming that local viewers have come to expect in the 500 channel world. Moreover, the Commission has allowed the competitive balance to tip so dangerously towards cable and satellite providers that the future vitality and competitiveness of all but the most-viewed broadcast stations and networks must now be considered to be in doubt.

Indeed, it is no exaggeration to say that multicast must-carry is an absolute necessity if broadcasters are to continue in the DTV age to fulfill their historic, congressionally-appointed role as the preeminent purveyors of diverse, decent, locally-oriented programming in every market in the country. Quite literally, there is no other industry that is willing or able to fulfill that role, and it is directly contrary to

Congress's policies to allow broadcast television to founder and to leave local viewers without the television services that they have come to expect and that they have a right to depend upon. Unfortunately that is the course the Commission currently has set. The only way to reverse that course is to revisit the *Multicast Order* and require full digital multicast must-carry.

III. Commission Policy Should Not Encourage Broadcasters To Offer Ancillary and Supplementary services in Lieu of Free Over-the-Air Programming.

The Commission also sought comment on the extent to which broadcasters are using their DTV spectrum for ancillary and supplementary services rather than for free over-the-air broadcasting.¹⁷ PCC is not engaged in providing ancillary or supplementary services and remains committed to providing viewers with the maximum level of free over-the-air programming and competing with MVPDs by offering multiple channels of our own. The Commission's refusal to recognize broadcasters' full digital multicast must-carry rights, however, likely will force many broadcasters to attempt to develop new revenue schemes through pay services or agreements with other parties seeking to utilize broadcasters' excess digital spectrum.

If the Commission forces broadcasters to go that route, the losers will be the consumers who will be deprived of the vast expansion of free over-the-air services that the advances in digital technology have given them a right to expect. While Congress has authorized broadcaster provision of ancillary and supplemental uses of DTV spectrum, the Commission's misinterpretation of the full digital multicast mandate of Section 614 is all but forcing many broadcasters to consider taking this path. That

¹⁷ *NOI*, ¶ 72.

regulatory strategy could hardly be further from Congress's desire to preserve a vibrant and full-throated over-the-air broadcasting service that features every station, not just those serving the mass audience.

Accordingly, the Commission should be sure that its recognition of broadcasters' right to use their spectrum to provide ancillary and supplementary services does not become a wholesale encouragement of broadcasters to offer these services in lieu of the expansion of free over-the-air DTV services. In addition, the Commission should not base its decisions on the extent of competition in the market for video delivery based on broadcasters' right to offer ancillary and supplementary services until viable business plans for these services has been demonstrated that actually would enhance broadcasters' ability to compete with cable and satellite MVPDs.

IV. The Diminished State of Competition in the Video Delivery Market Should Lead the Commission to Recognize that the Law and All Relevant Public Policies Favor Reconsideration of the Multicast Order.

As demonstrated above, a clear-eyed look at competition in the market for video programming delivery shows a considerable and growing imbalance that cannot help but damage both broadcasters and consumers in the long run and result in a sharp decline in the availability and quality of over-the-air broadcast television. This realization should lead the Commission to reexamine the legal and policy underpinnings of its *Multicast Order*.

A. The Plain Language of Section 614 Still Requires Full Digital Multicast Must-Carry.

PCC continues to maintain that Section 614 of the Cable Act flatly mandates full digital multicast must-carry. As the Commission recognizes, the must carry provisions

were written with analog, not digital, signals in mind.¹⁸ In interpreting how the statute applies to analog signals, the Commission always has construed it to require carriage of all broadcasters' free over-the-air video programming, together with the audio and other program-specific content contained in the broadcast signal,¹⁹ and that plainly was Congress's intent.

By the Commission's own admission, Section 614 contemplates analog rather than digital signals, so the continued insistence that the "primary video" language of Section 614 can be read to "limit" DTV carriage to a single stream of over-the-air programming is purely anachronistic and, consequently, unreasonable.²⁰ As the Commission knows, analog signals cannot be split between "primary" and "secondary" video signals. The distinction Congress intended by use of the word "primary" was between the station's main video programming (and associated audio and other material) and secondary non-video and subscription services also potentially contained in the broadcast signal. Congress's intention was not and could not have been to create a hierarchy among multiple video programming streams, because analog signals

¹⁸ *Multicast Order*, ¶ 34.

¹⁹ 47 C.F.R. § 76.62. Conversely, the statute itself exempts from the carriage requirement any signal components that are not related to the free video programming that constitutes the primary portion of each broadcaster's analog signal, specifically excluding, for example, "teletext and other subscription and advertiser-supported information services." 47 U.S.C. § 614(b)(3).

²⁰ In the *Multicast Order*, only Chairman Powell continued to adhere fully to this understanding of the statute and his analysis failed to explain how Congress could have intended to distinguish between primary and secondary analog video streams when analog signals lack the capacity to provide multiple video streams.

do not have the capacity to produce multiple video program streams.²¹ Instead, its intention was to ensure that viewers are able to receive the entirety of broadcasters' free video offerings in the same form as they would otherwise be able to receive them free over the air.

When Congress described its intentions regarding mandatory carriage of digital signals in Section 614(b)(4)(B), it simply directed the Commission to conform its digital must-carry rules to those that apply to broadcasters' analog signals.²² In other words, Congress instructed the Commission to make only those technical changes necessary to ensure the continued carriage of all broadcasters' free over-the-air programming. Indeed, the only changes the Commission is authorized to make to its rules are those "necessary to ensure cable carriage" of digital broadcast signals.²³ By ensuring that broadcasters' DTV multicast signals will not be carried by cable operators, the Commission has acted directly contrary to this congressional command.

That Congress intended the primary/non-primary distinction to distinguish between free services entitled to carriage and pay services that are not is further

²¹ The Commission itself recognized in an early case interpreting the "primary video" language that Section 614 has nothing to do with distinguishing between multiple video program streams but rather is designed to protect the integrity of each free over-the-air program stream that is required to be carried. In its EAS proceeding, the Commission explained that the "primary video" language of Section 614 was designed to guarantee carriage of "programming as a whole" by "ensur[ing] that none of its constituent parts audio or video, as a whole, are deleted." Amendment of Part 73, Subpart G, of The Commission's Rules Regarding the Emergency Broadcast System, *Memorandum Opinion and Order*, 10 FCC Rcd 11494, ¶ 25 (1995).

²² 47 U.S.C. § 534(b)(4)(B).

²³ *Id.*

evidenced by Section 336 of the Act authorizing broadcasters' provision of "ancillary and supplementary" services.²⁴ These services are the only DTV services that Congress specifically exempted from the DTV carriage requirements, just as "other material" and non program-related services like teletext and other information services were exempted from carriage under the analog provisions of Section 614.²⁵ In interpreting Section 336, the Commission has held that free video services on multicast program streams are not ancillary and supplementary services.²⁶ The only way to reconcile these statutory sections as the Commission has interpreted them is to conclude that Congress intended that all free video content would be carried and that carriage of all ancillary and supplementary services was intended to be at the discretion of the cable operator. Put another way, Congress intended that all free over-the-air DTV programming be considered "primary video" content within the meaning of Section 614 while ancillary and supplementary services should be considered "other material . . . or nonprogram-related material" that is exempt from mandatory carriage.

²⁴ 47 U.S.C. § 336(b)(3).

²⁵ In the *First Report and Order*, the Commission read Sections 614 and 336 as providing two separate exemptions from mandatory carriage – non-program related material and ancillary and supplementary material. *First Report and Order*, ¶ 60. The more straightforward reading of these two sections as they apply to DTV signals would be that non-program-related signal content is that which provides ancillary and supplemental services that are not entitled to carriage under Section 336. In any case, neither exemption can reasonably be applied to exempt any free digital video services from Section 614's carriage requirement.

²⁶ 47 C.F.R. § 76.624(c). Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809 ¶ 30 (1997); *First Report and Order*, ¶ 59.

To be sure, the Commission must be free to interpret Congress's directives in a way that is flexible enough to accommodate new technical developments.²⁷ But new statutory interpretations should be designed to further Congress's original intent, not to reshape that intent along whatever lines the Commission finds more appropriate. Congress directed the Commission to bring its analog must-carry requirements into the DTV era by making whatever technical changes were necessary. In the analog world, all local stations' free over-the-air broadcast programming was and is required to be carried on cable systems. In the digital world, Congress's statutes require no less. Therefore, the only reasonable way to interpret Congress's will is to require this result by mandating full digital multicast must-carry.

B. Congress Could Not Have Intended That Only Satellite Subscribers in Alaska and Hawaii Are Entitled to Full Digital Multicast Must-Carry.

The Commission's recent *SHVERA Order* shows just how untenable the Commission's reading of the "primary video" language of Section 614 really is. In that order, the Commission found that because SHVERA does not include the "primary video" language, Congress must have intended that the only viewers in America entitled to receive the full digital signals of all local broadcasters are viewers in Alaska and Hawaii. That result is absurd. There is simply no conceivable reason to believe that Congress intended to bestow the benefits of full digital must carry on Alaskan and Hawaiian satellite subscribers only while denying those benefits to MVPD subscribers in the rest of the country.

²⁷ Review of the Commission Rules and Policies Affecting the Conversion to Digital Television, *Sixth Report and Order and Second Memorandum Opinion and Order*, 17 FCC Rcd 15978, ¶ 29 (2002) (citing *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1113 (5th Cir. 1982)).

As the Commission is aware, Congress intended the cable and satellite must-carry requirements to be roughly congruent (except that satellite providers must carry all local stations only if they choose to carry one of them). Yet the Commission held that multicast must-carry is required only of DBS providers and only in Alaska and Hawaii largely because the mandatory carriage language regarding Alaska and Hawaii does not include the term “primary video.” To conclude that Congress sought such a bizarre result based on such an obscure, technical difference in the statutory language is entirely unreasonable.

The most straightforward reading of the SHVERA language that the Commission interpreted would be that Congress sought to conform the satellite carriage requirements in Alaska and Hawaii to the cable carriage requirements in every market. Accordingly, Congress drafted SHVERA, just as it drafted Section 614 of the Cable Act, to ensure that the entirety of every local broadcasters’ free over-the-air programming is carried. Thus the Commission reached the correct result in the *SHVERA Order*, but its attempts to distinguish SHVERA from Section 614 are unavailing, further highlighting the incorrectness of the Commission’s decision in the *Multicast Order*.

C. In Addition to Fostering Competition in the Video Delivery Market, Multicast Must-Carry Will Serve a Whole Host of Congressional and Commission Policies.

As explained above, there is no question that full digital multicast must-carry will enhance broadcasters’ competitive position by giving them the means to best serve the needs and expectations of their viewers. Moreover, multicast must-carry will restore competitive balance by curtailing the growing power of cable and satellite operators to determine what broadcast programming is seen by viewers. As PCC has shown in the past, however, this is only the tip of the iceberg in terms of the numerous Commission

and congressional policies that would be furthered by reconsideration of the *Multicast Order*.

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, by cable, or by satellite.²⁸ 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.²⁹ 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.³⁰ 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.³¹

²⁸ 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).

²⁹ *Turner I* at 649. The one-third limitation was designed to permit both broadcasters to thrive while permitting cable operators to continue to grow.

³⁰ *Turner II* at 216.

³¹ *Id.* at 194.

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 to cable."³² 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.³³

Indeed, without full digital multicast must-carry, much of Congress's and the Commission's broadcast television policy would fail. 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 rules³⁴ and the Commission has extended these rules to television stations that are multicasting.³⁵ By doing so, both Congress and the

³² *Id.*

³³ As Chairman Martin pointed out in his Separate Statement to the *Multicast Order*, "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."

³⁴ 47 U.S.C. § 303a.

³⁵ 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).

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.

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.³⁶ The proposed public interest requirements flow from Congressional directives that the Commission require television broadcasters to operate their stations in the public interest.³⁷ To fulfill Congress’s intent, the Commission must finally issue public interest regulations for DTV broadcasters – sooner rather than later³⁸ – 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.

³⁶ 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).

³⁷ 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.

³⁸ PCC Petition at 5-8.

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.³⁹ 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.⁴⁰

4. The DTV Transition. Congress appears ready to end the DTV transition sometime before the end of the decade.⁴¹ 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. 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.⁴² 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

³⁹ See Broadcast Localism, *Notice of Inquiry*, 19 FCC Rcd 12425 (2004).

⁴⁰ 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.

⁴¹ See Bill McConnell, Dual Carriage Revisited: Draft Bill Sets Digital Transition for 2009, *BROADCASTING & CABLE*, May 30, 2005, at 14.

⁴² 47 U.S.C. § 614(b)(4)(B).

to undertake the necessity or expense of buying an antenna and digital converter (in addition to their cable connections) to view multicast programming.⁴³ 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 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

⁴³ 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.

sports services. Programming aimed at minority, foreign-language, faith-based, 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. These benefits, coupled with the undeniably positive effect that full digital multicast must-carry would have on competition in local markets for the delivery of video programming services clearly direct the FCC to use the experience it gains in this proceeding to move ahead and grant the petitions for reconsideration seeking reversal of the *Multicast Order*.

CONCLUSION

The Commission should recognize that the continuing impasse over cable carriage of broadcasters' full DTV signals is damaging competition in the market for the delivery of video programming services. The Commission's attempt to allow cable operators to provide such carriage voluntarily has failed because cable operators have refused time and time again to negotiate such carriage in good faith. It's time the Commission recognized that Section 614 requires cable operators to do what they have refused to do voluntarily and require them to provide full digital multicast must-carry. The transition to DTV should lead to an explosion of free, diverse, local programming for

all viewers, not to an explosion of alternative uses of broadcast spectrum other than for free-over-the-air programming.

Respectfully submitted,

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