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Dean M. Goodman
President and Chief Operating Officer

February 17, 2006

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Federal Communications Commission
Office of Secretary

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Filing
CS Docket No. 98-120

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the FCC's Rules, this letter is submitted, in duplicate, to advise you that on February 15, 2006, the undersigned, together with R. Brandon Burgess, Chief Executive Officer of Paxson Communications Corporation, and Martha Atwater, Vice President, Programming & Development, Scholastic Entertainment, met with Commissioner Michael J. Copps and Jordan Goldstein, his senior legal advisor, to discuss a number of matters relating to over-the-air television broadcasting and the transition to digital. During the course of those discussions, the importance of full digital multicast must carry for television broadcasters was emphasized consistent with the previous filings of Paxson Communications Corporation in this docket, and the attached handout was provided.

Very truly yours,
Dean Goodman

Dean M. Goodman
President and Chief Operating Officer
Paxson Communications Corporation

Enclosure

cc: The Honorable Michael J. Copps
Jordan Goldstein, Esquire

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List A B C D E



**BOTH THE LAW AND THE FACTS SUPPORT AND, INDEED,
COMPEL A CHANGED INTERPRETATION OF “PRIMARY VIDEO”
THAT REQUIRES CARRIAGE OF BROADCASTERS’ MULTICAST SIGNALS**

I. The Commission Has Both the Authority and the Responsibility To Revisit the “Primary Video” Issue.

- A. Courts always have recognized that an agency may depart from its existing policies and prior decisions as long as the agency provides a reasoned basis for the departure. *See, e.g., Clinton Memorial Hospital v. Shalala*, 10 F.3d 854 (D.C. Cir. 1993) (“[T]he fact that an agency rule represents a change in course simply requires courts to make sure that ‘prior policies are being deliberately changed, not casually ignored.’”) (citing *Simmons v. ICC*, 829 F.2d 150, 156 (D.C. Cir. 1987); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).
- B. The U.S. Court of Appeals for the District of Columbia Circuit has consistently affirmed FCC decisions that modified policies adopted earlier in a proceeding, when changed circumstances warranted the alteration. *See, e.g., PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995 (D.C. Cir. 1999); *Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996); *Florida Cellular Mobil Communications Corp. v. FCC*, 28 F.3d 191 (D.C. Cir. 1994).
- C. When appropriate, the Commission in the past has even modified its construction of statutes on reconsideration without suffering reversal. *See, e.g., Federal-State Joint Board on Universal Service, Fourteenth Order on Reconsideration*, 14 FCC Rcd 20106, 20112(1999) (“After taking a fresh look at the statutory language, and considering the arguments set forth in the record, however, we conclude that the Commission read the statute too narrowly”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration*, 14 FCC Rcd 18049, 18060-63 (1999).
- D. Paxson Communications Corporation (“PCC”) long has maintained that the best interpretation of the 1992 Cable Act’s provisions regarding mandatory signal carriage is to construe “primary video” as encompassing all video programming that is broadcast free and over-the-air, including multicast program streams. A fresh look at the statute reveals that the Commission has much more flexibility in interpreting the “primary video” language than it previously has claimed.
 - 1. The “primary video” language appears just once in the statute at a point when the context is clearly directed to mandatory analog carriage. 47 U.S.C. § 534(b)(3)(A) (“A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system....”). This provision’s contemplation of analog rather than digital carriage is shown by its references to characteristics of analog

transmission, such as line 21 and the vertical blanking interval, which have no relevance to digital carriage or the DTV transmission. *Id.*

2. Under the express terms of the statutory provision governing DTV must-carry, which appears in an entirely separate statutory subsection, the Commission is directed to adopt such regulations as are necessary to “ensure cable carriage of [] broadcast *signals* of local commercial television stations which have been changed” to conform to the DTV standard. 47 U.S.C. § 534(b)(4)(B).
 3. The use of the term “signals” in § 534(b)(4)(B) is plural. If that were not enough, this statutory subsection makes no provision for partial carriage of DTV signals. Given this omission, the only reasonable interpretation is to make broadcasters’ carriage rights for DTV signals include carriage of the entire broadcast transmission, thereby conforming as nearly as possible to the standard for analog signals, *i.e.*, carriage of “the entirety of the program schedule.” 47 U.S.C. §534(b)(3)(B).
 4. The Commission’s rules specifically permit and contemplate multicasting, Advanced Television, *Fifth Report and Order*, 12 FCC Rcd at 12809, 12826 (1997), so DTV signals that include multiple program streams that conform to the FCC’s DTV broadcasting standard qualify under §534(b)(4)(B) as entitled to full carriage.
- E. In its January 2001 decision failing to mandate multicast must-carry, the FCC recognized that the term “primary video” was susceptible to different interpretations and based its decision on “the record currently before [it].” Carriage of Digital Television Broadcast Signals, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2622 (2001) (“*2001 Decision*”). In revisiting the issue in February 2005, the FCC acknowledged that the relevant provision of the 1992 Cable Act “may be less definitive than portions of our earlier decision suggested” but reaffirmed the 2001 result, over the strong dissent of the Commissioner Martin, who found the public interest benefits of such carriage far outweighed any burden on cable operators. Carriage of Digital Television Broadcast Signals, *Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516, 4533-34, 4550 (2005) (“*2005 Decision*”).
- F. It is clear not only that the Commission has the legal authority to alter its interpretation of the term “primary video” and mandate cable carriage of the entire DTV multicast signal, but its previous statements on the issue leave open the possibility of doing so. Such a result is consistent not only with construction of the relevant statutory provisions but, as shown below, absolutely essential given changed factual circumstances since the FCC issued its interpretations of “primary video.”

II. Since the Commission's Decisions Interpreting "Primary Video," Facts Have Changed Such That Reevaluation of the Decision Is Required.

A. Market forces have failed to produce any significant cable distribution whatsoever of broadcasters' multicast digital signals.

1. In January 2001, the Commission stated that mandatory carriage of broadcast stations' DTV signals was not necessary because market forces would give broadcasters access to cable carriage of DTV signals and cable operators access to broadcast DTV content. *2001 Decision*, 16 FCC Rcd at 2654-55. In February 2005, the FCC echoed this intent to rely on market forces. *2005 Decision*, 20 FCC Rcd at 4534-35. That market-driven access has not materialized.
2. Instead, despite broadcasters' increased offerings of multicast content, cable operators by and large continue to refuse to negotiate carriage of broadcasters' multicast DTV signals. PCC, for example, has not been able to reach multicast carriage agreements with a single one of the cable operators in any of its markets.
3. Market forces have not been sufficiently powerful to overcome recalcitrant cable operators' obvious self-interest in blocking a competitor's market entry and failing to conclude digital carriage agreements. Multicast must-carry will simply not occur unless the FCC mandates it.

B. Broadcasters have made substantial investments in DTV without realizing any increased revenue.

1. Since the January 2001 decision and continuing through February 2005 to the present, broadcasters have expended massive sums of money to bring the vast majority of DTV stations into operation. In January 2001, the Commission presumed that consumer adoption would proceed in a manner that revenues from DTV broadcasting would long ago have begun to offset broadcasters' DTV expenditures. Nothing close to Commission expectations has occurred. Recent available estimates indicate around 13 percent of the 110 million American households have DTVs, and about two percent have the ability to receive digital over-the-air signals. Lennard G. Kruger, *Digital Television: An Overview*, Congressional Research Service, The Library of Congress, CRS Report for Congress, at CRS-9 (updated Oct. 17, 2005) (and sources cited therein).
2. Broadcasters now face the prospect of increased expenditures as they hurry to upgrade their DTV transmission facilities from low-power to full-power and continue to incur the ongoing costs of dual station operation. By no later than July 1, 2006, all broadcasters must build and operate fully replicated or maximized facilities. In addition, for at least the next three years, or until the

very recently adopted February 17, 2009 deadline for return of the analog spectrum, Deficit Reduction Act of 2005, Pub. L. No. 109-171 (*“Deficit Reduction Act”*), 120 Stat. 4 at § 3002, (2006), broadcasters need to continue to operate analog facilities while digital set penetration rates improve. Without any foreseeable DTV revenue to offset these capital costs and high operational expenses, many stations’ financial health is inevitably at severe risk.

3. With increased expenditures and, at best, stagnant revenues, broadcasters will be unable to generate the high-value content or new services that all parties acknowledge are necessary to propel the broadcast DTV transition to a successful conclusion.
 4. In fact, a study commissioned by the National Association of Broadcasters last summer found that, of those stations already multicasting to some extent or planning to multicast, some 79.2 percent are “extremely unlikely” or “unlikely” to engage in multicasting if they are not to be carried by the major cable systems in their markets. “July 2005 Survey of Television Stations’ Multicasting Plans,” attached to NAB Comments, filed September 19, 2005, in MB Docket No. 05-255.
 5. These trends cannot help but weaken the system of free over-the-air broadcasting that the Supreme Court found so important in upholding the 1992 Cable Act’s must-carry provisions. *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 189 (noting governmental interests in “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming”).
- C. The deployment of high bandwidth digital cable systems coupled with advances in digital compression technology and statistical multiplexing have continued to accelerate, completely nullifying cable operators’ claims of lack of capacity for carriage of DTV multicast signals and making capacity concerns a thing of the past.
1. Five years ago, in 2001, cable operators reported that 82 percent of cable homes were passed by 550 MHz cable systems and 65 percent were passed by 750 MHz systems. Both 64 and 256 QAM digital compression schemes -- which allow cable operators to deliver either 8 or 12 digital channels in the same 6 MHz channel used to deliver a single analog channel -- were mostly still on the drawing board but promised to expand cable channel capacity greatly. Carriage of Digital Broadcast Signals, *First Report and Order*, 16 FCC Rcd 2598, 2631 (2001).
 2. At the end of 2003, more than 90 percent of homes were passed by 550 MHz cable systems and over 90 million cable homes were served by 750 MHz systems. National Cable and Telecommunications Association, *2003 Year-End Report* at 2. By the end of 2004, those figures had grown, with 113 million

homes passed by 550 MHz cable systems, and over 99 million cable homes served by systems of 750 MHz or higher. National Cable and Telecommunications Associate, *2004 Year-End Report* at 4, available at http://www.ncta.com/pdf_files/NCTAYearEndOverview04.pdf. In its Eleventh Annual report on video competition, the Commission found that “the cable industry ha[d] upgraded almost 91 percent of its plant to 750 MHz capacity or higher,” and that “approximately 85.7 percent of the . . . cable systems [sampled by the FCC] . . . have facilities with bandwidth of 750 MHz or above,” with “average bandwidth of systems in the [s]urvey [at] . . . approximately 734 MHz.” Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, 20 FCC Rcd 2755, 2760, 2771 (2005). From January 2003 to January 2004, the average number of channels carried on the average cable system increased from approximately 210 to 233. *Id.*

3. Many cable systems are pushing bandwidth even higher. A little over two years ago, press reports indicated that Cablevision had completed a system rebuild that upgraded the most populous areas of its New York systems to 860 MHz. *Cablevision: We're 750-MHz Throughout*, MULTICHANNEL NEWS, December 4, 2003, available at <http://www.multichannel.com/article/-CA339959?display=Breaking+News>. More recently, Cablevision has begun implementing technology developed by Narad Networks to allow use of bandwidth above 860 MHz to deliver data services. Narad Networks, Press Release, June 27, 2005, available at <http://www.naradnetworks.com/pr.062805.html>.
4. In addition, most cable operators have begun utilizing 64 or 256 QAM digital compression techniques to boost channel capacity far beyond what was possible when the FCC first considered the multicasting issue in 2001. Indeed, cable operators for several years have been toying with adoption of 1024 QAM which enables them to expand by approximately 30 percent the amount of digital content that can be delivered in a single 6 MHz channel. Karen Brown, *Cable Eyes Boost to 1024 QAM*, MULTICHANNEL NEWS, January 6, 2003 at 27. Moreover, statistical multiplexing, which allows cable operators using 64 and 256 QAM compression to deliver up to 18 programming streams per multiplexed channel, has been commonplace for several years. *Id.*
5. Despite these advances, cable operators and programmers continue to complain about the bandwidth constraints that would be caused by multicast must-carry and insist that if the Commission requires them to carry the entirety of each broadcasters' DTV signal, important public affairs outlets like C-Span and state and local news channels will have to be dropped from cable systems. *E.g.*, Opposition of NCTA to Petitions for Reconsideration, CS Docket No. 98-120, May 26, 2005, at 20-21.

6. Thus, although the potential amount of programming that can be carried on a 750 MHz cable system has at least roughly tripled since the FCC first considered this issue, cable operators still are repeating the same arguments about bandwidth constraint and the possibility of dropped channels. In the face of cable operators' vastly expanded -- and expanding -- cable capacity, their arguments regarding limited space for broadcast channels are absurd.
- D. At the same time, cable operators have aggressively rolled out their own digital services while denying broadcasters carriage of their DTV programming.
1. Unlike broadcasters, cable operators realize immediate revenues from their digital upgrades. These revenues in turn allow them to invest in higher value digital television content and other services.
 2. At this point, cable operators have established a competitive lead in the provision of digital television services that will be very difficult for any other provider, including over-the-air broadcast television, to ever overcome or even approach.
 3. Unless broadcasters are able to tap the revenues that would be generated by multicast must-carry, real danger exists that the migration of high value digital content from free broadcast television to cable will only accelerate.
 4. If these developments continue, the competitive balance between broadcasters and cable operators will be irretrievably altered, undermining the core government interests that the Supreme Court in *Turner* identified as central to the Congress's intent in enacting must-carry.

III. Reevaluation of the "Primary Video" Definition and Institution of Multicast Must-Carry Would Be Consistent with Adoption of a "Hard Date" for Return of the Analog Broadcast Spectrum and Changes in the Commission's DTV Transition Policies Since January 2001.

- A. In January 2001, Commission policy was to rely principally upon market forces alone to drive the DTV transition to a rapid conclusion. In the past several years there has been a marked shift in that approach, as the FCC, and now Congress, have begun to take a more active role in managing the DTV transition. Most significantly, Congress just this year mandated the return of broadcasters' analog spectrum by February 17, 2009. *Deficit Reduction Act*, § 3002. Prior to that, the FCC's own policy shift away from market forces had included (1) the DTV tuner mandate, Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Second Report and Order and Second Memorandum Opinion and Order*, 17 FCC Rcd 15978 (2002), (2) allowance of low-power DTV construction and approval of transitional low-power DTV operation, Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Memorandum Opinion and Order On Reconsideration*, 16 FCC Rcd. 20594, 20607-

08 (2001); (3) adoption of a sanctions regime for broadcasters failing to meet the FCC's build-out schedule, Remedial Steps For Failure to Comply With Digital Television Construction Schedule, *Report and Order and Memorandum Opinion and Order*, 18 FCC Rcd 7174 (2003), and (4) adoption of measures to address digital rights concerns. Digital Broadcast Content Protection, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23550 (2003), *rev'd in part and vacated in part, American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); Implementation of Section 304 of the Telecommunications Act of 1996, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20885 (2003). Any deference to market forces in prior FCC decisions on multicasting is now inconsistent with Congressional intent and the Commission's increasingly aggressive DTV transition policies. In fact, continued deference to such forces will actually and irreversibly skew market competition.

- B. It is critical that, at this juncture, the Commission order multicast must-carry so that broadcasters can begin reaching viewers with their full complement of free over-the-air DTV services. The damage that will be done to the interests identified by the Supreme Court in *Turner* if the Commission fails to act now cannot be ignored.

IV. Given the Legal and Factual Changes, Altering the Commission's Interpretation of "Primary Video" Is Not Only Legally Permissible, But Failure To Do So Would Run Afoul of Administrative Law Principles.

- A. The FCC has a "duty to evaluate its policies over time to ascertain whether they work -- that is, whether they actually produce the benefits originally predicted they would." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992). *See also Telocator Networks of Am. v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982). Indeed, courts have upheld changes in the Commission construction of a statute between stages of the same Commission proceeding if the facts and record justify such action. *Consumer Electronics Association v. FCC*, 347 F.3d 291, 295 (2003) ("The Commission acknowledged that it had, in earlier administrative proceedings, rejected calls for a digital tuner mandate, believing that market forces were sufficient to carry out the DTV transition By 2002, however, with the statutory 2006 deadline fast approaching, the Commission had concluded that "insufficient progress is being made towards bringing to market the equipment consumers need to receive broadcasters['] DTV signals over-the-air.").
- B. In January 2001 and as late as February 2005, the FCC had before it a very different set of determinants -- a DTV transition regime geared in part to market forces and a record that gave some members of the Commission comfort that it could rely on those forces to drive the DTV transition. As shown above, that record continues to change. With these changes has come a need for the FCC to reassess and adjust the approach it previously took, the very essence of reasoned decision making.
- C. Among the changes that the FCC has the authority, and, indeed, now the legal obligation to make, is modification of its "primary video" interpretation. The FCC

should do so as soon as possible and mandate cable carriage of DTV multicast signals transmitted by commercial and noncommercial broadcasters alike.

**AS CHAIRMAN MARTIN HAS RECOGNIZED, SOUND PUBLIC POLICY
REASONS REQUIRE GIVING AMERICAN CONSUMERS
THE BOUNDLESS POTENTIAL OF FULL DIGITAL MULTICAST MUST-CARRY**

- **Regulatory and Legal Background.** In February 2005, the FCC determined, ignoring extensive legal arguments to the contrary, that the statutory term relating to cable mandatory carriage (“primary video”) was ambiguous with respect to whether it requires cable systems to carry broadcasters’ digital multicast signals.
 - Over the strong dissent of then Commissioner Martin (*see attached*), the FCC decided that the public interest benefits of such programming do not outweigh the minimal burden imposed on cable operators.
 - As Chairman Martin’s dissent recognized, the record evidence demonstrated that digital multicast must-carry would advance Congress’ rationale for must-carry requirements, as evidenced by the Supreme Court in *Turner II*: (1) preserving the benefits of free, over-the-air local broadcast television for consumers, and (2) promoting the widespread dissemination of information from a multiplicity of sources.
 - The proceeding highlighted certain Commissioners’ concerns over the previous Chairman’s failure to consider what public interest requirements should be imposed on digital broadcasting. When these sentiments are taken into account, a majority of the Commission still either endorsed full digital multicast must-carry or believed that the record would not be complete until those public interest obligations were resolved.
- **Strong Public Interest Benefits.** Full digital must-carry will absolutely advance Congressional goals, increasing diversity, localism, and competition.
 - Multicast must-carry will advance the wide dissemination of information. Drawing on the extensive news operations of broadcasters, multicast must-carry will allow increased and advanced news offerings, not currently provided by cable operators, including the following:
 - Real-time election returns and coverage of government proceedings
 - 24-hour *local* news, traffic, sports and weather
 - Creation of nationwide educational children’s programming services
 - The country’s first true multi-community health care channel anchored by local communities and medical institutions
 - Simultaneous coverage of news within different sections of large or multi-jurisdictional DMAs (for example, a “Tennessee news channel” for the

Tennessee residents who live in the Paducah, KY-Cape Girardeau-Harrisburg, MO-Mt. Vernon, IL DMA)

- Multicast must-carry will meet the needs of various niche audiences through the provision of local faith-based programming, foreign language material, children's and educational offerings, and other uniquely targeted presentations
- Multicast must-carry advances competition not only in the programming arena but also in advertising. Cable operators have a very evident economic self-interest in blocking multicast must-carry given the profusion of new advertising availabilities it will bring. Advertisers, in particular, will benefit from the opportunity to purchase time on more targeted broadcast streams, and small businesses and consumers will benefit from the resulting downward pressure on advertising rates, especially at the local level
- At the same time, due to advances in cable capacity and compression technology, carriage of multiple digital program streams requires only about one-half the current bandwidth devoted to analog carriage and imposes a lesser "burden" on cable than the existing law requires from carriage of analog signals
- **Collateral Benefits.** Full digital must-carry is a compelling alternative to anti-cable indecency legislation and will help bring consumers "rate relief."
- Multicast must-carry will increase by as much as six times the amount of programming available on cable systems that is subject to existing indecency regulations and avoid any constitutional confrontation over efforts to subject cable programming to more stringent content requirements.
- Providing viewers with more free multi-channel alternatives to traditional cable and DBS programmers will exert downward pressure on cable rates, by making more programming available to cable operators at no cost.
- Multicast must-carry is essential for the survival of small broadcasters caught between expanding content conglomerates and multichannel gatekeepers.
- **Call to Action.** This Commission should follow Chairman Martin's leadership on this issue and order full digital multicast must-carry.
 - As the full FCC recognized in February 2005, the statutory language is ambiguous, and nothing in the legislative history compelled the decision the FCC reached then.
 - Since 2005, deployment of higher bandwidth digital cable has continued apace, and further advances in digital compression and multiplexing make capacity concerns even more outdated. In addition, cable has continued to consolidate at the local level through "clustering" transactions.

- At the same time, market forces have failed to produce any significant cable distribution of broadcasters' multicast signals, especially of independent, faith-based, foreign-language, and family-friendly local broadcasters.
- Chairman Martin had it right in February 2005, and the new Commission should follow his initiative so that industry players have sufficient opportunity to satisfy multichannel must-carry requirements as they make plans to meet the "hard date" of February 17, 2009 for return of the analog spectrum.