

June 12, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120

Dear Ms. Dortch:

Enclosed please find an *ex parte* submission entitled "Multicast Carriage Will Not Affect Cable's Ability to Carry Other Program Networks." As discussed in detail in the attached submission, cable capacity continues and will continue to expand such that multicast carriage will not burden cable operators, nor affect their capability to carry other program networks.

Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,



Jerianne Timmerman

Enclosure

Multicast Carriage Will Not Affect Cable's Ability to Carry Other Program Networks

Cable systems and operators continue to argue that the mandatory carriage of local broadcasters' multicast programming would restrict cable operators' ability to carry programming of their choice and cable programmers' ability to place their networks on cable. The claimed additional "burden" of multicast carriage, they contend, would be unconstitutional. The record before the Commission, and developments since NAB and MSTV's Petition for Reconsideration, show no such burden. Cable capacity continues and will continue to expand; that expansion and three new cable technologies eliminate any constraint on cable operators' ability to carry program networks.

Cable's oppositions continue to ignore a key fact: *whether a broadcast signal contains one stream or several, the entirety of the digital signal can be carried on cable using only half the bandwidth that is now needed to carry an analog channel.* Cable, however, continues to claim that carriage of multicast programs requires that additional cable channels be allocated to broadcasters. Repetition of this falsehood does not make it so. The truth is that the almost infinitesimal additional capacity that a cable system might have to employ to carry all of local broadcasters' free digital content will have no impact on cable operators and programmers.

- Without a burden on cable capacity, there is no First Amendment argument concerning multicast must carry.
 - The Supreme Court in *Turner Broadcasting System v. FCC*, 512 U.S. 622, 668 (1994)(*Turner I*), ordered a remand to determine the extent to which must carry in fact deterred cable operators and programmers from their programming choices. The Court anticipated that, "given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium," eradicating the constitutional arguments against must carry. *Id.* at 639. As we show below, that day has arrived.
 - On remand, the district court found that the impact of even analog must carry on cable capacity was so minimal, "if the burden to the cable industry were much smaller, then the First Amendment would not even be implicated." *Turner Broadcasting System v. FCC*, 910 F. Supp. 734, 743 n.22 (D.D.C. 1995), *aff'd*, 520 U.S. 180 (1997). Cable's capacity has expanded exponentially since then.
 - The Commission in the *First Report and Order* agreed that the growth in cable capacity was crucial in determining the effect of digital must carry. 16 FCC Rcd 2598 ¶ 115 (2001).
 - To the extent that cable programmers argue that carriage of broadcast multicast programming would prevent similar cable programming from gaining carriage, they ignore Congress's findings that cable operators have an economic incentive to favor cable programming. Cable Act § 2(a)(15).

- The undisputed evidence before the Commission shows that the burden of carrying digital signals will be a *fraction* of the burden upheld in *Turner II*.
 - When must carry rules went into effect in 1993, the signals of local commercial stations (including signals carried under retransmission consent agreements which, the Supreme Court held, cannot be considered a burden on cable) occupied 13.35% of the capacity of an average cable system.
 - A 2001 study of the capacity data cable operators submitted to the Commission showed that, at the end of the DTV transition, carriage of all local commercial digital signals would occupy only 2.63% of cable capacity – less than one tenth of the statutory 30% cap and one fifth of the burden upheld in *Turner*. That study assumed that only 83% of cable homes would be passed by large-capacity systems; cable industry statistics now show that almost all homes are passed by digital-capable cable systems, making the impact of must carry even less.
 - Indeed, broadcast digital signals occupy only *half* of the capacity on cable systems as analog signals, regardless of whether they include one stream or several. The replacement of local analog signals with digital will thus, in itself, free up cable capacity. Without submitting any technical data, cable continues to claim that carriage of multicast streams would require multiple cable channels. *See, e.g., Ex parte* Submission of TV One, *et al.*, CS Docket No. 98-120 (June 8, 2006) at 3. These arguments are, quite simply, false.
 - The complaint of Bloomberg, L.P., that must carry has prevented it from gaining access to *analog* cable tiers is, therefore, beside the point since this proceeding concerns carriage of broadcast *digital* signals carried by cable systems on their *digital* plant. *Ex parte* Submission of Bloomberg, L.P., CS Docket No. 98-120 (June 7, 2006) at 1. Digital multicast carriage has no impact on the size or capacity of a cable system’s analog tier.
 - Even if, for some time after the transition, cable systems also carry local signals in analog format to avoid having to provide subscribers with converters, allowing cable systems to strip multicast streams will not have any significant impact on the capacity devoted to local broadcast signals, the total of which will still be far less than the Court upheld in *Turner*.
 - Since cable does not dispute that, after the transition, local digital signals will be subject to must carry, the “burden” cable contends will flow from multicast carriage is, at most, only a fraction of a fraction of the capacity now used by cable to carry local signals.

- Remarkably, not one of the cable oppositions to the NAB/MSTV Petition for Reconsideration or the recent cable *ex parte* presentations which claim capacity is limited include any data on current cable capacity or how it is used.
- Cable’s public statements confirm that new technologies cable operators *are deploying* eliminate any capacity shortage that might exist.
 - Cable systems are rapidly moving to digital simulcasting in which *all signals* on a system are carried in both analog and digital formats. This voluntary dual carriage of all broadcast *and* cable programs shows that cable systems have no capacity shortage. *See* Reply in Support of the Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., CS Docket 98-120 (June 6, 2005) at 13-14. Ultimately, digital simulcasting is intended to move all customers to digital, allowing cable capacity now used for analog channels to be utilized far more efficiently for digital.
 - The cable industry’s own statements since then confirm that systems are rapidly converting to digital simulcast. *See The Wall Street Journal*, July 13, 2005 at B2B (Time Warner and Comcast say that “almost all of their markets should be broadcasting in simulcast by the end of [2006].”); *Multichannel News*, Sept. 19, 2005, at 8 (Comcast’s digital simulcast rollout will be 75% complete in 2005); *Multichannel News*, Jan. 9, 2006, at 28 (Time Warner will “roll out digital simulcast pretty much everywhere” in 2006); *Multichannel News*, March 20, 2006, at 40 (With digital simulcast, Cox’s chief technology officer says, “eight to 10 digital signals can fit into” the capacity used for one analog signal); *see also* Thomson StreetEvents, Transcript of Comcast Q4 2005 Earnings Conference Call, Feb. 2, 2006, at 2 (“We have 75% of the Company now offering digital simulcast signals in our markets”), Attachment 3 to Ex Parte Submission of RCN Corporation, MB Docket No. 05-311 (March 3, 2006).
 - In addition to digital simulcasting, “[c]able operators also are doubling the amount of data sent on a given video signal into the home. That saves bandwidth after the node, and *effectively doubles the number of channels that can be broadcast into a home.*” *Multichannel News*, March 20, 2006, at 40 (emphasis added).
 - Cable systems are also rapidly adopting Switched Digital Video (“SDV”) technology which allows less popular digital channels to be provided to households only when they want to watch them, and enables a cable system to “reclaim up to half of its digital channel capacity.” *Multichannel News*, May 30, 2005, at 41. “The newly opened bandwidth could be used for an expansion of VOD and HD, *or for the launch of any new linear network.*” *Id.*

- While cable has argued that non-video services occupy significant capacity on cable systems, *see* Joint Opposition to Petitions for Reconsideration of Altitude Sports & Entertainment, *et al.*, CS Docket No. 98-120 (May 26, 2005) at 20-21, NCTA now concedes that “cable modem service has used only a single 6 MHz channel.” Letter from Kyle McSlarrow, NCTA, to Commissioner Deborah T. Tate, CS Docket No. 98-120 (June 8, 2006) at 6. Even if the capacity needed for non-video services increases, cable has made no showing – nor could it – that there will be any technical constraint on systems’ ability to carry local broadcast and cable programming.
- Thus, cable’s capacity arguments are a “red herring,” based on erroneous technical claims and ignoring the evidence – evidence from the cable operators themselves – that cable capacity constraints are a thing of the past. Multicast must carry, therefore, will not prevent any cable programmer from obtaining carriage or prevent any cable system from carrying cable programming of its choice.