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June 13, 2006

EX PARTE

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

Re: Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120

Dear Ms. Dortch:

Discovery Communications, Inc. (“Discovery”) submits this letter ex parte to respond to the National Association of Broadcasters’ (“NAB”) recent argument that “[a] rule prohibiting the blockage of multicast commercial signals is entirely consistent with the First Amendment.”^{1/} NAB’s attempt to characterize the recently enacted “hard date” for the digital transition as a new and important governmental interest that justifies the need to expand cable’s must-carry obligations is without merit. Nothing in NAB’s recent filing alters the fact that, as Discovery has argued previously,^{2/} a multicast must-carry mandate places a serious burden on cable programmers’ First Amendment rights by making it substantially more difficult for them to reach their intended audience while doing nothing to advance Congress’s stated objectives. As such, a multicast must-carry mandate could not be sustained.^{3/}

Discovery is an innovator and a leader in developing original niche, family-oriented and educational programming.^{4/} However, such efforts require substantial investment and are highly

^{1/} Helgi C. Walker, Eve Klindera Reed, and Thomas R. McCarthy, Promoting the Public Interest Benefits of Broadcasting in the New Millennium: The FCC Can and Should Update Its Existing Carriage Regulations to Meet the Demands of the Digital Age, CS Docket No. 98-120 (June 2, 2006) (“NAB White Paper”), at iv.

^{2/} See Carriage of Digital Television Broadcast Signals, CS Docket Nos. 98-120, 00-96 and 00-2, Ex Parte Notices of Discovery Communications, Inc., Nov. 19, 2003 and Feb. 20, 2004.

^{3/} *U.S. v. O’Brien*, 391 U.S. 367, 377 (1968) (a content-neutral regulation will be sustained only if “it furthers an important or substantial governmental interest ... and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”). While NAB goes to great lengths to argue that a multicast must-carry requirement will not be subject to strict scrutiny, a point with which Discovery disagrees, the Commission need not necessarily address strict scrutiny because even under intermediate scrutiny, a multicast must-carry requirement is constitutionally suspect.

^{4/} Discovery’s family of U.S. networks includes Discovery Channel, TLC, Animal Planet, Discovery Health Channel, Travel Channel, BBC America, Discovery Kids, The Science Channel, Discovery Times Channel, Military Channel, Discovery Home Channel, Discovery en Espanol, Discovery Travel & Living (Viajar y Vivir), Discovery Kids en Español, FitTV, and Discovery HD Theater.

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risky. A requirement that cable operators carry multiple programming streams of each broadcaster, regardless of merit or consumer demand, would place a significant burden on Discovery's speech without furthering any important government interest, in violation of the First Amendment.

Multicast Must-Carry Requirements Do Not Promote the Digital Transition. NAB asserts that multicast must-carry would promote the swift transition to digital television,^{5/} and characterizes the recently enacted "hard date" for the digital transition as evidence of the importance that the government places on this interest. This argument does not hold water. The Commission has twice rejected broadcaster calls for multicasting rights, and each time, Congress has chosen not to disturb the Commission's decision. Even more recently, despite NAB's claims that multicasting will further the digital transition, Congress did not include a multicasting requirement in the DTV legislation passed last year. When Congress has addressed this issue, it has been to limit the burden on protected speech to the greatest extent possible. Section 614 of the Communications Act requires carriage of only a broadcaster's "primary video," and section 336(b)(3) bars must-carry rights for ancillary and supplemental services offered by broadcasters over their digital spectrum. Further, such arguments are irrelevant to a weighing of Discovery's First Amendment harm, since it is well established that a burden on speech is judged by its furthering of the government's asserted interests.^{6/} The government cannot create interests after-the-fact to support burdens on speech.^{7/}

In addition, NAB does not -- and cannot -- demonstrate that, absent a multicast must-carry requirement, the digital transition will be slowed. To the contrary, if broadcasters know that carriage of their new programming streams is guaranteed, their incentive to produce an innovative, high-quality product will drop dramatically. Only by requiring broadcasters to compete for distribution under normal market terms will the Commission best ensure development of compelling offerings that attract consumers and incent them to embrace the digital transition.

Indeed, multicast must-carry could actually harm the digital transition because it will result in digital spectrum -- which Congress meant to promote high-definition television, a truly new and different consumer offering -- being used to provide thousands of standard-definition broadcast channels. Given the bandwidth necessary for high-definition channels, broadcasters have every incentive to maximize their advertising revenues by using their must carry rights to obtain carriage for as many standard-definition networks as possible. If digital programming

^{5/} NAB White Paper at 25-26.

^{6/} Promotion of the digital transition was not one of the government's asserted interests in enacting must-carry. See *Turner II*, 520 U.S. at 189-90 (holding that must-carry was designed to serve three interrelated interests and describing those interests, none of which is related to the digital transition).

^{7/} See *Edenfield v. Fane*, 507 U.S. 761, 768 (1993 (intermediate scrutiny "does not permit us to supplant the precise interests put forward by the State with other suppositions").

does not provide something new from a consumer perspective, consumers will not appreciate the value of the transition and will be unwilling to accept the costs that accompany it.

Moreover, some of the networks most likely to suffer from a multicasting mandate are the niche digital networks that have offered consumers something different from what is already available. Discovery has spent ten years and hundreds of millions of dollars building its digital networks, slowly winning subscribers, yet a broadcaster riding on those efforts will have instant access to twice the number of subscriber homes that Discovery has won through its willingness to risk and invest. Eliminating the incentive for companies to invest in innovative new digital programming would not advance the consumer interest in the digital transition.

Multicast Must-Carry Requirements Do Not Promote Diversity. Promoting the widespread dissemination of information from a multiplicity of sources was a key consideration in the decision to uphold the analog must-carry requirements.^{8/} Justice Breyer, while casting the decisive fifth vote to uphold those requirements, acknowledged that must-carry violates the First Amendment rights of cable programmers because it “prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs.”^{9/} He found, however, that the benefits of diversity outweighed this burden on speech.

In contrast, requiring cable operators to carry multiple programming streams of each broadcaster will cause a significant loss of diversity on the system, by making it more difficult for independent cable programmers to gain or retain carriage. Many broadcasters have indicated that they may use their additional programming streams to copy those niche cable programmers that have successfully demonstrated a demand for their programming. If cable operators are forced to carry multiple multicast channels targeted at niche audiences, it is highly unlikely that they will carry a non-broadcast network targeted at the same minority group or audience for which they must pay affiliate fees, even if they believe subscribers would prefer the Discovery product.

The competitive disparity created by a multicast must-carry requirement could have very real consequences for Discovery:

- DIC has stated that it intends to create a digital children’s programming service, which would be advertiser-supported, to be distributed via multicast must-carry. If such a service were launched, Discovery Kids, which received 14 daytime Emmy nominations and eight Parents’ Choice Awards this year, would have to convince distributors that it should carry both programming services, even though the DIC

^{8/} See *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189-90 (1997) (“*Turner II*”); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (“*Turner I*”).

^{9/} *Turner II*, 520 U.S. at 226 (Breyer, J., concurring in part).

service is available to them for free. It also would have to compete with DIC for advertising revenues with no government guarantee of widespread carriage.

- ION Media Networks has announced its intention to begin offering I-Health as a digital multicast network on ION stations this year. While I-Health would be entitled to instant carriage in 90 million homes, the award-winning Discovery Health, targeted at a similar audience, has had to convince distributors of its merit since its launch in 1999. Discovery Health Channel is widely acclaimed for such public service initiatives as its Continuing Medical Education program, designed to provide the most essential health information to medical professionals through special programs focused on topics such as the childhood obesity epidemic, but Discovery would face an uphill battle to convince distributors that it should retain Discovery Health on the system despite the availability of similarly-targeted programming available for free.
- Discovery has committed substantial resources to meeting the needs of underserved Hispanic viewers, launching Discovery en Espanol in 1998 and two additional networks, Discovery Kids En Espanol and Discovery Travel and Living (Viajar y Vivir) last year, but broadcasters have suggested that they intend to use their multicast must carry streams to provide similarly-targeted programming. Discovery would lose all the benefits of its investment if its programming is dropped or disfavored (through lower affiliate fees or fewer advertising dollars) because distributors have no choice but to carry the broadcast product.

In each case, even if the Discovery networks manage to gain or retain carriage, they will be placed at a serious competitive disadvantage, because their broadcast counterpart -- with instant and guaranteed access to tens of millions of viewers -- will have significantly greater ability to attract advertising revenues, and will not need to make the investments to sustain the highest quality programming since it is in no danger of losing carriage. Moreover, the affiliate fees distributors are willing to pay Discovery for the right to carry the programming are likely to drop significantly.

Discovery cannot realistically continue to provide the highest quality programming on such an unlevel playing field. Allowing untested broadcast networks to copy the results of Discovery's labor and investment and secure nationwide carriage could well result in the denial to consumers of Discovery's higher-quality programming. Discovery Channel's specials with Ted Koppel examining issues of national and global importance, for example, would likely be prohibitively expensive to produce. Discovery Channel's upcoming ATLAS HD series -- programming that will take viewers on a breathtaking journey of exploration and adventure in high definition to 30 countries around the globe -- cost \$65 million to produce, and so likely could not be replicated in an environment in which Discovery earns lower affiliate fees and advertising revenues. Similarly, Discovery Kids' READY SET LEARN! preschool programming block -- which Discovery has chosen to keep completely commercial and sponsorship free, at a significant loss of potential advertising revenues -- or the Animal Planet

network could be lost. Such a result would lessen, not increase, diversity of viewpoints on the cable system, at a time when a large portion of current cable system line-ups already are occupied with broadcast signals and broadcast-affiliated networks that are able to use retransmission consent to force their way onto the system.

Multicast Must-Carry Requirements Do Not Preserve Over-The-Air Broadcasting. While NAB asserts that multicast must-carry is needed to “preserve the benefits of free, over-the-air television,”^{10/} a multicast must-carry requirement would expand, not preserve broadcast television. Indeed, NAB concedes this point by arguing that multi-stream broadcasting will provide broadcasters with the opportunity to compete for viewers in *new* niche programming markets.^{11/} Allowing broadcasters special protections as they expand into new markets is clearly outside the scope of “preserv[ing] the existing structure of the Nation’s broadcast television medium.”

While NAB concedes that the Supreme Court has made clear that any must-carry rules must be “narrowly tailored,” it argues that “*extending* cable’s current carriage obligations to digital broadcasting, including multicasting, imposes far *less* of a burden on cable operators than the existing must-carry rules that the Supreme Court has upheld as narrowly tailored.”^{12/} The amount of occupied spectrum, however, is not the test: cable operators are not subject to increasing burdens on speech every time technology improves. To be narrowly tailored, a regulation must be tied to the specific governmental interest and go no further than necessary to achieve that interest.^{13/} If technology permits a lessening of the restriction (in this case, decreasing the dedicated spectrum from six MHz to three MHz) while still achieving the same interest, the restrictions must be adjusted. Cable operators and programmers cannot be required to give up protected speech rights for more than the amount of spectrum necessary to preserve over-the-air broadcasting.

The Marketplace of Ideas Should Govern Carriage Decisions

Discovery has built its strong reputation by providing exactly the type of diverse family and education-oriented programming that the Commission purports to encourage. A multicast must-carry requirement, however, would undermine the ability of Discovery and other programmers to develop such innovative programming, by threatening their ability to gain or retain carriage of that programming on competitively neutral terms. Unlike the broadcasters,

^{10/} NAB White Paper at 22-24. The Supreme Court found in *Turner II* that “Congress enacted must-carry to ‘preserve the existing structure of the Nation’s broadcast television medium.’” *Turner II*, 520 U.S. at 193 (citing *Turner I*, 512 U.S. at 622).

^{11/} NAB White Paper at 23-24.

^{12/} *Id.* at 26. (emphasis added for “*extending*,” emphasis in original for “*less*”).

^{13/} *O’Brien*, 391 U.S. at 377.

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Discovery does not seek any regulatory advantage in the marketplace, but only to ensure that there is a level playing field for video programming. Discovery believes that quality should prevail in the emerging digital video programming marketplace and that consumers -- not government or the group favored by government regulation -- should determine which networks meet the definition of "quality." The public interest and the Constitution require that the video programming marketplace be governed by the marketplace and the marketplace of ideas, not a government mandate favoring the special interests of broadcasters. A multicast must-carry requirement is antithetical to this concept.

Sincerely,

/s/

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