

June 14, 2006

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

Re: Cable's Arguments to Justify Stripping of  
Broadcasters' Digital Signals  
CS Docket No. 98-120

Dear Ms. Dortch:

In NCTA's letter to the Commission of June 8, the cable industry makes various allegations in support of immunizing its anti-competitive practice of stripping multicast services from broadcasters' digital signals. The ABC, CBS and NBC Television Affiliate Associations respond as briefly as possible to these claims, which have been fully addressed in earlier filings.

**NCTA's Arguments**

The FCC already twice decided this issue, and the petitions for reconsideration add nothing new.

**Affiliates' Responses**

"Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planter's Bank*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). Moreover, the record reflects overwhelming new evidence of rampant cable blocking of the public's access to broadcasters' free multicast services for anti-competitive reasons, which compound the problems that were previously before the Commission. The impending hard date increases the urgency of promoting consumer acceptance of digital broadcasting technology and an anti-stripping rule will promote that goal.

Broadcasters “fail to include any . . . predictive studies that would form a basis to support a policy change.”

The recent study conducted by Decisionmark demonstrates that cable systems are today carrying only 56 commercial-station multicast services out of 624 offered. In light of this real-world evidence, predictive studies are unnecessary.

Use of the word “primary” in the statute (albeit in the context of analog carriage) connotes singularity, and, therefore, cable should have to carry only one of a broadcaster’s multicast services, not all of them.

It is common knowledge that the adjective “primary” takes the singular or plural form depending on the context, as in the case of three (not one) primary colors and 82 (not one) primary elements in the periodic table. Cable takes the use of “primary” in an analog context and transposes it mechanically into digital, without taking into account the substantial differences in digital technology.

An anti-stripping rule would violate the First Amendment.

Compared to the analog rules upheld by the Supreme Court in *Turner II*, the need for anti-stripping protection is greater, the burden is significantly less (as NCTA acknowledges), and cable’s incentive and power to act anti-competitively are greater (and well documented).

Any carriage regulation must be justified as preventing a “reduction” in broadcast programming.

Congress and the Supreme Court were concerned about the health and viability of the public’s free television service. Existing multicast services will wither away if they continue to be blocked by cable. Moreover, unrebutted evidence in the FCC record shows that the public’s broadcasting service in the new multichannel environment needs the invigoration that multicasting services will provide.

An anti-stripping requirement would not serve the goal of source diversity.

As our June 8 Supplemental Submission shows, numerous would-be programmers (e.g., religious, minority, children’s, rural) attest to the contrary.

Because an anti-stripping rule would entail carriage of more than one broadcast service per station, though admittedly requiring half as much capacity as analog carriage, it would be more suspect, constitutionally, than the Congressionally-mandated analog carriage rule.

NCTA's capacity/First Amendment argument focuses on the numerator and ignores radical changes in the denominator. In 1992, a large cable system typically had 35 channels, so that carriage of six analog broadcast stations consumed 36 MHz (6 x 6 MHz), or 17% of the cable system's capacity. In 2006, a large cable system typically has 200 channels, so that carriage of six digital broadcast stations (including all multicast channels) consumes no more than 18 MHz (6 x 3 MHz), or 1.5% of the cable system's capacity. In comparison, the Supreme Court in *Turner II* upheld a carriage obligation up to 33% of a cable system's capacity.

An anti-stripping rule would be inconsistent with the Fifth Amendment.

NCTA's Fifth Amendment arguments are based on a mischaracterization of digital technology, and the alleged "takings" impact of full digital carriage, including multicast services, on cable systems' capacity would be far less than the impact of the analog carriage requirements that the Supreme Court upheld in *Turner II*.

Broadcasters' digital spectrum was a huge give-away.

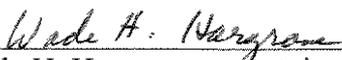
Broadcasters will spend \$10 billion and will give back 26% of their original spectrum allocation in order to implement the digital transition.

Because the 2006 budget reconciliation act did not prohibit cable from stripping broadcasters' signals, the 1992 Cable Act should be read to foreclose anti-stripping protection for the American consumer.

The Byrd rule prevented non-fiscally germane provisions from being included in the reconciliation bill. In any event, non-passage of a subsequent possible legislative provision has no relevance to the Commission's obligation to interpret the meaning of the 1992 Cable Act. That Act directed the FCC to adapt its analog carriage requirements, including the non-degradation principle, to broadcasting's new digital transmissions.

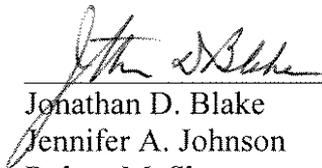
NCTA's June 8 letter reveals how threadbare is cable's position that the Commission cannot, constitutionally, and should not, as a matter of policy, protect the public against the stripping by cable of the new diverse and competitive multicast program services being developed by local television stations. A Commission requirement for full digital signal carriage would be constitutional; it would be consistent with the public interest; and it would advance the Congressionally mandated transition to digital broadcasting and, with it, the benefits the digital transition offers the American people.

Respectfully submitted,



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