

June 14, 2006

The Honorable Kevin J. Martin  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re: CS Docket No. 98-120**

Dear Mr. Chairman:

In a White Paper submitted June 2, 2006, NAB explained why the Commission should update the existing regulatory regime for cable carriage of broadcast television by ensuring that cable operators do not block broadcasters' multicast programming from viewers and, further, why the Constitution presents no bar to such regulatory action.<sup>1</sup> In response, the National Cable & Telecommunications Association ("NCTA"), in a letter filed June 8, 2006, largely restates the same constitutional arguments that the cable industry has previously advanced and NAB has fully rebutted.<sup>2</sup> The NCTA response fails to address – let alone cure – the numerous fallacies in cable's "constitutional" claims. The cable industry's position thus should be rejected once and for all. The Constitution in fact imposes no bar on the Commission's ability to prevent cable operators from stripping out broadcasters' multicast program offerings, thereby assuring a smooth transition to digital television ("DTV") and ensuring that American television viewers receive the full benefits that DTV promises to offer.<sup>3</sup>

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<sup>1</sup> See "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" ("*NAB White Paper*") (attached to Letter from Helgi C. Walker, Wiley Rein & Fielding LLP and counsel to NAB, to Marlene H. Dortch, FCC Secretary, CS Docket No. 98-120 (June 2, 2006)).

<sup>2</sup> See Letter from Kyle McSlarrow, President and CEO, NCTA, to The Honorable Kevin J. Martin, CS Docket No. 98-120 (June 8, 2006) ("*NCTA Ex Parte*").

<sup>3</sup> At the outset, NCTA suggests that broadcasters' request for reconsideration of the Commission's February 23, 2005 *Second Report and Order* regarding digital carriage is somehow procedurally improper. See *NCTA Ex Parte* at 1. NAB and others acted wholly within their rights in seeking reconsideration of this order, as expressly authorized by Commission rules. See 47 C.F.R. § 1.429(i). And the Commission may always reconsider its decisions if the public interest would thereby be served. See *id.* § 1.429(b)(3); see also Petition for Reconsideration of the National Association of Broadcasters and The Association for Maximum Service Television, Inc., CS Docket No. 98-120 (filed Apr. 21, 2005) ("*NAB Petition for Reconsideration*"), at 1-2 & n.4.

## **The Cable Act Requires Carriage of all Non-Subscription Portions of a DTV Signal**

NCTA's argument that, by requiring carriage of the "primary video" of broadcast signals, the Cable Act mandates carriage of only one stream of programming, is incorrect.<sup>4</sup> As NAB has explained previously, given the historical context of the must-carry scheme, NCTA's position makes no sense. When Congress enacted the must-carry statute in 1992, there was in fact no "secondary" video content that *could* be transmitted on an analog channel. Instead, the only services provided by broadcasters but not subject to must-carry were subscription services for which special receivers were required. By statutory mandate, cable was required to carry *all* of the content received over the air by ordinary television receivers. Video services that broadcasters offer for free, over the air, are functionally equivalent to the video and audio portions that Congress required cable operators to carry, whether a broadcaster chooses to offer a single stream of high definition video or multiple streams of standard definition video, and all of those services fall within the definition of "primary video."<sup>5</sup>

In short, the must-carry statute, which provides that cable operators "shall carry the signals of local commercial television stations,"<sup>6</sup> without distinction between analog and digital signals, clearly covers multicasting.

## **Preventing the Blocking of Multicast Program Streams Would Not Violate the First Amendment**

Contrary to the cable industry's claims, a rule preventing cable operators from stripping out multicast signals from broadcasters' digital transmissions would not violate the First Amendment. As an initial matter, NCTA is simply wrong in persisting that a multicast carriage requirement should be judged under strict scrutiny.<sup>7</sup> As NAB has explained, the Supreme Court was quite clear in *Turner I* and *Turner II* that must-carry rules are content-neutral and thus subject to intermediate scrutiny.<sup>8</sup> Nothing has changed since the Supreme Court issued those decisions that could properly alter that conclusion. Contrary to NCTA's suggestion, and as explained previously, the emergence of competition to cable from other sources such as DBS does not bear at all on the appropriate level of constitutional scrutiny that would apply to must-carry protections for multi-stream broadcasts.<sup>9</sup>

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<sup>4</sup> See *NCTA Ex Parte* at 2.

<sup>5</sup> See, e.g., *NAB Petition for Reconsideration* at 6-7; see also "Digital Multicast Carriage Advances the Government Interests Supporting Must Carry" (attached to Letter from Helgi C. Walker, Wiley Rein & Fielding LLP and counsel to NAB, to Marlene H. Dortch, FCC Secretary, CS Docket No. 98-120 (June 9, 2006)).

<sup>6</sup> 47 U.S.C. § 614(a).

<sup>7</sup> *NCTA Ex Parte* at 4-5.

<sup>8</sup> *NAB White Paper* at 19-21.

<sup>9</sup> *Id.* at 21.

NCTA also appears to argue that several other “new developments” would require application of strict scrutiny, including: (1) the supposed ability of broadcasters to reach viewers by means other than over-the-air broadcasting; and (2) purported technological advancements enabling cable subscribers to receive over-the-air signals with more ease than an “A/B” switch would allow.<sup>10</sup> These “new facts” are similarly immaterial to the appropriate level of constitutional scrutiny, which is perhaps why NCTA does not even try and explain their relevance. Moreover, broadcasters’ exploratory use of alternatives to over-the-air delivery does not change the fundamental fact that cable providers continue to control access to the overwhelming majority of television viewers. And regardless of whether it might now be “easier” for cable subscribers to obtain broadcast material than it was in 1992, cable does not deny that subscribers still must take additional steps to do so. As NAB has explained, today’s viewers, having lived with must-carry for over a decade, now demand *seamless* access to all available sources of programming.<sup>11</sup> The basic fact, recognized by Congress when it passed the must-carry statute, that “once individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air signal,” is even more true today.<sup>12</sup>

On the merits, NCTA claims that a multicast must-carry requirement would not pass even intermediate scrutiny.<sup>13</sup> As NAB has shown, however, the cable industry’s constitutional attack improperly tells only one side of the story – *theirs*.<sup>14</sup> Notably, NCTA does not even attempt to explain why the First Amendment interests of viewers, which the Supreme Court has held are “paramount,” should not be factored into the analysis at all.<sup>15</sup> Clearly, the interests of viewers in receiving more, rather than less, information must be considered here. NCTA also seeks to discredit NAB’s argument that the First Amendment rights of broadcasters must be included in the Commission’s analysis of this issue.<sup>16</sup> Broadcasters have legitimate free speech concerns, such as the interest in effective communication with their intended audience and their right to program their digital signals as they see fit, that must be weighed in the balance of interests. And NCTA’s contention that, even in the absence of a multicast must-carry requirement, broadcasters remain “free as ever to reach over-the-air viewers” is *itself* absurd; it is like saying that a newspaper is “free” to publish six different editions of its paper when the company that controls the delivery of newspapers to 85% of the public refuses to deliver all but one of those editions (not coincidentally, the one that presents no competitive threat to its own business interests) to its customers. Such action prevents effective speech by broadcasters and, contrary to fundamental First Amendment principles, results in less speech rather than more, to the ultimate detriment of the viewing public.

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<sup>10</sup> *NCTA Ex Parte* at 5.

<sup>11</sup> *NAB White Paper* at 14.

<sup>12</sup> *Id.* (citing S. Rep. No. 102-92, at 45 (1991)).

<sup>13</sup> *NCTA Ex Parte* at 4-5.

<sup>14</sup> *NAB White Paper* at 16-19.

<sup>15</sup> *Id.* at 17.

<sup>16</sup> *NCTA Ex Parte* at 5 (calling argument “absurd”).

NAB has further shown that regulatory measures to ensure that cable operators do not strip out multicast programming streams would vindicate the same two interests that the Supreme Court has twice found are sufficiently weighty to satisfy intermediate scrutiny and are served by the must-carry statute: (1) “preserving the benefits of free, over-the-air local broadcast television”; and (2) “promoting the widespread dissemination of information from a multiplicity of sources.”<sup>17</sup> In response, NCTA first claims that there is a lack of evidence that a multicast carriage obligation would further these interests because cable operators would still be required to carry the same amount of programming that is currently aired on broadcasters’ analog channels.<sup>18</sup> But this is a nonresponse; today, due to the promise of digital broadcast technology, the “benefits of free, over-the-air local broadcast television” include the manifold programming options that broadcasters can offer by multicasting. Broadcasters, moreover, must be able not merely to survive, but also to compete meaningfully in the video programming market, and in the digital age this means being able to offer viewers the very types of niche programming that multicasting is uniquely suited for.<sup>19</sup> And there *is* overwhelming record evidence that broadcasters will *not* be able to justify increased investments in multicast programming absent certainty that such programming will be carried on cable.<sup>20</sup>

NCTA argues, further, that guaranteeing carriage of additional programming from the same broadcasters already entitled to must-carry will not promote diversity.<sup>21</sup> This claim, too, is simply wrong. Mandatory cable carriage of multicasts will ensure the availability of as many as six additional viewing options, free of charge to the public, and if that is not an increase in diversity it is unclear what would be.<sup>22</sup> The record in this proceeding is replete with examples of the types of programming that broadcasters are currently – or would be, if carriage were guaranteed – offering pursuant to their multicasting capabilities.<sup>23</sup> Furthermore, the alternative

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<sup>17</sup> *NAB White Paper* at 22-25.

<sup>18</sup> *NCTA Ex Parte* at 4.

<sup>19</sup> *NAB White Paper* at 23-24.

<sup>20</sup> *See id.*; *see also* NAB Research and Planning, “July 2005 Survey of Television Stations’ Multicasting Plans” (“*July 2005 Survey*”) (attached to Letter from David K. Rehr, President & CEO, NAB, to the Honorable Kevin J. Martin, *et al.*, CS Docket No. 98-120 (June 8, 2006) (“*NAB June 8 Ex Parte*”)); “Selected Comments of Television Broadcasters Multicast Plans and Cable Carriage” (attached to *NAB June 8 Ex Parte*); Mark Fratrick, BIA Financial Network, “A Review of the Economic Benefits of Multicasting Must Carry” (June 5, 2006) (attached to *NAB June 8 Ex Parte*); Mark Fratrick, BIA Financial Network, “Economic Benefits of Multicasting Must Carry” (Aug. 16, 2005) (attached to *NAB June 8 Ex Parte*).

<sup>21</sup> *NCTA Ex Parte* at 4.

<sup>22</sup> *NAB White Paper* at 24-25.

<sup>23</sup> *See id.* at 5-7; *see also* *NAB June 8 Ex Parte* at 1-2; *July 2005 Survey*; “Selected Examples of Planned Local Multicast Programming” (attached to *NAB June 8 Ex Parte*); *see also* Letter from Ann Arnold, Executive Director of the Texas Association of Broadcasters, to Marlene H. Dortch, FCC Secretary, CS Docket No. 98-120 (June 8, 2006); Letter from Guy H. Kerr, Belo Corp. Senior Vice President/Law and Government, to Marlene H. Dortch, FCC Secretary, CS Docket No. 98-120 (June 8, 2006); Letter from Doreen Wade, President of CBS Television Affiliates Association, and Marci Burdick, President of NBC Television Affiliates, to The Honorable Ted Stevens, the Honorable Daniel K. Inouye, the Honorable Joe Barton, the Honorable John D. Dingell, the Honorable Fred Upton, and the Honorable Edward J. Markey, CS Docket No. 98-120 (June 8, 2006); Supplemental Submission by

to an anti-stripping rule – allowing a single cable operator to deny to their subscribers additional programming from multiple broadcasters – clearly *harms* diversity.

NCTA’s argument relating to a purported lack of record evidence regarding cable operators’ incentive and ability to disfavor broadcast programming fares no better.<sup>24</sup> As NAB has explained, it is quite obvious that cable operators have a powerful incentive to refuse to carry local broadcast programming – in particular, the specialized niche programming most likely to be aired on multicast streams – because it competes directly with cable’s own program networks.<sup>25</sup> Numerous broadcasters have supplied updated information explaining the myriad difficulties that they have encountered in obtaining cable carriage for multicast programming and, in particular, multicast programming that competes with cable’s own offerings.<sup>26</sup> The record also shows that broadcasters with little negotiating leverage but who provide important services to their local communities, such as small-market broadcasters, independent stations, Hispanic stations, religious broadcasters, and foreign-language stations, experience particular problems in securing carriage for multicast material.<sup>27</sup> If there were any doubt about cable’s

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CBS and NBC Affiliate Associations, CS Docket No. 98-120 (June 8, 2006); Comments of Journal Broadcast Group, Inc., CS Docket No. 98-120 (June 7, 2006); Comments of KPHO-TV, CS Docket No. 98-120 (June 6, 2006).

<sup>24</sup> *NCTA Ex Parte* at 4.

<sup>25</sup> *NAB White Paper* at 13-14, 24.

<sup>26</sup> *NAB June 8 Ex Parte* at 2-3; see “Selected Comments of Television Broadcasters Multicast Plans and Cable Carriage” (attached to *NAB June 8 Ex Parte*); see also, e.g., Letter from Gregory MacDonald, President/CEO of Montana Broadcasters Association, to Marlene H. Dortch, FCC Secretary, CS Docket No. 98-120 (June 7, 2006); Letter from Guy H. Kerr, Belo Corp. Senior Vice President/Law and Government, to Marlene H. Dortch, FCC Secretary, CS Docket No. 98-120 (June 8, 2006); Comments of Journal Broadcast Group, Inc., CS Docket No. 98-120 (June 7, 2006); Letter from Lee Armstrong, President of the North Carolina Association of Broadcasters, Christine H. Merritt, Executive Vice President of the Ohio Association of Broadcasters, and Douglas F. Easter, Executive Director of the Virginia Association of Broadcasters, to Marlene H. Dortch, FCC Secretary, CS Docket No. 98-120 (June 7, 2006).

<sup>27</sup> See, e.g., Letter from Lee Armstrong, President of the North Carolina Association of Broadcasters, Christine H. Merritt, Executive Vice President of the Ohio Association of Broadcasters, and Douglas F. Easter, Executive Director of the Virginia Association of Broadcasters, to Marlene H. Dortch, FCC Secretary, CS Docket No. 98-120 (June 7, 2006) (explaining that “large MSOs typically refuse to carry religious programming or any form of paid programming or constrain such programming to the graveyard hours of 12:00 midnight to 6:00 am”); Comments of Mike Lee, Vice President/General Manager of KXXV-TV/DT, CS Docket No. 98-120 (filed June 9, 2006) (explaining that many cable operators have refused to carry the multicast stream on which KXXV airs Telemundo network programming); Comments of Mike Taylor, Vice President/General Manager of KSWO Television Company, Inc., CS Docket No. 98-120 (June 5, 2006) (explaining that he has had only “limited success” securing cable carriage for his multicast stream that airs Telemundo network programming, and has also aired Spanish-language coverage of the Dallas Cowboys); Letter from Dianne Smith, Special Projects Counsel to Capitol Broadcasting Company, CS Docket No. 98-120 (Feb. 4, 2005) (explaining that, as to “Non-Big Four Affiliates, including many religious and minority broadcasters,” “[m]ost of these broadcasters have no negotiating leverage, so multicasting carriage seems unlikely”); see also Comments of Brian Lawlor, Vice President & General Manager, WPTV, CS Docket No. 98-120 (June 6, 2006) (stating that, if multicast streams were guaranteed cable carriage, his station would multicast emergency information in Spanish throughout the duration of an emergency situation); Letter from David Honig, Executive Director of Minority Media & Telecommunications Council, to Johanna Mikes Shelton, Legal Assistant to Commissioner Adelstein, and Jordan Goldstein, Legal Assistant to Commissioner

incentives and intent to disfavor competing programming, its vociferous opposition to carrying only commercial multicasting should eliminate it.

In addition to serving the interests that the Supreme Court held were furthered by analog must-carry, NAB has shown that an anti-stripping rule would serve an additional, entirely new, and equally important government interest – the interest in ensuring a smooth transition to DTV, and all the attendant benefits of that transition.<sup>28</sup> Rather than addressing this argument, NCTA attempts to turn the tables by claiming that, because Congress has now set a “hard deadline” for the end of the transition, further action designed to increase the attractiveness of DTV technology to consumers is entirely unnecessary because at the end of the transition they will simply have no choice but to accede to the change.<sup>29</sup> Congress, however, clearly did not mean to force DTV on the American public irrespective of its impact – after all, \$990 million has been allocated to a program that will provide subsidies for the purchase of converter boxes by individuals who still rely on analog television at the end of the transition.<sup>30</sup> This shows that Congress recognized the importance of moving the DTV transition forward with the least possible amount of consumer confusion and inconvenience, an approach diametrically opposed to the one that NCTA advances. The fact that there is “hard date” for the conclusion of the transition does not mean that government should stop trying to make the transition as smooth and as convenient as possible for the viewing public.

As NAB has also explained, preventing cable operators from blocking broadcasters’ multicasts meets the second prong of intermediate scrutiny as well. A multicast carriage obligation requirement simply cannot be said to “burden substantially more speech than necessary to further” the important government interests animating must-carry because it will impose *no greater burden* on cable than the existing must-carry regime that was blessed by the Supreme Court.<sup>31</sup> NCTA again turns a blind eye on the technological facts that render the cable industry’s First Amendment arguments unsustainable.<sup>32</sup> But both an analog channel and a digital channel occupy 6 MHz, and with current compression technologies a digital channel – whether used to air a single high definition programming stream or up to six multicast standard definition streams – even less.<sup>33</sup> Because the Supreme Court has already upheld against constitutional challenge the existing must-carry requirements, these facts mean that a multicast must-carry mandate

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Copps, CS Docket 98-120 (Jan. 26, 2004) (“In particular, the vertically and horizontally integrated structure of the cable industry renders it difficult for minorities and other new entrants to successfully launch any new channel, especially one whose viewership includes moderate income families who must receive television over-the-air or on only basic cable.”).

<sup>28</sup> *NAB White Paper* at 25-26.

<sup>29</sup> *NCTA Ex Parte* at 7.

<sup>30</sup> *NAB White Paper* at 4.

<sup>31</sup> *Id.* at 7-9, 26-29.

<sup>32</sup> *NCTA Ex Parte* at 4.

<sup>33</sup> *NAB White Paper* at 7-9.

would necessarily be found not to “burden substantially more speech than is necessary to further” the government’s interests and would similarly be upheld as constitutional.<sup>34</sup>

### **No Unconstitutional “Taking” Would Result From a Multicast Must-Carry Mandate**

The cable industry is similarly incorrect that an FCC rule ensuring the carriage of multi-stream broadcasts would violate the Takings Clause of the Fifth Amendment. Rather than rising to the level of a taking, such a rule, as NAB has shown, is typical government balancing a variety of interests that does not require compensation.<sup>35</sup> NCTA’s contrary claim is based almost entirely on a purported lack of explicit statutory authorization for multicast must-carry,<sup>36</sup> but, as shown above, its arguments on the statutory point are simply wrong.<sup>37</sup> NCTA argues, further, that there would be an “enormous” financial impact on cable operators if they were prevented from stripping out multicast signals.<sup>38</sup> As shown in the attached economic report, however, NCTA’s claims on this score are based on a faulty analysis.<sup>39</sup>

Moreover, it must be recalled that the cable industry has never before seriously argued that the existing must-carry rules constitute a taking and has publicly stated that it has “accommodated” itself to analog must-carry.<sup>40</sup> As NAB has shown, both analog must-carry and digital must-carry have precisely the same impact on cable operators’ alleged property rights, and if anything digital must-carry has less of an impact.<sup>41</sup> The transition from analog to digital – or a broadcaster’s choice to use a digital channel to multicast rather than air a single stream of high definition programming – does not increase the burden on cable’s property rights one iota. Thus, if analog must-carry is constitutional, then so too is a multicast carriage obligation.<sup>42</sup> In apparent recognition of this fatal flaw in its position, NCTA now suggests that *all* must-carry requirements – both analog and digital – are Fifth Amendment takings.<sup>43</sup> This is not only wrong for the reasons that NAB has previously explained,<sup>44</sup> but is also a radical suggestion, and one that makes clear cable’s underlying desire to deconstruct the *entire* must-carry regime despite its

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<sup>34</sup> *Id.* at 26-29.

<sup>35</sup> *Id.* at 29-34.

<sup>36</sup> *NCTA Ex Parte* at 6.

<sup>37</sup> *See supra* p. 2.

<sup>38</sup> *NCTA Ex Parte* at 6.

<sup>39</sup> Mark Fratrack, BIA Financial Network, “Estimating the Economic Impact of Multicasting Must Carry: How it is Misleading (Sept. 20, 2005) (responding to a study prepared by Kane Reece Associates, Inc. on behalf of NCTA entitled “The Economic Impact of Multicast Must Carry” (Sept. 7, 2005)).

<sup>40</sup> Cooper & Kirk, PLLC, *A Mandatory Multicast Carriage Requirement Would Violate Both the First and Fifth Amendments* (Sept. 6, 2005), at 16, available at [www.ncta.com](http://www.ncta.com); see *NAB White Paper* at 30.

<sup>41</sup> *NAB White Paper* at 7-9.

<sup>42</sup> *Id.* at 29-30.

<sup>43</sup> *NCTA Ex Parte* at 6 n.5.

<sup>44</sup> *NAB White Paper* at 30-34.

having been twice upheld against constitutional challenge and the benefits that it has provided to American viewers for over a decade.

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Contrary to NCTA's claims, the Constitution does not preclude the Commission from taking regulatory action, under the Cable Act, to update the existing carriage regime for the digital age. The marketplace is clearly *not* working, as NCTA asserts, to ensure voluntary carriage of multicast programming streams, programming that is essential to broadcasters' ability to compete in the modern marketplace of specialized and diverse programming. In actuality, the evidence is that the only multi-stream programming that cable operators are willing to carry is programming that does not present a competitive threat to cable's own offerings, and cable has made plain throughout this entire proceeding its intent to block this programming from the overwhelming majority of the American viewing public, which in the end harms the public interest. NAB therefore urges the Commission to ensure that cable operators do not strip out broadcasters' multicast streams from digital transmissions, thereby furthering the government's interests in preserving broadcasting, increasing diversity, and promoting a smooth transition to DTV.

Sincerely,



David K. Rehr

Attachment

cc: The Honorable Michael J. Copps  
The Honorable Jonathan S. Adelstein  
The Honorable Deborah Taylor Tate  
The Honorable Robert M. McDowell

**ESTIMATING THE ECONOMIC IMPACT OF  
MULTICASTING MUST CARRY:  
How it is Misleading**

Mark R. Fratrick, Ph.D.

BIA Financial Network

September 20, 2005



## EXECUTIVE SUMMARY

The recently released report by Kane Reece Associates attempts to quantify the economic impact from a proposed multicast must carry regulation. While the calculations are quite complex and lead to extraordinarily large numbers, their analyses fail to provide any meaningful estimates for the following reasons:

- There is no additional capacity that the cable industry will need to utilize under a multicast must carry regime beyond what it would use to carry a local digital signal that would be broadcasting in HDTV.
- The costs of “freeing up” cable capacity, as suggested in the study, only involve converting existing analog cable channels to digital, a process that is occurring already due to competitive pressures.
- The cable industry would not have to give up lost opportunities to provide additional services now and in the future as they can invest the relatively small sums to convert the existing analog cable channels to a digital format freeing up additional capacity.
- There is no analysis, or any acknowledgment, that a multicast must carry regulation could generate potential benefits. Hence, by default, the study cannot fully evaluate the economic impact of this proposed regulation.

Unfortunately, the Kane Reece study does not meet the criteria of a thorough economic impact study. Though it provides some very sophisticated and well-developed models, this analysis relies on assumptions of the cable industry “giving up” resources to comply with this regulation that are not based on fact. Thus, the estimates offered by the study are invalid.

# ESTIMATING THE ECONOMIC IMPACT OF MULTICASTING MUST-CARRY:

## How it is Misleading

### Introduction

In a recently issued paper, the valuation firm of Kane Reece Associates, Inc. has claimed to estimate the economic impact of a must-carry regulation involving the mandated carriage of all multi-cast signals of local television stations.<sup>1</sup> In that number-laden document Kane Reece uses four approaches “to estimate the cumulative value of the broadband bandwidth which would have to be used to satisfy a multicast must carry requirement.”<sup>2</sup> Those four approaches involve a national leased model, a 6 MHz valuation model, a cost of capital approach, and an opportunity cost approach.

While the calculations of those analyses are quite complex involving many different variables, they fail to provide any meaningful estimates. All of these calculations generate very large values assuming that the cable system has to allocate additional spectrum for multicasting purposes. The most basic problem with that assumption is simply that if local television stations do **not** multicast, their digital signals will still require the same six MHz on local cable systems. Cable systems have to be prepared to allocate that capacity at any time to those local digital signals no

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<sup>1</sup> *The Economic Impact of Multicast Must Carry*, Kane Reece Associates, Inc., September 7, 2005, issued by the National Cable & Telecommunications Association.

<sup>2</sup> Kane Reece, p. 1.

matter what is being locally broadcast. In short, all the Kane Reece estimates are based on a fallacy that undercuts their entire premise.

Furthermore, as the study itself points out, “freeing up” this capacity to carry the local digital television signals only involves converting existing analog cable channels to digital transmission, a process that is occurring already due to competitive pressures. Finally, the study never acknowledges in its analysis the economic impact of the potential of benefits to local individuals and business communities resulting from the additional choices and competition generated by the multicast signals. In sum, the Kane Reece study fails to provide a basis that a digital multicast must carry regulation induces any meaningful costs on the cable industry, or outweigh the benefits resulting from that regulation.

### **Costs of Allocating Additional Capacity**

For there to be a cost associated with multicasting must-carry obligations, local cable systems must be “giving up something.” If they are already required by law to carry the digital signal of a local broadcaster, there is no “giving up” of other services to carry the multicast signals, since they have to allocate that same amount of capacity.<sup>3</sup> Cable systems under a multicasting must-carry obligation will only be substituting the multicast signals for the otherwise digital signal that

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<sup>3</sup> The Kane Reece study also assumes that the local stations will be multicasting even if the local cable systems are not required to carry those signals. As pointed out in a previous paper, it will be necessary for local broadcasters to know for certain that local systems will be required to carry these multicast signals before these broadcasters invest the considerable sums for that additional programming. See Mark R. Fratrik, *Economic Benefits of Multicasting Must Carry*, National Association of Broadcasters, August 16, 2005, pp.4 – 6.

could take up the same amount of capacity. As some have succinctly expressed this point, “6 MHz is 6 MHz.”

How the cable industry will free up the capacity to carry the local broadcast digital signal emphasizes the lack of any meaningful costs incurred by the cable industry. As the Kane Reece study admits, the spectrum that will be utilized for the multicast signals is easily obtainable:

“[B]andwidth space for the broadcast digital signals is made available by the removal of some existing analog channels from the current channel line up. The removed channels could be made available in a digital format with the addition of headend facilities similar to the equipment needed to implement the digital broadcast signals.”<sup>4</sup>

Consequently, the only costs associated with carrying the multi-cast local signals, or for that matter the non-multicast digital local signals, are the costs of converting the three analog cable channels to digital. Moreover, it might not be necessary to even incur these costs as there are more cable networks planning to convert to a digital format as they try to compete with other digital cable networks as well as the digital programming provided by over-the-air television stations. The competitive pressures faced by these cable networks may quickly free up the capacity needed to carry the local digital signals.

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<sup>4</sup> Kane Reece, p. 8. This conversion is only necessary for cable systems that fully utilize their capacity, i.e., system that have no excess capacity. Cable systems not in that position can allocate that unused capacity for the local digital broadcast signals.

## Estimates of Lost Opportunities

This ability to “free up” their capacity by simply converting analog channels to digital transmission, surprisingly, is not included in their value analysis of lost opportunities. In other words, when calculating the reputedly extremely large costs of the cable industry losing “its ability to expand its high speed data, telephony, video on demand and other advanced services and to introduce the next generation of services,”<sup>5</sup> the analysis does not allow for the cable systems to convert additional analog channels to digital transmission thereby increasing the number of additional services local cable systems can continue to offer.<sup>6</sup> Instead, the analysis generates a very large opportunity cost estimate that could be avoided by an investment that is a fraction of that amount. In other words, local cable systems can provide all of these additional services as well as future services without any interruption by simply making these small investments in converting analog cable networks.<sup>7</sup>

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<sup>5</sup> Kane Reece, p. 10.

<sup>6</sup> Of course, there is a limit to the “freeing up” of capacity by converting analog cable channels to digital. However, as the analysis shows, nearly half of the average cable system capacity is now being allocated to these analog cable channels. (Kane Reece, p. 5). Therefore, there is a considerable amount of capacity to be liberated before other cable channels have to be taken off.

<sup>7</sup> In fact, Steven Burke, Chief Operating Officer of Comcast, Inc., the largest cable MSO recently was quoted as saying, “if the company could reclaim all 80 analog channels tomorrow it wouldn't know what to do with the bandwidth.” (*Communications Daily*, Warren Publishing, September 12, 2005). Clearly, this company will be able to offer all of the next generation of services for the foreseeable future.

In addition, it is extremely disingenuous for the study to highlight the inability “to introduce the next generation of services” without even acknowledging the possibility that advancements in technology will solve this alleged “problem.” Advancements in signal compression have been remarkable in just the last few years, and it is entirely likely that further advancements in that technology will continue. The next generation of services will not be hampered by the lack of available capacity, and will continue to be offered.

### **Benefits Not Accounted For**

In most economic impact analyses of proposed regulation, there is, at the very least, some discussion of the benefits that might result from that proposal. Even if the study authors believe that those benefits are not substantial, there is always a discussion of why the benefits are not as high as others may be professing. The readers of a study can then evaluate whether the costs that the study suggests are worth the estimated benefits, if any. Curiously, the Kane Reece study makes no mention of any benefits, and we are left wondering what their position is on the extent of those potential benefits.

These potential benefits manifest themselves in many different arenas.<sup>8</sup> By fostering multicast services through a must-carry regulation, an increase in the diversity of programming may be provided.<sup>9</sup> Additionally, the introduction of multicast digital signals may provide additional competition to local cable systems both in attracting viewers and in local advertising markets.

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<sup>8</sup> For a full discussion of these benefits see Mark R. Fratrik, *Economic Benefits of Multicasting Must Carry*, National Association of Broadcasters, August 16, 2005.

Finally, multicast digital local signals may provide advertising vehicles which will lead to faster growth for businesses targeting specific demographic groups and specified local areas.

## Conclusion

Forecasting economic impacts of proposed new regulations is often a daunting task. Analysts must make assumptions about individuals' and firms' reactions to these new regulations as well as other factors affecting these markets. In all cases, analysts must discuss openly the costs associated with the new regulations and the possible benefits that may result.

Unfortunately, the Kane Reece study does not meet those criteria. It offers some very sophisticated and well-developed models that generate very large estimates for costs that are, however, **not** caused by a multicast must carry obligation. The capacity that local cable systems will devote to local digital signals is the same whether the local station is multicasting, or instead, providing a full HDTV signal. Moreover, cable systems providing that capacity for those local digital signals can find that capacity with little or no additional investment.

Finally, the Kane Reece study makes no attempt to quantify, or even discuss, the potential benefits that may result from a multicast digital carriage requirement. Without that discussion and the lack of any evidence of substantial sacrifice by the cable industry the estimates offered by the Kane Reece study cannot be relied upon.

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<sup>9</sup> By gaining access to many smaller groups of populations of particular demographic groups, national programming sources may find it economical to produce and distribute diverse program where otherwise it would not make financial sense.