



Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the “Associations”), by their attorneys in this matter, hereby jointly submit their *ex parte* joint comments in the above-captioned proceeding.

The State Associations join with the other broadcasters who have participated in this proceeding in urging the Commission to adopt a digital multicast must-carry requirement. As has been amply demonstrated, such a requirement would (a) spur investment in diverse and innovative new programming content, much of it locally focused and/or produced and all of it free to the public; (b) enable broadcasters to more effectively compete in a digital multi-channel environment; (c) impose less of a burden on cable operators than do the existing analog must-carry rules; and (d) speed the digital transition by encouraging consumers to invest in digital television receivers. Moreover, such a requirement would be entirely consistent with the United States Constitution. Accordingly, the Commission should act promptly to bar cable operators from stripping out any portion of broadcasters’ digital signals by adopting a digital multicast must-carry requirement.

## **DISCUSSION**

### **I. A Multicast Carriage Requirement Is Necessary To Spur Broad Investment in Diverse and Innovative Local Programming Content**

As demonstrated in this proceeding, a number of broadcast stations are currently multicasting and even more have plans to commence multicasts. Much of this programming is locally produced and/or locally focused. In fact, according to a survey of full-power commercial

television stations submitted in this proceeding by the National Association of Broadcasters (“NAB”), 85% of responding stations that were either currently multicasting or planning to do so expected some or all of their future multicast programming to consist of local news, sports, public affairs, weather, minority-oriented programming, religious programming, college and high school events coverage, community events coverage, or other locally produced or locally focused programming.<sup>1/</sup> However, because broadcasters’ programming is completely advertiser supported, such programming must receive wide distribution to be financially viable. Sufficient distribution is simply not possible absent mandatory carriage on cable systems, which serve the vast majority of viewers in most markets. Recognizing this fact, 79.2% of stations in NAB’s survey that were multicasting or planning to multicast stated that they were “extremely unlikely” or “unlikely” to provide multicast services in the future if those services were not guaranteed carriage by the major local cable systems.<sup>2/</sup>

Thus, absent a multicast must-carry requirement, many broadcasters will be unable to commence multicast services or, if they have begun, will not be able to sustain these services. Cable systems will either refuse outright to carry more than one digital stream or achieve the same result through endless negotiations and requests for inordinate consideration which will have the effect of making a broadcaster’s investment in new programming prohibitive. Such an outcome would be detrimental to the public interest, as it would deprive viewers of new local programming services and limit the diversity of their programming choices. Even the regulatory

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<sup>1/</sup> See July 2005 Survey of Television Stations’ Multicasting Plans, NAB Research and Planning (“NAB TV Survey”); Letter from David K. Rehr of NAB to The Honorable Kevin J. Martin *et al.*, dated June 8, 2006. See also, Letter from Ann Arnold of the Texas Association of Broadcasters to the FCC, dated 8, 2006 (providing examples of programming currently being offered or envisioned on multicast channels by Texas television stations).

<sup>2/</sup> NAB TV Survey.

uncertainty over multicast must-carry has an expected, depressing effect on the willingness of licensees and their financial sources to invest ample sums for the development of programming intended for airing over multicast broadcast streams.

## **II. A Multicast Carriage Requirement Is Necessary For Free, Over-The-Air Broadcasting To Remain Universally Available in a Digital, Multicast World**

As the gatekeeper to 60% to 70% of the broadcast industry's audience, cable wields tremendous power over the ability of new broadcast-based multicast services to exist and succeed, over the health and viability of broadcasters in an increasingly digital world, and over the public's access to new and diverse forms of programming.

The threat of anticompetitive behavior by cable operators is real. As demonstrated by data gathered by Decisionmark, an independent media technology software and information firm, and submitted in this proceeding by NAB, only about 9% of non-PBS multicast channels currently receive carriage on a cable system in their market.<sup>3/</sup> Thus, right now, cable operators are refusing carriage of the vast majority of multicast services. Convincing anecdotal evidence submitted in this proceeding reveals that cable's motive in refusing to carry this programming is primarily anticompetitive. Operators do not want to carry any digital programming that might compete with programming that they now carry or might choose to carry in the future or that might siphon away advertisers from their own programming.<sup>4/</sup> Such behavior threatens the

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<sup>3/</sup> See Decisionmark data submitted to FCC by NAB letter dated June 9, 2006. See also, Letter from David K. Rehr to The Honorable Kevin J. Martin *et al.*, dated June 8, 2006 and Letter from David K. Rehr to the Honorable Joe Barton, dated June 8, 2006.

<sup>4/</sup> See, *e.g.*, Supplemental Submission by CBS and NBC Affiliate Associations at pp. 3-6, 9, dated June 8, 2002 (citing examples of cable operators' refusal to carry broadcasters' multicast local weather, news and children's programming, relegating such programming to a premium tier, or imposing onerous conditions on carriage that regulate multicast content in order to stifle competition); Letter to FCC Commissioners from David K. Rehr of NAB at pp. 2-3, dated June 8, 2006 and Letter to FCC from The North Carolina Association of Broadcasters, the Ohio Association of Broadcasters and the Virginia

viability of local broadcast stations as well as the interests of television viewers in an array of diverse and local programming.

Without cable carriage, much of the new programming being developed by broadcasters will have too small a potential audience. Without an adequate audience, broadcasters will not have the financial underpinning necessary to permit them to continue to develop and offer multicast programming, notwithstanding the incentive for broadcasters to develop such programming. In short, without the regulatory certainty created by a multicast must-carry requirement, broadcasters will be faced with a Hobson's Choice: either forego cable carriage altogether, which defeats the purpose of developing multicast program streams and denies the benefit of that new, diverse programming to the public, or be willing to pay the cable systems whatever they demand in order to insure carriage even if it means that the price of carriage prevents the broadcaster from earning a fair return on its investment. The first alternative is clearly not a solution that advances the FCC's goals. Nor is the second alternative because if a broadcaster does not have reasonable assurance of a fair return, it will not invest in the first place, nor will it find its financial backers willing to invest. Does the FCC truly want to go down the road of involving itself in determining, on a case by case basis, whether a cable system's demands are unreasonably impairing the Commission's goal of promoting a strong broadcast industry and the potential for more diverse programming in a digital, multicast world?

The provision of multicast services is necessary to enable broadcasters to remain competitive vis-à-vis cable and satellite providers, which can offer hundreds of channels from diverse programming sources. Digital multicasting presents broadcasters with the same opportunity to provide programming targeted to niche viewers as well as unique local

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Association of Broadcasters at p. 2, dated June 7, 2006 (each providing examples of cable operators' anticompetitive behavior).

programming that is the hallmark of broadcast television. As the Commission recognized in setting forth rules for the digital conversion, an essential goal of the digital transition is to:

promote and preserve free, universally available, local broadcast television in a digital world. Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television's unique benefit: free, widely accessible programming that serves the public interest. DTV will also help ensure robust competition in the video market that will bring more choices at less cost to American consumers. Particularly given the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to encourage broadcasters to offer digital television as soon as possible. . . . Digital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital.<sup>5/</sup>

This goal cannot be realized if the cable audience for broadcasters is limited to a single channel of general interest programming while cable systems offer hundreds of channels of varied, specialized interests, to the same audience.

### **III. A Multicast Must-Carriage Requirement Will Be Less Burdensome on Cable Operators than the Current Analog Must-Carry Requirements**

While cable carriage of broadcasters' multicast signals is essential to the health of the broadcast industry, such carriage will not impose any additional burden on cable operators. As has been repeatedly emphasized in this proceeding, multicasting will use no more cable system capacity than is currently being used for carriage of analog programming. Whether carrying a single analog television signal, a single HDTV programming stream or all of a station's digital multicast streams, a cable system will use no more than 6 MHz of bandwidth. Moreover, new compression technology currently employed by many cable operators enables the entire digital signal, including all the program streams contained within that signal, to be transmitted using only 3 MHz, half that currently used for carriage of broadcasters' analog signals. Thus, a

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<sup>5/</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, ¶ 5 (1997) ("*Fifth Report and Order*"), *subsequent history omitted*.

multicast must-carry requirement will be less burdensome to cable operators than the existing analog regime, even ignoring the dramatic increases in cable system capacity that have taken place in recent years.

#### **IV. A Multicast Carriage Requirement Would Speed the Digital Transition**

In addition, as the Commission is aware, Congress recently set February 17, 2009 as the final deadline for the DTV transition. Thus, the interests of broadcasters, Congress, and the FCC are all aligned in seeing as many viewers as possible convert to digital as quickly as possible. The creation of unique and innovative programming content of interest to local viewers for provision of various multicast services will speed the digital transition by encouraging consumers to invest in digital television sets. If the cable industry had their way, potentially 60% to 70% of the American audience would not even know what is newly available on the multicast digital channels of broadcasters nationwide. Multicast must-carry will insure that this will not be the case, and that awareness of the new offerings by broadcasters will spur the sales of new digital compatible television receivers.

#### **V. A Multicast Must-Carry Requirement is Entirely Consistent with the First and Fifth Amendments to the Constitution**

As has been amply demonstrated in this proceeding, adoption of a multicast must-carry requirement is fully consistent with the requirements of the United States Constitution. Significantly, the existing must-carry statute has been held constitutional by the United States Supreme Court.<sup>6/</sup> As demonstrated above, a multicast carriage obligation would be less burdensome to cable operators than the existing analog carriage scheme upheld in *Turner II*. Accordingly, if the existing scheme does not impermissibly burden protected speech in violation of the First Amendment or constitute a compensable taking in violation of the Fifth Amendment,

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<sup>6/</sup> See *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”).

then certainly the extension of those protections to the digital context does not violate these laws. In fact, as amply demonstrated by others in this proceeding,<sup>7/</sup> a multicast must-carry requirement would serve the same content-neutral goals of (a) preserving the benefits of free, over-the-air local broadcast television and (b) promoting the widespread dissemination of information from a multiplicity of sources that were held to satisfy First Amendment requirements in *Turner II*.<sup>8/</sup> Since the decision in *Turner II*, nothing has changed that would suggest that the carriage of the digital streams of television stations would be materially burdensome to cable. In addition, broadcasters are still at the mercy of cable operators for access to 60% to 70% of viewers in their markets. Cable companies still have the incentive (and the record demonstrates that they are acting on this incentive), and indeed a heightened incentive given their broader array of their own program offerings and new competition from telecom providers, to cut off, to the extent possible, viewers' access to "broadcast" content.

A new circumstance, that did not exist when "must-carry" was first enacted into law, adds even more weight in favor of a multicast must-carry requirement. That circumstance is the digital transition whose deadline is February 17, 2009. That deadline has placed the broadcast industry, and the public at large, in a sea of potentially troubled waters where the cut-over date is certain, but assurances of high digital receiver penetration by that date are not. A multicast must-carry obligation will act as a critical driver in the development of new broadcast programming; such programming in return will drive digital receiver penetration.

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<sup>7/</sup> See, e.g., *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*, dated June 2, 2006, prepared on behalf of NAB by Helgi C. Walker, Eve Klindera Reed, and Thomas R. McCarthy of Wiley Rein & Fielding LLP.

<sup>8/</sup> See *Turner II*, 520 U.S. at 189-90.

As mentioned above, the Commission has recognized as an essential goal of the digital transition to “promote and preserve free, universally available, local broadcast television in a digital world. Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television’s unique benefit: free, widely accessible programming that serves the public interest.”<sup>9/</sup> The absence of a multicast must-carry requirement will allow the cable industry to frustrate the digital transition either by refusing to carry more than one digital stream or by achieving the same result through endless negotiations and requests for inordinate consideration, which will have the effect of making a broadcaster’s investment in new programming prohibitive. In light of the Supreme Court’s decision in *Turner II*, and the experiences since that decision, there is simply no valid argument that a less burdensome multicast carriage requirement, in these unique circumstances, would violate the Constitution.

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<sup>9/</sup> *Fifth Report and Order* at ¶ 5.

**CONCLUSION**

For the foregoing reasons, the Associations strongly urge the Commission to adopt a multicast carriage requirement to prevent cable operators from stripping out portions of broadcasters' programming from their digital signals.

Respectfully submitted,

**NAMED STATE BROADCASTERS ASSOCIATIONS**

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