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Legal & Regulatory Affairs

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Federal Communications Commission
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98-120

Fax

To: Commissioner Jonathan Adelstein From: Joan Flowers

Fax: 202-418-0232 Pages: 2

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Re: CC:

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Attached is a copy of a letter dated June 8, 2006 that was sent to Joe Barton, Chairman Committee on Energy & Commerce.

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David K. Rehr
 President & CEO
 1771 N Street, NW Washington, DC 20036-2800

June 8, 2006

Honorable Joe Barton
 Chairman
 Committee on Energy & Commerce
 U.S. House of Representatives
 2125 Rayburn HOB
 Washington, D.C. 20515

Dear Chairman Barton:

Multicast must-carry is an important priority for the National Association of Broadcasters (NAB) and critical to free over-the-air broadcasting's future. Accordingly, I was very disturbed and somewhat confused by your recent letter to Federal Communications Commission (FCC) Chairman Kevin Martin objecting to any FCC decision to prevent cable operators from stripping out multiple program streams contained in digital over-the-air broadcast signals. With all respect, I believe your objection is based on frequently-repeated misinformation from our cable brethren. I would like to correct the record.

First, contrary to cable's claims, nothing in sections 614 and 615 of the Communications Act bars the FCC from requiring cable systems to carry broadcasters' full digital signals, including multicast programming. The FCC recognized in its *Second Report and Order* that these sections "do not directly translate to digital technology generally," and concluded that Congress "did not expressly compel a particular result with respect to ... multicasting specifically." *Second Report and Order*, Docket 98-120, 20 FCC Rcd 4516, 4533 at para. 34 (2005). In other words, there is no statutory barrier.

The FCC made very clear in this last order that its decision not to require full carriage was based on its then "current record." *See, e.g.*, paras. 37 – 41. While broadcasters believed that there was enough record evidence to support a full digital carriage requirement at that time, we now point to even more evidence to support the need for the requirement. For example, very recent data from Decisionmark, an independent research firm that tracks industry data, shows that as of June 6, 2006, only about nine percent of commercial multicast channels currently receive carriage on any cable system. Cable systems regularly operate as gatekeepers, stripping out commercial broadcasters' multicast channels that carry unique local programming – clearly programming that the public wants.

Independent programmers would not suffer if the FCC required full digital carriage. Independent programmers have been complaining for some time that they cannot get carriage because the large cable operators favor their own affiliated programmers. That is unlikely to change given the concentrated nature of the cable industry. Broadcasters, on the other hand, will be open to independent programmers because they will have an increased need for programming on multicast channels – if they can get them started.

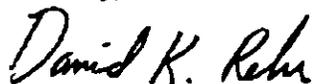
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I submit, Mr. Chairman, that Congress should allow the FCC to complete the rulemaking that is before it. As you know, there are many different views in Congress, within the House Energy and Commerce Committee and elsewhere about how this complicated issue should be resolved. As the expert agency, subject to judicial review, the FCC is in the best position to resolve the issue in a manner that will serve the public interest.

Finally, I note that the Deficit Reduction Act (P.L. 109-171) does not preclude the FCC from preventing cable operators from stripping out multicast channels. That Act was not a comprehensive response to all digital issues. Indeed, it was limited by the Senate rules to budget issues. Thus, it would be inaccurate to read any barrier into that legislation.

NAB and our approximately 8,300 members strongly support Chairman Martin's effort to require carriage of more desirable free local programming for your constituents and all American consumers. In the digital world, cable systems can easily carry additional local programming from broadcasters without impinging on non-broadcast programming. This would be consistent with the intent of Congress for more localism and greater diversity in programming. We look forward to discussing these critical issues with you further in the near future.

Sincerely,



David K. Rehr

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

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Attached is a copy of an exparte submission dated June 12, 2006 and entitled "Multicast Carriage Will Not Affect Cable's Ability to Carry Other Program Networks."



Legal Department

1771 N Street, NW, Washington DC 20036-2800
(202) 429-5430 • Fax: (202) 775-3526

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 Red 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.*

- Time Warner recently told the Commission that SVD will play a “critical role in clearing digital spectrum and the resulting benefits to subscribers in terms of more high definition digital content *and new services.*” Letter from Steven N. Teplitz, Time Warner, to Marlene H. Dortch, FCC, CS Docket No. 97-80 (May 11, 2006)(emphasis added).
 - Time Warner’s chief technology officer said, “So first you simulcast, then you switch and what you end up with is much, much better picture quality for the digital subscribers *and the ability to add as many new channels as you want.*” *Multichannel News*, Jan. 9, 2006, at 28 (emphasis added). Comcast, Time Warner and Cox are quickly moving to switched video which would allow them to offer new channels and services. *The Wall Street Journal*, July 21, 2005, at B1 (“If consumers show an appetite for tens of thousands of hours more, we can match it.”).
 - Cable systems also will be able to deploy IP-based video, also resulting in an almost unlimited ability to add channels.
 - Cable’s arguments that the requirement to carry local broadcasters’ full digital signals – which by definition use no more capacity for multicasting than a single HDTV signal occupies – will threaten carriage of other cable networks flies in the face of the fact that cable has ample capacity today and vastly more coming. None of the cable arguments opposed to multicast carriage even acknowledge the existence of the technologies that, in other contexts, cable trumpets as providing it with unlimited capacity.
- If cable operators choose to devote capacity to non-video services such as Internet access or telephony, that is their business decision, but it is irrelevant to an analysis of the “burden” of must carry.
 - If a cable system devotes capacity to non-video services and decides not to carry a cable program service, the programmer cannot argue that *but for* must carry, it would have gained access to the cable system. Notably, while C-SPAN argued that it had been dropped from cable systems because of analog must carry, in the *Turner* remand it was unable to demonstrate even one instance where must carry rules were responsible for its failure to be carried. *See* Letter from Edward O. Fritts, NAB, to Brian Lamb, C-SPAN, May 29, 1998 (App. C to Reply Comments of the National Association of Broadcasters, CS Docket No. 98-120 (Dec. 22, 1998); *see* Reply Comments of NAB/MSTV/ALTV, CS Docket No. 98-120, at 35-35 (Aug. 16, 2001).

- 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 McSarrow, 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.