

COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW WASHINGTON
WASHINGTON, DC 20004-2401 NEW YORK
TEL 202.662.6000 SAN FRANCISCO
FAX 202.662.6291 LONDON
WWW.COV.COM BRUSSELS

August 24, 2006

Via Electronic Filing

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: The FCC's authority to prevent cable from blocking the public's access to
broadcasters' free multicast programming (CS Docket No. 98-120)

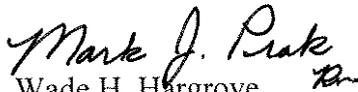
Dear Chairman Martin:

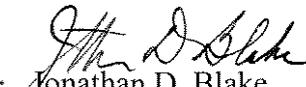
Recently skepticism has been expressed about whether the FCC has the power to protect the public against cable systems' stripping broadcasters' free multicast offerings from their digital signals. The enclosed White Paper shows that not only does the FCC have this authority but also that it was clearly *directed* by Congress in the 1992 Cable Act to adapt its analog carriage requirements to the new digital transmission technology. Congress would not have instructed the FCC to make these adaptations, if it did not believe that the FCC had the authority to do so. Further, developments both in Congress and at the Commission since the 1992 Act confirm that this is the only possible reading of the Act and that it specifically applies to the multicast carriage issue.

NAB President David Rehr wrote Commissioner McDowell on August 16 succinctly making a number of points about this issue. The ABC, CBS and NBC Affiliate Associations submit this White Paper to focus in depth on the issue of agency authority. The White Paper does not address other issues such as whether the Commission should, as a matter of public policy, exercise this authority to prevent cable blockage of the public's access to multicast services. These topics have been amply addressed in prior submissions to the record.

It is the affiliates' conviction that multicast carriage remains essential for the future vitality of the public's local, free and universal television service, and they stand ready to discuss with the Commission any and all aspects of this issue.

Respectfully submitted,


Wade H. Hargrove
Mark J. Prak
ABC Television Affiliates
Association


Jonathan D. Blake
Jennifer A. Johnson
NBC Television Affiliates


Jonathan D. Blake
Jennifer A. Johnson
CBS Television Network
Affiliates Association

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
(CS Docket No. 98-120)

**THE FCC'S AUTHORITY OVER CABLE CARRIAGE
OF BROADCASTERS' MULTICAST SERVICES**

Jonathan D. Blake
Robert A. Long, Jr.
Gregory M. Lipper
Robert M. Sherman
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

August 24, 2006

**THE AUTHORITY OF THE FEDERAL
COMMUNICATIONS COMMISSION TO RULE THAT
CABLE OPERATORS' DIGITAL CARRIAGE
OBLIGATIONS ENCOMPASS BROADCASTERS'
MULTICAST SERVICES**

**Jonathan D. Blake, Robert A. Long, Jr.,
Gregory M. Lipper, and Robert M. Sherman**

Digital technology has allowed broadcasters to begin providing television viewers with multicast video content. Examples include children's programming, extended coverage of local and civic news, 24-hour weather reports, channels targeted to minorities and non-English speakers, and detailed information about emergencies.¹ These long-anticipated multicast services are serving important public interest goals and meeting the needs of specific community segments that could not be met through the use of only a single programming stream. And, as more consumers purchase digital sets to take advantage of these services, the government will spend less money subsidizing converter boxes.

Recently, questions have been raised about whether the Federal Communications Commission has the authority to incorporate multicast programming into the digital carriage obligations of its rules. This paper concludes that the Commission has this authority, that both Congress and the Commission have repeatedly recognized that the

¹ See, e.g., *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report & Order, 12 FCC Rcd. 12,809, 12,817 (1997) (describing some innovative uses of multicasts); Supplemental Submission by the CBS and NBC Affiliate Associations, CS Docket No. 98-120, at 8-12 (filed June 8, 2006) (same).

Commission has this authority, and that Congress has repeatedly directed the Commission to exercise its authority for this very purpose.²

I. CONGRESS DIRECTED AND EMPOWERED THE COMMISSION TO APPLY ITS ANALOG CARRIAGE REQUIREMENTS TO BROADCASTERS' DIGITAL SERVICES INCLUDING THEIR MULTICAST SERVICES.

A. The 1992 Cable Act Established Analog Carriage Principles and Required the Commission to Adapt Them to the New Digital Technologies.

In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act³ ("1992 Cable Act"). The Act directed cable systems to (1) carry broadcasters' free programming, (2) carry all of a station's free programming schedule, and (3) refrain from degrading broadcasters' signals. These requirements flowed from Congress' finding that "there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position."⁴ Congress concluded that comprehensive carriage requirements were "the only means to protect the federal system of television allocations, and to promote competition in local markets."⁵

Because Congress recognized that analog broadcasting would eventually be replaced by new technologies, referred to as the "advanced television services" ("ATV"),

² Even if this were not clearly the case, the Commission's general rule making authority (47 U.S.C. §§ 154(i) and 303(r)) would provide sufficient basis for the Commission to adopt digital carriage rules that would encompass multicast programming. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 692-93 (D.C. Cir. 2005) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968)).

³ Pub. L. 102-385, 106 Stat. 1460 (1992). Congress also adopted the retransmission consent principle which is not relevant to the issues addressed here. *Id.* at § 2(a)(19).

⁴ *1992 Cable Act* at § 2(a)(15).

⁵ 138 Cong. Rec. H8308-01, H8328 (Sept. 14, 1992).

Congress instructed the Commission, and thereby made clear that it was empowered, to adapt the Congressionally-mandated analog rules to keep pace with these new technologies:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission *shall initiate* a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.⁶

In delegating this authority to the Commission, Congress turned its back on earlier proposals that would have required the Commission to get permission from Congress before adapting the analog rules for application to the new digital technologies. Thus, draft House legislation in 1990 (H.R. 5267, the Cable Television Consumer Protection Act of 1990) would have, instead, required the Commission to:

- (i) initiate a proceeding to consider technical standards applicable to cable carriage of broadcast signals; or
- (ii) consider submission to the Congress of suggestions for legislative changes necessary to ensure cable carriage of the new broadcast standard.⁷

This language would have limited the Commission to adopting only technical standards for digital and to suggesting to Congress the legislative changes it would then have to enact to adapt the analog carriage regulations to the new advanced television services. In replacing this restrictive language of the 1990 legislation with the empowering and

⁶ 47 U.S.C. § 534(b)(4)(B) (emphasis added).

⁷ Cable Television Consumer Protection and Competition Act of 1990, H.R. 5267, 101st Cong., § 5 (1990).

directing language adopted in 1992, Congress confirmed that it was neither necessary nor desirable for the Commission to await further legislation before adapting its analog rules to the new transmission technologies.⁸

Congress was well aware in 1992 of the promise of digital multicast services. Indeed, Congress was initially concerned about permitting multicasting because, at the time, it was believed that HDTV programming and multicasting might be mutually exclusive as a technical matter; that is, that broadcasters would have to make a choice between providing HDTV service, which Congress considered to be a major goal of the digital transition, and offering multicasts.⁹ Although it was aware of this issue, Congress did not require broadcasters to air either HDTV content or multicasts. Today, of course, the concern no longer exists because a broadcaster can simultaneously transmit both HDTV and multicast programming.¹⁰

⁸ See, e.g., *United States v. Wells*, 519 U.S. 482, 492-94 (1997) (relying on textual changes between statute and the previous version it replaced); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995) (same).

⁹ Some broadcasters expected to transmit an HDTV signal much of the day and to employ multicasting for programming where HDTV was thought not to add much value, e.g., in the local evening news where diverse and separate coverage of D.C., Maryland and Virginia news might better serve the public than a single newscast of higher resolution.

¹⁰ The FCC's 1992 rulemaking to implement the 1992 Act also specifically reflected the promise of multicasts and the relevance of multicasting to the carriage obligations. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 8 FCC Rcd. 510 (1992). See also Letters from Alfred C. Sikes, Chairman, FCC, to Hon. Ernest F. Hollings, Chairman, Committee on Commerce, Science & Transp., U.S. Senate, Hon. John D. Dingell, Chairman, Committee on Energy & Commerce, U.S. House of Representatives, Hon. Edward J. Markey, Chairman, Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives, Hon. Daniel K. Inouye, Chairman, Subcommittee on Communications, Committee on Commerce, Science & Transp., U.S. Senate, Hon. John C. Danforth, Ranking Minority Member, Committee on Commerce, Science & Transp., U.S. Senate, MM Docket No. 92-266 (Jan. 14, 1993).

B. The Statutory Bases for Resolving the Issue of Multicast Carriage.

In the 1992 Act, Congress provided the Commission with a starting point for adopting digital carriage rules. The statute directed the Commission to enact certain analog carriage rules and directed the Commission then to adapt those rules to the digital technologies. The starting point for this process begins, therefore, with the 1992 Act's prescription for analog carriage requirements.

First, Congress required cable operators in the analog context to carry the “primary video, accompanying audio, and line 21 closed caption transmission.”¹¹ This provision allowed the “cable operator [to] retain discretion whether or not to retransmit . . . program-related material in the vertical blanking interval and on subcarriers or other enhancements of the primary video and audio signal (such as teletext and other subscription and advertiser-supported information).”¹² It should be emphasized that this provision applied to analog broadcasts, and did not speak to the applicability of the general carriage requirement to the future digital technologies. In short, Congress directed the Commission to require cable operators to carry all free broadcast content included within a station's analog signal but to allow cable operators not to carry ancillary services such as teletext and other subscription-based services.

¹¹ 47 U.S.C. § 534(b)(3)(A). As the Commission has observed, this language was intended to specify carriage obligations in an analog environment. It does “not directly translate to digital technology,” and accordingly does not “compel a particular result for multicasting must-carry.” All five Commissioners agreed with this conclusion.

¹² *See, e.g.*, 138 Cong. Rec. E3193-01 (Oct. 9, 1992) (statement of Sen. Eckart). Congress sought to ensure that the analog carriage obligation was not “used to require carriage of secondary uses of the broadcast transmission, including the lease or sale of time on subcarriers or the vertical blanking interval for the creation or distribution of material by persons or entities other than the broadcast licensee.”

These excluded services were paid services ancillary to the *analog* signal. If they are at all similar to digital services, it is only to the paid ancillary or supplementary digital services that Congress specified in 1996 should be excluded from the digital carriage requirements. They are decidedly dissimilar to the free digital multicast services, over which Congress gave the Commission authority to apply the principles of its analog carriage rules.

Second, cable operators were prohibited from cherrypicking the content of the analog stations they carried. Congress provided that “[t]he cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited.”¹³ Blocking a station’s multicast local news channel is, for example, the digital equivalent of blocking a station’s local news program from its analog schedule.

Third, Congress mandated that “[t]he signals of local commercial television stations that a cable operator carries shall be carried without material degradation.”¹⁴ Congress believed that without a restriction on degradation – of which complete blockage is the most extreme form – cable operators could and would seek unearned, anticompetitive advantage by degrading the signals of their broadcaster rivals. Thus, Congress directed the Commission to enforce this provision through carriage rules that would evolve with technology: “The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage

¹³ *Id.* § 534(b)(3)(B).

¹⁴ 47 U.S.C. § 534(b)(4)(A).

provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.”¹⁵

C. Subsequent Legislation.

During and after the passage of the 1992 Cable Act, Congress recognized the prospect of multicasting. In connection with the Act’s broad delegation of authority and responsibility to the Commission, Congress could have excluded multicasts from the carriage obligations applicable to digital. Congress did not seek to do so in the 1992 Act, nor did Congress do so later, especially in 1996 when it explicitly excluded paid “ancillary or supplementary” services from digital carriage obligations but chose not to exclude multicast services.

1. 1992 – 1996: Continued attention to multicasting.

As Congress was enacting the 1992 Act, agency and industry leaders continued to recognize the potential of multicasting to enhance and sustain the public’s free broadcast service:

- Commissioner Marshall: “I am becoming increasingly convinced . . . that the real key to broadcasters’ continued competitiveness lies not so much in ATV as a crisp picture, but in its potential for spectrum-efficient multiplexing. In my view, broadcasters must become multichannel providers to continue to flourish in the long run.”¹⁶
- Chairman Sikes: The drive toward digital television was not based on “just better pictures and improved sound.” Rather, such a “flexible digital system

¹⁵ *Id.* All three requirements applied to retransmission consent stations, as well as to must-carry stations. See n.3.

¹⁶ See, e.g., *Advanced Television Systems & Their Impact Upon The Existing Television Broadcast Service*, Mem. Op. & Order, 7 FCC Rcd. 6924, 6999 (1992) (Statement of Cmr. Sherrie P. Marshall).

. . . will mean innovative video. For instance, the signal could carry multiple scenes and camera angles or multiple programs.”¹⁷

- Senior Fox Executive: Digital broadcasting is a “real potential avenue for opportunities. Once you are able to transmit a digital signal . . . and perform simulcast requirements, you can do pretty much whatever else you wish to do with that channel . . . including additional programs.”¹⁸

Later, in a 1995 notice of proposed rulemaking, the Commission concluded, “Digital encoding and transmission technology has evolved and matured to the point where we are confident that it would not only permit the broadcast of a digital High Definition Television signal over a 6 MHz channel, but that it would *also* allow for an array of *additional* alternative uses.”¹⁹ New technology, explained the Commission, “allows for multiple streams, or ‘multicasting,’ of Standard Definition Television (‘SDTV’) programming at a quality at least comparable to, and possibly better than, the current analog signal.”²⁰

Congress also was fully aware that broadcasters could use the greater capacity made possible by digital technologies for multicasting but focused its concern instead, on its possible use for pay services. Thus, in 1994, Congressman Ed Markey and Senator Ernest Hollings each introduced legislation that would have required broadcasters to pay

¹⁷ “FCC and Broadcasters Battle Toward Flexible HDTV Conversion,” *Broadcasting Magazine* (Oct. 5, 1992).

¹⁸ “Do Not Be Weak-Kneed, Sikes Tells Broadcasters At Conference On HDTV,” 2.21 *HDTV Report* (Oct. 14, 1992).

¹⁹ *Advanced Television Systems and Their Impact Upon The Existing Television Broadcast Service*, Fourth Further Notice of Proposed Rulemaking, 10 FCC Rcd. 10,540, 10,541 (1995) (emphasis added).

²⁰ *Id.*

fees for nonbroadcast, subscription-supported “ancillary or supplementary” services, such as data transmissions.²¹

Similarly, in 1995, the Senate passed S. 652, introduced by Senator Larry Pressler, then Chairman of the Senate Commerce Committee. Section 207 of that bill would have allowed broadcasters to use the new technologies to provide paid “ancillary or supplementary” services, but only “if the licensees provide without charge to the public *at least one* advanced television program service as prescribed by the Commission that is intended for and available to the general public on the advanced television spectrum.”²² The bill’s reference to “at least one” service illustrates that Congress again contemplated multicasting, and again neither disallowed it nor exempted it from cable’s carriage requirements.

2. Telecommunications Act of 1996.

Congressional scrutiny of the uses of the new digital technologies culminated in a provision of the Telecommunications Act of 1996 that distinguished between “advanced television broadcast” services, which included multicasting, and paid “ancillary or supplementary” services, which did not. In the Act, Congress limited the scope of the authority it had given to the Commission in 1992 by specifying that mandatory carriage

²¹ See H.R. Rep. No. 103-560, at 87 (1994) (“[P]ermitting broadcasters more flexibility in using their spectrum assignments is consistent with the public policy goal of providing additional services to the public. Such as policy not only promotes more efficient spectrum use, but also encourages innovation”).

²² S. 652, 104th Cong., § 207(a)(1)(A) (1995).

should not apply to the latter.²³ But Congress did not limit the Commission’s authority to require cable carriage of “advanced television” services – which included multicasts.²⁴

The accompanying Conference Report further reiterated congressional awareness that digital broadcasts could include multiple program streams. The Report explained that the Senate version of the legislation required a “broadcaster [to] provide *at least one* free, over-the-air advanced television broadcast service on [its] spectrum.”²⁵ Congress also expressed its understanding that the Commission was authorized, and encouraged, to consider application of the analog carriage rules to digital multicasts. The Conference Report explained that Section 534 did not itself “confer must carry status on advanced [digital] television” because “that issue is to be the subject of a Commission proceeding” under 47 U.S.C. § 534(b)(4)(B).²⁶ Recently, Senate Commerce Committee Chairman Ted Stevens said he would be “happy” for the FCC to address multicast carriage, and observed, “[A multicast carriage mandate is] going to be a regulation.”²⁷

In sum, when it altered the Commission’s statutory authority in 1996 to adapt the analog carriage rules to digital, Congress made two important judgments: First, it specified that the mandatory digital carriage requirements must not extend to paid “ancillary or supplementary” services. Second, it classified multicasts (but *not* “ancillary

²³ 47 U.S.C. § 336(b)(3). This provision also likely prevented the Commission from exercising its general rule making authority (*see* n.2) to require cable carriage of paid “ancillary or supplementary” services.

²⁴ *See* 47 U.S.C. § 336(b)(3).

²⁵ Telecommunications Act of 1996, H.R. Conf. Rep. No. 104-458, at 159 (1996) (emphasis added).

²⁶ *Id.* at 121.

²⁷ He also pointed out that it would be “subject to consideration by us when we get to the full consideration of the whole digital transition.” *See* Jonathan Make & Howard Buskirk, “McDowell Studying Multicast Must-Carry,” *Comm. Daily* (June 9, 2006).

or supplementary” services) as “advanced television programming” services, and reaffirmed Section 534’s instruction that the Commission adopt a carriage obligation for these advanced services, if the Commission found such an obligation to be consistent with the public interest.

3. Balanced Budget Act of 1997.

In 1997, while it reemphasized that the Commission could not require carriage of subscription services, Congress reaffirmed the Commission’s broad authority to define cable’s carriage obligations in the digital context. In the Conference Report that accompanied the Balanced Budget Act of 1997, Congress stated that it was “not attempting to define the scope of any MVPD’s [digital carriage] obligations.”²⁸ The report acknowledged “that the Commission has not yet addressed [carriage obligations] with respect to digital television service signals, and the conferees are leaving that decision for the Commission to make at some point in the future.”²⁹

D. FCC Rulemakings.

In response to Congress’ direction that it consider the multicast carriage issue along with other digital carriage questions, the Commission initiated a rulemaking in the summer of 1998 to establish DTV carriage rules.³⁰ In 2001 and again in 2005, the Commission issued decisions about those rules.

In the 2001 decision, the Commission concluded that the text of the 1992 Cable Act led to the conclusion that, “to the extent a television station is broadcasting more than

²⁸ H.R. Rep. No. 105-217, at 577 (1997) (Conf. Rep.).

²⁹ *Id.*

³⁰ *Carriage of the Transmissions of Digital Television Broadcast Stations*, Notice of Proposed Rulemaking, 13 FCC Rcd. 15,092 (1998).

a single video stream at a time,” the cable operator need carry “only one of such streams of each television station.”³¹ In 2005, however, the Commission reconsidered the issue and reached the opposite conclusion. Though in the exercise of its statutory authority the Commission declined to require cable operators to carry multicast streams, the Commission concluded that the 1992 Act did not “expressly compel a particular result with respect to the application of [carriage rules] to digital television generally, and multicasting specifically.”³² In separate statements, each Commissioner specifically agreed that the 1992 Act permits the Commission to apply cable’s carriage requirements to multicast streams.³³

* * *

Thus, any argument advanced at this time that the Commission lacks authority to include multicast services in its digital cable carriage requirements is inconsistent with 14 years of Congressional consideration of this issue and the considered opinion of all five of the FCC Commissioners who acted on this issue last year.

³¹ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, First Report & Order, 16 FCC Rcd. 2598, 2621 (2001) (“First Order”).

³² *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Second Report & Order & First Order on Recon., 20 FCC Rcd. 4516, 4533 (2005) (“*FCC Second Report*”).

³³ *See id.* at 4544 (Separate Stmt. of Chmn. Michael K. Powell) (Act is “susceptible to different interpretations”); *id.* at 4545 (Separate Stmt. of Cmr. Kathleen Q. Abernathy) (Act “*permits* a multicasting requirement”) (emphasis in original); *id.* at 4548 (Separate Stmt. of Cmr. Michael J. Copps) (Act makes “ample latitude available to the Commission to determine changed carriage requirements in a changed media environment”); *id.* at 4550 (Separate Stmt. of Cmr. Kevin J. Martin) (Act’s language “is ambiguous, and therefore [the Commission] could have interpreted it to mandate broader carriage”); *id.* at 4552 (Separate Stmt. of Cmr. Adelstein) (“The [Act’s] undeniable ambiguity means underlying policy factors and Congressional intent take on greater importance.”).

II. THE ROLE OF THE PHRASE “PRIMARY VIDEO” AND THE FIRST AMENDMENT IN DEFINING THE COMMISSION’S AUTHORITY TO RESOLVE THE MULTICAST CARRIAGE ISSUE.

Neither the Act’s use of the phrase “primary video” nor the First Amendment circumscribes the Commission’s authority – and responsibility – to resolve the issue of multicast carriage or suggests that the Commission should not permit cable operators to block subscribers’ access to multicast services by stripping them from broadcasters’ digital signals.

A. “Primary Video”

As the Commission’s decision in 2005 made clear, the 1992 Act’s use of the word “primary” – to refer to analog video and analog audio – does not require and should not incline the Commission to limit cable operators’ digital carriage obligation to single-channel programming.³⁴ To the contrary, the Supreme Court has specifically recognized that “primary” can mean “more than one.” In *Board of Governors v. Agnew*, the Court analyzed a federal statute that prohibited certain bank positions from being held by employees of partnerships “primarily engaged” in certain financial transactions.³⁵ The Court reversed the appellate decision holding that “a firm is not ‘primarily engaged’ in underwriting when underwriting is not by any standard its chief or principal business.”³⁶

In its opinion, the Supreme Court rejected the argument that “primary” necessarily refers only to one thing:

It is true that ‘primary’ when applied to a single subject often means first, chief, or principal. But that is not always the case. For other accepted and common meanings of

³⁴ As noted at page 5, this concept pertained to cable’s analog carriage obligations.

³⁵ See 329 U.S. 441, 443 (1947) (quotations omitted).

³⁶ *Id.* at 446.

‘primarily’ are ‘essentially’ (Oxford English Dictionary) or ‘fundamentally’ (Webster’s New International). An activity or function may be ‘primary’ in that sense if it is substantial. If the underwriting business of a firm is substantial, the firm is engaged in the underwriting business in a primary way though by any quantitative test underwriting may not be its chief or principal activity.³⁷

Other courts have likewise interpreted “primary” to refer to more than one entity,³⁸ and courts have also not hesitated to identify “two primary means of [statutory] construction.”³⁹

Leading dictionaries confirm that “primary” does not necessarily refer to only one item. The Supreme Court has recognized that ambiguity often arises from “accepted alternative meanings shown as such by many dictionaries.”⁴⁰ The Oxford English Dictionary, Webster’s Third, and the American Heritage Dictionary each supply definitions of “primary” in which the term applies to more than one item or entity.⁴¹ Perhaps most importantly, “primary” regularly refers to multiple items when used in technical definitions. For instance, a “*primary color*” is “any of a set of *colors* from

³⁷ *Id.* at 446-47.

³⁸ *See, e.g., Passa v. Derderian*, 308 F. Supp. 2d 43, 63 (D.R.I. 2004) (construing the phrase “primary defendants,” and concluding that “the primary defendants are not from a single state”).

³⁹ *Catholic Soc. Servs., Inc. v. Meese*, 664 F. Supp. 1378, 1382 (E.D. Cal. 1987) (emphasis added).

⁴⁰ *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 227 (1994).

⁴¹ OXFORD ENGLISH DICTIONARY, available at <http://oed.com> (2d ed. 1989) (“Not involving intermediate agency; direct, immediate, first-hand.”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1800 (2002) (“functioning or transmitted without an intermediary” and “not derived from or dependent on something else”); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1393 (4th ed. 2000) (“Serving as or being an essential component, as of a system; basic.”).

which all other colors may be derived.”⁴² The “*primary circles*” are “the *four* fundamental great *circles* of the celestial sphere.”⁴³ A “*primary feather*” is “one of the large flight-*feathers* of a bird’s wing.”⁴⁴ The “*primary planets*” are “those *planets* which revolve directly around the sun as centre.”⁴⁵ And “*primary structure*” refers to “those parts of an aircraft whose failure would seriously endanger safety.”⁴⁶

Since “primary,” itself, connotes neither the singular nor the plural, it takes its meaning from the noun it modifies. In the case of the language of the 1992 Act, however, “primary” modifies “video” and “audio,” which are both composite nouns that are neither singular nor plural. Thus, substituting the words “videos” and “audios” in the 1992 Act would have made no sense at all.

Though “primary” is susceptible to different interpretations,⁴⁷ statutory canons also confirm that, as used in the 1992 Cable Act, “primary video” in no way ties the Commission’s hands. The Supreme Court has recognized that, in a statute, “a word is known by the company it keeps.”⁴⁸ The Act, immediately after it requires cable companies to carry “primary video and accompanying audio,” distinguishes this “primary” content from nonprogram-related material (including “teletext and other subscription and advertiser-supported information services”) – whose carriage “shall be

⁴² WEBSTER’S THIRD, at 1800.

⁴³ *See id.*

⁴⁴ OXFORD ENGLISH DICTIONARY, *supra*.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Compare Agnew*, 329 U.S. at 446-47, with *Malat v. Riddell*, 383 U.S. 569, 572 (1966).

⁴⁸ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

at the discretion of the cable operator.”⁴⁹ According to the Supreme Court, it is “a cardinal principle of statutory construction” that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”⁵⁰ Therefore, had “primary video” meant “the broadcaster’s lone programming stream,” Congress would have had no reason to define “other material” – which necessarily would have meant “all programming except for the broadcaster’s first programming stream.”

The narrower definition of “primary” would also create inexplicable statutory awkwardness. In the analog era in which the Act was enacted, the narrow interpretation would have rendered superfluous the word “primary” itself. Because an analog signal can carry only one stream of video programming at a time, any analog carriage requirement would, by definition, have applied to only one stream of video.

Whereas in an analog context the narrow interpretation of “primary” creates unexplained duplication, in the digital context the narrow interpretation leaves unexplained gaps. The Act, in section 614(b)(3)(A), identifies two categories of content: (1) “primary” (program-related) content, which cable companies are obligated to carry, and (2) “nonprogram-related material,” which cable companies need not carry. If “primary” refers to program-related material – and does not limit the number of broadcast streams – then the statute addresses the entire universe of broadcaster output (some of which must be carried, and some of which need not be carried). But if “primary” were

⁴⁹ 47 U.S.C. § 534(b)(3)(A).

⁵⁰ *Alaska Dept. of Env'tl. Conservation v. EPA.*, 540 U.S. 461, 489 (2004) (quotations omitted). *See also, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (same); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (same).

interpreted to refer to only one stream of program-related material, the Commission would be creating a third category of content, which the statute does not address: program-related content that need not be carried. That cannot be the result contemplated by Congress.

For all these reasons, the term “primary video” in the 1992 Cable Act cannot be read to limit the Commission’s authority to include multicast programming within its digital cable carriage requirements.

B. The First Amendment.

The First Amendment values underlying the Act also indicate that, as in *Agnew*, the broader definition of “primary” is “not only permissible but also more consonant with the legislative purpose than the [alternative] construction.”⁵¹

In rejecting a First Amendment challenge to the Act’s analog carriage requirements, the Supreme Court held that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.”⁵² But today, though broadcasters offer nearly 700 free multicast services, cable companies carry only a fraction of them.⁵³ But 70 percent of television viewers subscribe to cable. Without access to such a high percentage of a market’s population, broadcasters will inevitably cut back or totally

⁵¹ 329 U.S. at 447.

⁵² *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (“*Turner I*”); see also, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 226 (1997) (“*Turner II*”) (Breyer, J., concurring in part) (government has interest in “provid[ing] over-the-air viewers who *lack* cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate”).

⁵³ Supplemental Submission of CBS and NBC Affiliate Associations, CS Docket No. 98-120 (filed June 8, 2006).

withdraw these services, thereby also depriving viewers who are not cable subscribers of these services as well.⁵⁴

The fact that a cable system must carry one of the programming streams transmitted by a broadcaster in its digital signal does not undercut the governmental interest in assuring viewer access to the broadcaster's full schedule of multicast services. Thus, the Supreme Court specifically rejected the cable companies' argument that the governmental interest "extends only as far as preserving 'a minimum amount of television broadcast service.'"⁵⁵ Moreover, in certain markets that are smaller or channel-constrained or both, the same local station may use its digital multicasting capability to carry the programming of more than one network. For instance, one station may carry the programming of both the CBS and FOX networks, and each network's programming is supplemented by the station's own local news and other non-network programming that is distinctive to each of the two multicast services. Failure to include multicast services within the digital carriage requirement would deprive viewers of any access to the entire network/local program package.

The increasingly precarious finances of many local stations similarly implicate the policy concern – also recognized in *Turner II* – that "the viability of a broadcast station depends to a material extent on its ability to secure cable carriage."⁵⁶ As cable channels have proliferated into the hundreds and cable operators have aggressively used those

⁵⁴ See, e.g., *FCC Second Order*, at 4545 (Separate Stmt. of Cmr. Abernathy) (it is "undoubtedly correct that, in the absence of mandatory cable carriage for all these streams, many broadcasters may be forced to curtail the breadth of their digital programming services").

⁵⁵ *Turner II*, 520 U.S. at 190-91 (quoting *Time Warner Br.* at 28).

⁵⁶ *Id.* at 208.

channels to sell advertising spots in competition with single-channel television stations, the revenues of broadcasters – particularly those that serve small markets – have markedly declined. In *Turner II*, the Court noted that broadcast advertising revenues had declined over ten percent over a period of five years.⁵⁷ The problem has worsened: local station revenues declined nearly eight percent in the past year alone.⁵⁸ Further, given that many fourth-ranked stations are losing the millions of dollars each year,⁵⁹ digital multicast carriage would vindicate the government’s interest in avoiding erosion into “a rump broadcasting industry providing a minimum of broadcast services to Americans without cable.”⁶⁰ Many broadcasters are already in serious financial condition; “[a]n industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly.”⁶¹

In addition, the government interests identified in the *Turner* decisions are even stronger today than in 1992 because the greater concentration and clustering of cable systems let them impose tighter bottlenecks. Moreover, because cable now competes far more directly against broadcasters for local advertising revenues, cable operators have far greater incentives to thwart the availability of broadcasters’ multicast services to the public – both cable subscribers and non-subscribers. This incentive is most dramatically illustrated in those well-documented cases where cable operators reserve the power to

⁵⁷ See *id.* at 212.

⁵⁸ See Mark R. Fratrick, *A Review of the Economic Benefits of Multicast Must Carry* 5 n.11 (2006).

⁵⁹ See NAB, *THE DECLINING FINANCIAL POSITION OF TELEVISION STATIONS IN MEDIUM & SMALL MARKETS* 5-9 (2002)

⁶⁰ *Turner II*, 520 U.S. at 192.

⁶¹ *Id.* at 212 (quotations omitted).

terminate carriage of a multicast service if the cable operator decides to launch a competitive cable channel.⁶²

Finally, the burdens on cable are far lighter than they were at the time of *Turner II*. In *Turner II*, the Court upheld the cable carriage requirements even though they would “prevent[] displaced cable program providers from obtaining an audience.”⁶³ Now, the number of cable channels per system has increased five-fold since 1992 and “carriage of the full digital signal, including all of its multicast components, requires only 3 MHz of capacity, as compared to the 6 MHz required for analog signal carriage.”⁶⁴

* * *

The applicable Congressional mandates, which this White Paper has sought to analyze, establish beyond a doubt that the Commission has the responsibility as well as the power to resolve the multicast carriage issue and that they by no means should incline the Commission against including multicast programming within the overall digital carriage requirements. Instead, the statutory considerations analyzed in this White Paper suggest that in exercising its obligation to apply the Congressionally-mandated analog carriage principles to digital – (1) carriage of primary video and audio but not of paid ancillary and ancillary services, (2) carriage of all of a station’s schedule, and (3) the

⁶² See Special Factual Submission by the CBS Television Network Affiliates Ass’n in Support of Multicast Carriage Requirement, CS Docket Nos. 98-120, 00-96 & 00-2 (Jan. 13, 2004), Special Factual Submission in Support of Multicast Carriage by the NBC Television Affiliates Ass’n, CS Docket Nos. 98-120, 00-96 & 00-2 (Jan. 8, 2004).

⁶³ 520 U.S. at 226 (Breyer, J., concurring in part). Note also that because multicast programming is contained within broadcasters’ 6 MHz signals (which requires only 3 MHz of a cable system’s capacity), no cable program providers would be displaced.

⁶⁴ Supplemental Submission of CBS and NBC Affiliate Associations, CS Docket No. 98-120, at 16 (filed June 8, 2006).

prohibition against signal degradation – the Commission should encompass free multicast services within its cable carriage requirements.