

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Second Periodic Review of the	)	MB Docket No. 03-15
Commission's Rules and Policies	)	
Affecting the Conversion to	)	RM 9832
Digital Television	)	
	)	
Public Interest Obligations of TV	)	MM Docket No. 99-360
Broadcast Licensees	)	
	)	
Children's Television Obligations of	)	MM Docket No. 00-167
Digital Television Broadcasters	)	
	)	
Standardized and Enhanced Disclosure	)	
Requirements for Television Broadcast	)	MM Docket No. 00-168
Licensee Public Interest Obligations	)	

**COMMENTS OF  
COURTROOM TELEVISION NETWORK LLC**

Robert Corn-Revere  
James S. Blitz  
Ronald G. London  
DAVIS WRIGHT TREMAINE, L.L.P.  
1500 K Street, N.W., Suite 450  
Washington, D.C. 20005-1272  
(202) 508-6600

April 21, 2003

## TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY .....	ii
BACKGROUND.....	3
I. PROPOSALS FOR GREATER CABLE CARRIAGE OF BROADCAST PROGRAMMING ARE NOT A PANACEA FOR THE DTV CONVERSION .....	6
II. NEITHER DUAL CARRIAGE OF ANALOG AND DIGITAL SIGNALS NOR MANDATORY CARRIAGE OF MULTICAST DIGITAL SIGNALS ARE CONSISTENT WITH THE FIRST AMENDMENT .....	10
A. Proposals for Multicast Carriage Reveal Content-Based Motives ....	10
B. Even if Digital Must Carry is Considered Content-Neutral, Carriage Requirements Are Unconstitutional .....	13
1. Requiring Carriage of Multiple Broadcast Video Streams Would Not Advance Any Relevant Government Interest .....	13
2. Requiring Carriage of Multiple Broadcast Video Streams Would Burden More Speech Than Necessary to Advance Legitimate Government Interests .....	17
3. Multicast Must Carry Would Unfairly and Unconstitutionally Favor Broadcasters Over Cable Programmers.....	19
CONCLUSION .....	24

## EXECUTIVE SUMMARY

Courtroom Television Network LLC (“Court TV”) submits these comments in response to the Commission’s second inquiry on the progress of the DTV transition to stress that, contrary to broadcaster claims, digital must carry will not – and cannot, consistent with the Constitution – play a significant role in the transition. The current Notice seeks comment on whether the FCC should reassess its decisions that cable operators cannot lawfully be required to carry both a broadcaster’s analog and digital signals during the transition, and that broadcasters’ primary video entitled to carriage means a single program stream. Though digital must carry has become enmeshed in the debate about how to speed the transition, it does not remove the practical and legal problems associated with viewing must carry as a key to the transition.

The digital conversion poses difficult policy questions that require the FCC to resolve a multitude of issues, including threshold matters such as channel election, simulcasting, and consumer awareness issues, as well as digital copy protection and consumer adoption of the new technology. While broadcasters, who continue to insist “full digital multicast must carry is the only way for broadcast television to reach the future,” would willingly accept whatever regulatory advantage the FCC might be induced to provide, the relevant question is whether government-imposed burdens on other industries should – or even lawfully can – be used for such ends.

Under must carry, a policy adopted by Congress in 1992 to serve an entirely different purpose, “[b]roadcasters, which transmit over the airwaves, are favored, while

cable programmers, which do not, are disfavored.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994). Consequently, any must carry mandate must materially advance important government interests unrelated to program content, and cannot burden substantially more speech than necessary to further those interests. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997). Moreover, it must advance the interests Congress identified and the Supreme Court relied upon – specifically, preserving free over-the-air local broadcasting, promoting widespread dissemination of information from a multiplicity of sources, and promoting fair competition. *Id.* The FCC may not substitute new interests in their place. *Id.* at 190-191; *Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

The unanswered questions in the digital transition proceeding undermine the Commission’s ability to perform the necessary constitutional analysis of any must carry mandates. Until the FCC finalizes the simulcast obligations and multicast opportunities and rules broadcasters will face, there is no way it can make its required affirmative showing on multicast must carry under the above factors. Notably, the General Accounting Office found must carry mandates unlikely to significantly impact the transition and has accepted that dual carriage would violate the First Amendment. It suggested that the FCC increase public awareness about the transition, and consider bolstering digital-tuner mandates and setting a date-certain for cable carriage to switch from analog to digital.

Recent broadcaster submissions and congressional filings on their behalf make clear that calls for multicast must carry are content-based. Paxson, for example,

seeks “full digital multicast must carry” for program offerings that it extols as “a safe haven ... free of explicit sex, gratuitous violence and foul language,” and a recent letter from Senators Lott and Craig claim that lack of multicast must carry will disproportionately affect “religious and multilingual” broadcasters, as well as “constructive and positive programming,” including “family friendly, and spiritual” shows and other “wholesome” offerings. Needless to say, such content-based rationales for multicast must carry would render it unconstitutional.

So, too, would any effort to justify multicast must carry based on the need to expedite the DTV transition. Simply put, neither facilitating multicasting nor speeding the digital transition were interests that Congress enunciated. The is particularly true with respect to the former given that the policy debate within the FCC centered on high definition television at the time the Cable Act and its must carry mandates were adopted. In short, guaranteeing broadcasters a platform from which to launch new multicast services is not what Congress contemplated in the Cable Act.

Multicast must carry will do no more to preserve free over-the-air broadcasting than mandatory carriage of a single primary video signal, which has already been granted. In fact, multicast must carry cannot *preserve* anything since, as noted, it is an entirely new broadcast opportunity. Multicast must carry also would not promote a multiplicity of programming sources, but would at best give broadcasters multiple channels while displacing cable program providers and reducing the sources on a cable system. For the same reason, multicast must carry would not promote fair competition,

but rather would further insulate broadcasters from market pressures faced by other program providers. Moreover, in doing so, multicast must carry would burden more speech than necessary by unfairly (and thus unconstitutionally) favoring broadcasters over cable programmers by adding to the many regulatory advantages broadcasters already enjoy vis-à-vis cable and other program providers.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Second Periodic Review of the	)	MB Docket No. 03-15
Commission's Rules and Policies	)	
Affecting the Conversion to	)	RM 9832
Digital Television	)	
	)	
Public Interest Obligations of TV	)	MM Docket No. 99-360
Broadcast Licensees	)	
	)	
Children's Television Obligations of	)	MM Docket No. 00-167
Digital Television Broadcasters	)	
	)	
Standardized and Enhanced Disclosure	)	
Requirements for Television Broadcast	)	MM Docket No. 00-168
Licensee Public Interest Obligations	)	

**COMMENTS OF COURTROOM TELEVISION NETWORK LLC**

Courtroom Television Network LLC ("Court TV") hereby submits comments in response to the Notice of Proposed Rulemaking in the captioned proceeding. <sup>1/</sup> This proceeding is about the transition from analog to digital television, and does not focus on the issue of must-carry. Of the 136 paragraphs in the Commission's 63-page *Notice*, only three are devoted to the issue of digital must carry. Obviously, must carry is not critical to the digital transition, but the issue of whether the FCC will adopt rules to favor broadcasters over cable networks is of critical importance to Court TV.

---

<sup>1/</sup> *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 1962 (2003) ("*Notice*").

In these comments, Court TV focuses on proposals by some commenters who advocate mandatory carriage requirements, as well as the few statements in the *Notice* that indicate possible future changes in cable operators' digital must carry obligations. *See id.* ¶ 112 (inquiry into whether rules applied to broadcasters choosing to multicast should vary based on "whatever final digital must carry obligation the Commission adopts"). *See also id.* ¶¶ 67, 86. The statements in the *Notice* raise questions about whether the Commission is reconsidering its well-founded conclusion that cable operators cannot lawfully be required to carry both a broadcaster's analog signal and its digital signal during the DTV transition. *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, ¶ 12 (2001) ("*Digital Must Carry Order*"). They also suggest possible reassessment of the finding that a broadcaster's "primary video" is limited to a single programming stream and other program-related content, even where the broadcaster uses its digital allotment for multicasting rather than HDTV programming. *Id.* ¶ 57.

Court TV appreciates the difficult task the Commission and industry face in managing the move from analog to digital television. As difficult policy issues raised by the DTV conversion have required the resolution of many elements, the question of mandatory carriage of broadcast signals – a policy adopted by Congress in 1992 to serve an entirely different purpose – has become enmeshed in debates about how to speed the transition. Yet, as explained below, must carry is not the key to the DTV transition, and any attempt to have it serve that purpose necessarily raises significant legal problems, as underscored by recent proposals and calls to action submitted to the Commission.

## BACKGROUND

The Commission's *Notice* makes clear that many factors are vital to the digital transition, and that mandatory cable carriage of digital broadcast signals is not the "magic bullet" some interest groups claim it to be. Rather, many threshold issues must first be resolved, a number of which are raised in the *Notice*, including channel election, simulcasting, and consumer awareness issues, to name but a few. Other factors not raised in the *Notice*, like digital copy protection, will also play a significant role. Most importantly, consumer adoption of the new technology, which the government cannot control, remains a "wild card" that could impede or countermand even best laid plans adopted by the Commission.

Nevertheless, broadcasters continue to insist that "full digital multicast must carry is the only way for broadcast television to reach th[e] future." <sup>2/</sup> While there is no doubt that broadcasters would willingly accept whatever regulatory advantage the Commission might be induced to provide, the relevant question is whether placing government-imposed burdens on other industries should – or even lawfully can – be used for such ends. Cable networks like Court TV produce compelling content in order to build consumer demand to ensure carriage of their programming, yet still must often

---

<sup>2/</sup> Letter to Hon. Jonathan S. Adelstein, from Lowell W. Paxson, December 23, 2002, in CS Docket No. 98-120, at 1 ("Paxson Letter").

provide financial inducements to cable systems to secure affiliation agreements.<sup>3/</sup> Where broadcasters bristle at the prospect of “spend[ing] millions of dollars” during the transition to digital television “without [the] guarantee[ of] cable carriage,” Paxson Letter at 5, cable programmers – and all other non-broadcast content providers competing in the open market – face precisely that marketplace imperative every day.

Broadcasters (and many others) perceive the debate over the constitutionality of must carry as involving only issues of cable system capacity.<sup>4/</sup> But “compulsory carriage that creates the ‘guarantee’ extracts a serious First Amendment price. It interferes with the protected interests of cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching ... their preferred set of programs.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 226 (1997) (“*Turner II*”) (Breyer, J., concurring). Accordingly, any analysis of must carry necessarily requires the Commission to consider more than just the number of channels that will remain within

---

<sup>3/</sup> See, e.g., Comments of Courtroom Television Network LLC, in CS Docket No. 98-120, filed June 11, 2001, at 4-5.

<sup>4/</sup> See, e.g., Paxson Letter at 4-5 (arguing FCC erred in only requiring cable carriage of a single channel of programming, “based to a large extent on ... channel capacity” calculations); see also, e.g., Letter to Hon. Michael K. Powell, from Marilyn Mohrman-Gillis, Donna Gregg and Katherine Lauderdale, February 27, 2003, in CS Docket Nos. 98-120, 00-96 and 00-2 (“Noncommercial Broadcaster Letter”) (must carry proposal based on constitutionality of 28% cap on cable capacity devoted to broadcast signals).

cable operators; editorial control. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-68 (1994) (“*Turner I*”).

For that and other sound reasons, the Commission determined that requiring cable operators to carry both a broadcaster’s analog signal and its digital signal during the DTV transition would impose too great a burden on cable operators’ First Amendment rights to survive constitutional review. *Digital Must Carry Order*, 16 FCC Rcd 2598, ¶ 12. It also determined that, as applied to digital broadcast signals, the requirement that cable operators must carry a broadcaster’s “primary video” signal 5/ means one programming stream and its program-related content, even if the broadcaster uses its digital allotment to multicast several program offerings. *Digital Must Carry Order* ¶ 57 (““primary video’ means a single programming stream and other program-related content”).

Broadcasters have continued to press the point, however. *See, e.g.,* Ted Hearn, *Fritts Keeps Pressing for Dual Must-Carry*, MULTICHANNEL NEWS, Apr. 14, 2003, at 26. The Commission has received various proposals to require cable systems to carry multiple broadcast programming streams. The Paxson proposal, for example, demands “full digital multicast must carry.” This would entitle broadcasters to replace their existing analog signals with a primary digital signal in a down-converted analog format on a cable system’s analog channels, plus carriage of an HDTV signal or digital

---

5/ 47 U.S.C. §§ 534(b)(3), 535(g)(1).

multicast signals (consisting of multiple program streams) on the digital portion of the cable system. *See* Paxson Letter at 1-2. Another, more recent proposal would require cable systems to “carry, in both digital and analog, the noncommercial television stations they are now required to carry only in analog.” *See* Noncommercial Broadcaster Letter, Att. A at 1-2. Though the plan would limit this to 28 percent of cable system capacity required to be devoted to carrying any broadcast signal, it would also require carriage of multicast broadcast programming.

These proposals, along with recent expressions of support by some members of Congress for government-mandated carriage of multicast signals, <sup>6/</sup> are based largely on content preferences and misplaced assumptions about the role that forced carriage of multicast broadcast programming can play in the digital transition.

#### **I. PROPOSALS FOR GREATER CABLE CARRIAGE OF BROADCAST PROGRAMMING ARE NOT A PANACEA FOR THE DTV CONVERSION**

Broadcasters continue to assert erroneously that “full digital multicast must carry is an essential element of the digital conversion and the return of analog spectrum.” Paxson Letter at 6. They do so in part by relying on outdated claims that the “most important factor to the success of the transition is cable carriage of digital

---

<sup>6/</sup> *See* Letter to Hon. Michael K. Powell, from Sen. Trent Lott and Sen. Larry Craig, October 11, 2002 (“Lott Letter”).

signals during the transition.” <sup>7/</sup> However, a more recent General Accounting Office (“GAO”) report, entitled *Additional Federal Efforts Could Help Advance Digital Television Transition* (November 2002) (“Second GAO Report”), underscores the disconnect between must carry and the digital transition. The GAO Report observed that mandatory carriage requirements were unlikely to have a significant impact on the move to digital TV, finding that, among other things, “[m]ost stations, including the great majority of those affiliated with a major broadcasting network, do not need to invoke ‘must carry’ because cable systems desire to carry them,” leading to carriage under retransmission consent agreements. *Id.* at 23-25.

Accordingly, the GAO recommended that the Commission should increase public awareness about the transition and its implications, consider bolstering its recently adopted digital-tuner mandates, and consider setting a date-certain for cable carriage switch from analog to digital carriage. *Id.* at 39-40. While Paxson correctly notes that the Second GAO Report indicated that clarifying broadcast digital must carry rights would “assist” the transition, Paxson Letter at 6, nothing in the report suggests that those must carry rights should take the form of mandated carriage of multicast signals. In fact, the Second GAO Report accepted the Commission’s earlier decision that a dual carriage requirement would violate the First Amendment. *Id.* at 25.

---

<sup>7/</sup> Noncommercial Broadcaster Letter at 1 (quoting *Completing the Transition to Digital Television*, Congressional Budget Office (Sept. 1999)).

The *Notice* reinforces that, rather than digital must carry being a lynchpin of the digital transition, many other issues must be resolved before the FCC can even analyze digital must carry's burdens and benefits, which it must assess before rules are adopted. The *Notice* reveals, for example, that the Commission is still unsettled on broadcast simulcast obligations. *Notice* ¶¶ 65-68. This includes the interaction between the need to simulcast to protect analog viewers, and the freedom to use DTV allotments for "innovation." *Id.* ¶ 66. The Commission notes the value of using multiple broadcast feeds for "digital features [such as] different camera angles and aspect ratios, additional program information, and interactivity," depends in part on how the FCC defines what "simulcasting" is required. *Id.* ¶ 67. At the same time, the Commission asks about the "kind of programming ... being produced to take advantage of the capability of DTV," and the extent to which broadcasters are engaged or are planning to engage in multicasting, *id.* ¶ 21, though it is clear the opportunity to do so in some ways must await resolution of the simulcast issue. The Commission also acknowledges it has yet to resolve the interrelationship between simulcasting and the "substantial duplication" must carry exclusion. *Notice* ¶ 67 ("We also seek comment on how simulcast requirements and the definition of 'simulcasting' relate to the substantial duplication decision in the must carry portions of the Act.") (citing 47 U.S.C. §§ 614(b)(5), 615(b)(3)(C)).

All of this creates a "chicken and egg" problem with respect to digital must carry. Until the FCC knows what multicasting will consist of, it cannot determine what interests, if any, cable carriage of multicast broadcast signals will serve, if any of those

interest are relevant to those Congress and the Supreme Court identified as sufficient to support compulsory carriage mandates, and what burdens such carriage would entail. The transition thus is not waiting for the must carry shoe to drop – indeed, it cannot, because until the transition is further along digital must carry cannot be decided – but rather for the resolution of other factors. Among these, as the Commission acknowledges, are the rate of DTV station build-out, *id.* ¶ 30 (temporary deferral of replication protection deadline intended to allow more gradual buildout), the availability and marketing of DTV consumer equipment, *id.* ¶ 22, and consumer awareness issues. *Id.* ¶ 95 (“at least 40% of the public is unfamiliar with the digital transition”) (citing GAO Second Report at 15).

Consequently, it is not digital must carry that will drive the DTV transition, but rather, what broadcasters are willing to offer to spur the conversion from analog to digital. Indeed, the Commission recognizes that “[o]nce stations commence at least [a] minimum level of digital service, ... DTV set penetration levels will increase, thereby driving demand for digital programming and providing broadcasters with an incentive to expand digital service.” *Id.* ¶ 30. Since digital must carry will thus play at best a secondary role in the transition, the Commission would do much to spur the process by merely quelling the multicast carriage debate, so as to allow the agency and industry to focus on matters that will play a more direct role.

## II. Neither Dual Carriage of Analog and Digital Signals Nor Mandatory Carriage of Multicast Digital Signals are Consistent with the First Amendment

### A. Proposals for Multicast Carriage Reveal Content-Based Motives

What the multicast carriage proposals universally seek is a government-imposed preference for broadcast programming compared to cable networks. As the Supreme Court observed, there is no doubt that under any must carry regime, “[b]roadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored.” *Turner I*, 512 U.S. at 645. Consequently, to survive constitutional scrutiny, any justification for elevating digital broadcasting to preferred status must be found in the Act, and not in some newly asserted value of broadcast service. Indeed, the one point on which a majority of the Supreme Court agreed in *Turner I* was that any must carry regime justified by the value of the programming itself would be presumptively invalid. *Id.* at 644-646; *see also id.* at 678-681 (O’Connor, J., concurring in part and dissenting in part). As Justice Breyer stated in later concurring to make up the slim 5-4 margin by which must carry survived constitutional scrutiny, “government intervention and control through [must carry] regulation can prove appropriate” only “when not content based.” <sup>8/</sup>

---

<sup>8/</sup> *Turner II*, 520 U.S. at 228 (Breyer, J., concurring in part) (internal quotation and citations omitted). *See also id.* at 225 (Stevens, J. concurring) (“If this [must carry] statute regulated the content of speech ... our task would be quite different.”).

Despite this basic constitutional requirement, the proponents of mandatory carriage for all of a digital broadcaster's multicast program streams base their support on what are clearly content-based preferences. Paxson, for example, seeks "full digital multicast must carry" for its program offerings that it extols as "a safe haven of over-the-air television ... free of explicit sex, gratuitous violence and foul language." Paxson Letter at 1. Similarly, the Lott Letter asks the FCC to adopt a content-based preference for certain programmers at the expense of others by suggesting that multicast carriage is needed to promote preferred types of broadcast content. The letter expresses Senator Lott's "concern" that lack of mandatory carriage for broadcasters' multiple digital signals "will have a disproportionate effect" on "religious and multilingual broadcasters." Without an FCC rule requiring multicast carriage, it continues, "constructive and positive programming which [broadcasters] offer will be ... diluted as a percentage of the total channels available on digital cable systems." The letter credits must carry requirements with "fostering the availability of local, family friendly, and spiritual programming to cable television viewers," and ensuring "wholesome programming of local and regional interest is available on cable systems." It asks the FCC to "ensure that such important programming will flourish and grow" during the digital transition. <sup>9/</sup>

---

<sup>9/</sup> See Lott Letter. Just as the above content-conscious justifications for multicast must carry pose significant constitutional problems, the specter of the FCC "approach to multicast public obligations ... vary[ing] with the scope of ... digital must carry" raises serious concerns. *Notice* ¶ 112. In upholding must carry, the Supreme Court found the rules content-neutral in part by disavowing any link between the carriage requirement and the extent to which broadcasters' public interest obligations affect content. *Turner I*,

[footnote continues]

Content-related issues are raised in the *Notice* as well. The Commission asks commenters to address “whether our approach to multicast public interest obligations should vary with the scope of whatever final digital must carry obligation [it] adopts.” *Notice* ¶ 112. Depending on what the FCC finds, any linkage between multicast content requirements and must carry rules will have a profound effect on the constitutional analysis. Such content-based factors are the antithesis of what the Supreme Court envisioned in affirming the original must carry requirements. The Court specifically cautioned against making must carry obligations “a subtle means of exercising a content preference.” *Turner I*, 512 U.S. at 645. It also disavowed any congressional intent “to force programming of a ‘local’ or ‘educational’ content on cable subscribers.” *Id.* at 648. Thus, far from making the case for multicast carriage of digital broadcast signals, the above statements serve only to highlight constitutional problems of multicast carriage and to underscore First Amendment and policy infirmities of the broadcasters’ position. *See supra* at 10 (citing *Turner I*, 512 U.S. at 644-646, 678-681 (majority agreeing that any must carry regime justified by value of programming would be presumptively invalid)).

---

512 U.S. at 649-50 (holding argument that must-carry rules are content-based because they give preference to broadcast stations automatically results in content regulation “exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming”). If the Commission’s multicast public interest rules are influenced by must carry rights, or must carry rights are based on multicast public interest requirements that affect content, it would create a link, absent in *Turner*, that would render the must carry rules content-based and therefore unconstitutional.

**B. Even if Digital Must Carry is Considered Content-Neutral, Carriage Requirements Are Unconstitutional**

Even if digital must carry requirements are not content-based, they must materially advance important government interests unrelated to suppressing speech, and cannot burden substantially more speech than necessary to further those interests. *Turner II*, 520 U.S. at 189. In this regard, the Commission already correctly found that a dual carriage mandate cannot satisfy these criteria. See *Digital Must Carry Order*, 16 FCC Rcd 2598, ¶ 12. The same holds true for any requirement that cable operators must carry each of a broadcaster’s multicast program streams beyond its primary video feed in the name of expediting the DTV transition.

**1. Requiring Carriage of Multiple Broadcast Video Streams Would Not Advance Any Relevant Government Interest**

Whether spurring the digital conversion can serve as government interest in support of multicast carriage is not just a policy question; it is an issue constitutional dimension. The Commission may impose carriage requirements only if it can show that multicasting is necessary to serve a substantial governmental interest. *Turner II*, 520 U.S. at 189. But it cannot be just any interest – it must be in support of the original purpose of the enactment.<sup>10/</sup> In this regard, the must carry provisions in the Cable

---

<sup>10/</sup> See *Turner II*, 520 U.S. at 190-191 (refusing to include in constitutional review any rationale “inconsistent with Congress’ stated interests in enacting must carry”); *cf.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (refusing to sanction must carry absent

[footnote continues]

Television Act of 1992, Pub. L. 102-385, 106 Stat. 1460, were an effort by Congress to address a specific policy concern – potential bottleneck control over television households by cable operators – with a specific solution tailored to that problem. *See Turner I*, 512 U.S. at 661 (“must-carry provisions ... are justified by ... bottleneck monopoly power exercised by cable operators”). But must carry rules simply never were intended to address the multifaceted problem of facilitating the DTV conversion, where cable carriage of broadcast signals is only one among many variables and may or may not be a significant factor. Because any constitutional justification for new must carry requirements must advance the interest Congress identified, and the Supreme Court relied on, for the original must carry mandates, ordering cable systems to carry multicast broadcast signals to promote the DTV transition is an impermissible objective under the *Turner* cases. <sup>11/</sup>

Congress did not mention the digital transition in the legislative history of the Cable Act, and certainly did not discuss the benefits of “multicasting,” since the policy debate within the FCC at that time centered on high definition television. To the extent Congress has spoken at all on the issue, it has been to *extend* the transition by making

---

congressional findings). *See also Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (it is impermissible to “supplant the precise interests put forward by the State”).

<sup>11/</sup> This is not to suggest the FCC lacks a substantial interest in the transition to digital television. But it simply is not an interest that Congress sought to promote through the adoption of a must carry mandate in 1992.

termination contingent on public acceptance of digital broadcast technology. Pursuant to the Balanced Budget Act of 1997, the date for returning analog broadcast frequencies was put off indefinitely in any market in which less than 85 percent of television households are able to receive DTV signals. *See* Pub. L. 105-33 (Aug. 5, 1997) (codified at 47 U.S.C. § 309(j)(14)(B)). In short, guaranteeing broadcasters a platform from which to launch new multicast services is not what Congress contemplated in the Cable Act. Moreover, that objective fails to advance any interest Congress identified in adopting must carry, and it would substantially burden cable programmer speech.

Broadcaster demands for multicast must carry must be rejected because it would not serve any of the interests identified by Congress: (1) preserving free over-the-air local broadcasting, (2) promoting widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition. *Turner II*, 520 U.S. at 189. Multicast must carry is not necessary to preserve free over-the-air local broadcasting, because broadcasters' digital signals are already guaranteed a place on cable systems through the requirement that operators carry each broadcaster's primary video stream. *See, e.g., Digital Must Carry Order*, 16 FCC Rcd 2598, ¶ 41 ("A cable operator must provide each local television station that is entitled to mandatory carriage with a sufficient amount of capacity to carry its primary digital video signal"). To the extent must carry is intended to ensure broadcasters a critical mass of potential viewers so broadcasters are not left with only non-cable households, and non-cable households do

not lose access to television programming, *see, e.g., Turner I*, 512 U.S. at 634, mandatory carriage of a single digital broadcast programming stream fully serves that objective.

Multicast must carry cannot, in fact, *preserve* anything. Multicasting is an entirely new business opportunity not previously available to broadcasters. As the Supreme Court noted, “Congress enacted must-carry to preserve the *existing structure* of the Nation’s broadcast television medium” based on its “tradition and use for decades.” *Turner II*, 520 U.S. at 193-194 (quoting *Turner I*, 512 U.S. at 652, and citing *Turner I*, 512 U.S. at 663) (emphasis added) (internal quotations omitted). Compulsory carriage of a single broadcast programming stream satisfies this intent by carrying forward each broadcaster’s traditional use of its frequency allotment into the digital age by assuring dissemination of a single broadcast programming stream. Multicast must carry is not geared to preserving the “existing structure” of local television broadcasting, but rather seeks a guaranteed platform from which broadcasters can “develop additional revenue streams from innovative digital services” never offered in the past. 12/

A multicast carriage mandate also would not promote a multiplicity of video programming sources, but would – at most – give current broadcasters a multiplicity of

---

12/ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, ¶ 29 (1997). Moreover, to the extent that the freedom for broadcasters to multicast carries with it the right to offer subscription services so long as a primary video signal is available at no charge, *id.* ¶ 29, granting multicast must carry rights for such subscription programming will do nothing to “preserve free over-the-air local broadcasting.”

channels.<sup>13/</sup> In fact, to the extent that “compulsory carriage ... displace[s] cable program providers,” *Turner II*, 520 U.S. at 226 (Breyer, J., concurring in part), multicast carriage would *reduce* the number of programming sources carried on a cable system. This occurs because, for every broadcast program stream cable operators are required to carry, another programming source loses a potential programming opportunity. *See id.* at 214 (discussing “limited channels remaining” to cable programmers).

**2. Requiring Carriage of Multiple Broadcast Video Streams Would Burden More Speech Than Necessary to Advance Legitimate Government Interests**

A multicast must carry rule also would fail to satisfy the *Turner* requirement that it not burden more speech than necessary to achieve the government’s objectives. The Commission already has determined that requiring cable operators to carry both a broadcaster’s analog signal and its digital signal would overburden cable operator First Amendment interests. *Digital Must Carry Order*, 16 FCC Rcd 2598, ¶ 12. Reorienting the inquiry to multicast carriage does nothing to ameliorate that fundamental constitutional problem. This is so because the First Amendment failings associated with digital must carry are not based solely on a channel capacity shortages, but flow from the basic

---

<sup>13/</sup> This is underscored by the Paxson Letter, which in advocating “multiple channels of programming th[at] provid[e] diversity and increased localism,” fundamentally misunderstands the multiplicity-of-sources interest to which much carry is targeted. The *Turner* cases upheld must carry because it supported diversity of programmers, not a diversity of opportunities for the same programmers to speak repeatedly. *See Turner II*, 520 U.S. at 192-94.

justifications for must carry and the preferential treatment it accords broadcasters over cable programmers. 14/

Even if cable system capacity alone were the touchstone for determining whether a multicast must carry requirement could withstand constitutional scrutiny, the burden on cable operators and programmers would be sufficient to invalidate the rules. First Amendment burden analysis is inextricably related to statutory objectives. *See, Turner II*, 520 U.S. at 215-16 (upholding analog must carry because burden was “congruent to the benefit it affords”). As shown above, the broadcasters’ multicast must carry proposals are not backed by statutory objectives but rather purport to be aimed at speeding the DTV transition. Moreover, it is not clear that digital must carry can help advance the three interests asserted and satisfied in the *Turner* cases. Faced with these shortcomings, reviewing courts will not tolerate the restriction on speech that must carry necessarily entails, since there is no fit between its benefits and burdens. The Supreme Court has repeatedly confirmed “there is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.” *E.g., Lorillard Tobacco*

---

14/ Of course, capacity problems *do* raise constitutional issues as well. They are just not the only problems. The GAO found, for example, that “[m]any smaller cable systems have not installed fiber optic cable lines or made other upgrades to their cable network that allow for the carriage of digital signals. As a result, these systems are highly limited in their channel capacity and are unable to carry local digital broadcast channels in a digital format.” Second GAO Report at 21-22. Moreover, these limitations mean that for every broadcast program stream entitled to guaranteed carriage, a cable programmer will be eliminated from the cable line-up.

*Co. v. Reilly*, 533 U.S. 525, 567 (2001). Thus, where the burden on speech is not balanced by furthering statutory objectives, even a small restriction violates the First Amendment. See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999).

In any event, the relevant comparison is not the percentage of capacity that would be devoted to broadcast channels under a multicast must carry rule compared to that under analog must carry. See Noncommercial Broadcaster Letter, Att. A at 2. The relevant inquiry is the extent to which increasing the number of channels reserved for broadcasters unfairly disadvantages non-broadcast channels, and the extent to which that broadcast programming is insulated from market imperatives that cable programmers continue to face. As shown above, that balance tips decidedly toward broadcasters and against cable programmers like Court TV. There is thus no basis for the broadcasters' claim that proposals calling for carriage of multiple broadcast streams "would not entail *any* additional burden." *Id.* at 3 (emphasis is original).

### **3. Multicast Must Carry Would Unfairly and Unconstitutionally Favor Broadcasters Over Cable Programmers**

Any multicast must carry requirement would establish an unconstitutional preference for broadcast programming by magnifying the regulatory advantages broadcasters already receive. The regulatory and marketplace realities facing cable operators and networks are entirely different from those facing broadcasters. As noted, the cable industry invested heavily in developing digital transmission capability. It did not have the benefit of a gift of free spectrum. In addition, cable operators pay local franchising

authorities for use of the public right-of-way, and cable networks often pay to secure a place on programming tiers. In sharp contrast, broadcasters receive free spectrum, are guaranteed carriage, and are barred from paying for it.

A multicast must carry requirement would subvert the Cable Act's goal of promoting fair competition by giving broadcasters an undeserved preference over cable programmers, who have no such guarantee of carriage. Broadcasters are correct when they point out that "digital is the future of television," Paxson Letter at 1, but this is no more true for broadcasters than other video programming providers. To date, broadcasters repeatedly have enjoyed significant regulatory advantages, including:

- billions of dollars worth of free spectrum with no set return date;
- guaranteed cable carriage of either a broadcaster's analog or digital channel, along with preferential channel placement;
- retransmission consent protections that can be used to create leverage for carriage of multiple programming services;
- no high definition programming obligations; and
- the ability to engage in flexible use of additional broadcast spectrum for innovative, for-profit ventures.

Consequently, it is hard to fathom how broadcasters can claim the Commission would "turn its back" on them by not "guaranteeing cable carriage" for multicasting, or how they can make this demand on grounds that it somehow promotes "a level playing field." Paxson Letter at 5.

Court TV stands as a case in point on how multicast must carry would undermine rather than promote competition. Over the past several years, Court TV has offered financial inducements valued at \$750 million (including payments for carriage,

launch/marketing support and initial-term free carriage) to gain access to cable systems, and spent over \$100 million in 2002/2003 to develop programming to attract viewers and garner carriage. The network must compete with other cable programmers for carriage, as well as with broadcasters who are guaranteed a spot in the cable line-up. Many of these broadcasters can also use their retransmission consent rights as leverage to assure additional carriage for affiliated programming. <sup>15/</sup> The must carry guarantee that these broadcasters enjoy insulates them from the competitive demands Court TV faces, and the ability to leverage retransmission consent rights insulates their affiliates as well. And Court TV must compete with these insulated programmers not just for a spot on the cable dial, but for the viewers that translate into commercial viability for every program source. <sup>16/</sup> Guaranteeing carriage to multicast offerings would thus put Court TV at a competitive disadvantage far exceeding that under the current rules, and this disadvantage has *nothing whatsoever to do with channel capacity*.

The significant regulatory benefits already accorded to broadcasters and the lack of any similar hand-outs to cable, coupled with broadcaster demands for a

---

<sup>15/</sup> See generally *American Cable Association Petition for Inquiry Into Retransmission Consent Practices* (filed October 1, 2002).

<sup>16/</sup> See *Turner II*, 520 U.S. at 208 (securing cable carriage is critical because “audience size directly translates into revenue”) (quotation and citation omitted). This additional competition posed by guaranteed carriage for multiple broadcast program streams completely undermines any broadcaster claim that “the burden imposed ... by [their] proposal would ...be substantially less than the burden imposed on cable by the analog carriage requirement[.]” Noncommercial Broadcast Letter, Att. A at 4.

“guarantee” of cable carriage before they will produce quality digital programming to attract viewers, makes the broadcasters’ call for “cable ... to shoulder some responsibility for helping implement the transition” ring particularly hollow. Noncommercial Broadcaster Letter, Att. A at 5. The cable industry has invested more than \$70 billion of private risk capital since 1996 to upgrade system capacities in anticipation of the digital conversion. Letter to Hon. Michael K. Powell, from Daniel L. Brenner, March 20, 2003, in CS Docket Nos. 98-120, 00-96 & 00-92, at 2. This investment, made without any kind of guarantee such as that sought by broadcasters, is part of the cable industry’s goal to advance the digital transition by providing digital programming from broadcasters and cable program networks to an increasing number of subscribers. *Id.* at 4. This in turn aids broadcasters by not only providing them carriage, but by helping advance consumer acceptance of digital television technology.

In such an environment, any added mandates that create preferences for favored programmers weigh heavily against networks that lack such regulatory largess. <sup>17/</sup> Given the disadvantages already suffered by cable programmers vis-à-vis

---

<sup>17/</sup> Astoundingly, even with the benefits broadcasters have already received, their intransigence in providing digital programming that will attract viewers absent carriage guarantees, and the \$70 billion the cable industry has already invested in the name of the digital conversion, broadcasters would place still more of the burden on the cable industry. See Noncommercial Broadcaster Letter, Att. A at 2 (advocating creation of “powerful incentives” for cable systems to spur consumer acceptance of digital television). This speaks volumes on the broadcasters’ pursuit of a free ride while other industry segments absorb the full burden of convincing consumers to embrace digital television.

broadcasters due to must carry, any extra regulatory favoritism would make the marketplace all the more non-competitive. The Supreme Court recognized the significant burdens imposed on cable programmers when it narrowly upheld analog must carry rules. *Turner I*, 512 U.S. at 641 (“must-carry provisions impose special obligations upon cable operators and special burdens on cable programmers”). It is highly unlikely it would approve a multicast carriage regime that increases this disparate treatment without serving any recognized statutory goals.

## CONCLUSION

As the GAO most recently found, must carry is not a significant factor in the complex puzzle that is the DTV conversion. When coupled with the legal problems discussed above, there is ample basis for the Commission to eliminate the distraction caused by debating multicast carriage, and to instead focus on issues that will actually promote the transition. Accordingly, the Commission should reaffirm its conclusions not to adopt a dual carriage requirement for digital broadcasting, and that broadcasters are entitled to mandatory carriage of only their "primary" digital signal consisting of one video stream.

Respectfully submitted,

**Courtroom Television Network LLC**

By /s/ Robert Corn-Revere

Robert Corn-Revere

James S. Blitz

Ronald G. London

DAVIS WRIGHT TREMAINE, L.L.P.

1500 K Street, N.W., Suite 450

Washington, D.C. 20005-1272

(202) 508-6635

Its Attorneys

April 21, 2003