

**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 A&E TELEVISION NETWORKS**

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## EXECUTIVE SUMMARY

A&E Television Network (“AETN”) submits comments on those aspects of the current Notice in the Commission’s second periodic review of the DTV transition that appear to re-open whether cable operators must carry multicast broadcaster transmissions, an issue it appeared the FCC put to rest two years ago but that broadcasters refuse to let lie. AETN respectfully submits that refocusing the must carry debate from dual carriage, which was rejected as overburdening cable operator speech, to multicast must carry does not change the First Amendment calculus that led to the rejection of dual carriage.

AETN has demonstrated the substantial disconnect between the imperative of speeding the digital transition and the statutory goals underlying must carry, as expediting the DTV transition was not a legislative objective the Supreme Court relied upon in narrowly affirming must carry’s constitutionality, and the goal of facilitating the transition may not be substituted for those Congress identified. Digital must carry rules would not advance the interests the Supreme Court relied upon – (1) preserving free over-the-air local broadcasting, (2) promoting widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition – and this is no less true of multicast must carry.

Both the instant Notice and a recent report by the General Accounting Office underscore that must carry will, at best, play a tangential role in the digital transition. The NPRM reveals just how many issues other than digital must carry still must be

resolved, including some of the most basic aspects of digital broadcasting that will shape how the service evolves. While the GAO indicated that clearer digital must carry rights could “assist” the DTV transition, it gave no indication whatsoever that those rights should extend to multicast broadcast offerings, and it in fact acknowledged dual carriage would violate the First Amendment.

Broadcasters continue to push multicast must carry even though the FCC correctly decided that a broadcaster’s “primary video” entitled to compulsory carriage means a single program stream. This decision is squarely supported by the language of the Act, the genesis of the scope of the must carry obligation, and the legislative history.

Broadcasters also continue to press multicast must carry without regard to the constitutional infirmities such a policy would present. The open issues raised in the Notice regarding simulcasting, DTV innovation, multicast public interest mandates, and other matters render it impossible for the FCC to make the affirmative constitutional showing required for must carry rules. Until it is clear what form multicasting will take, it cannot be known what interests multicast must carry would serve, whether such interests are relevant to those Congress and the Supreme Court set out, and the burden that multicast carriage would impose. Even were this not the case, the multicast must carry mandate broadcasters advocate would not survive constitutional review to the extent they seek an impermissible content-based preference for their programming.

While the FCC cannot make its constitutional showing, this does not mean that it is not already clear that multicast must carry would violate the First Amendment.

First, it would not further any relevant government interest, as advancing the digital transition was never one of the goals of the Act's must carry provisions, the FCC cannot now simply exchange objectives set out in the Act for new imperatives it faces, and multicast must carry would not advance the three required interests. Multicast must carry is not needed to help "preserve" free over-the-air broadcasting, which is already assured by the compulsory carriage of "primary video" signals – multicasting is an entirely new business opportunity previously unknown to broadcasters. It also would not promote a multiplicity of video programming sources, but rather would do no more than give some broadcasters multiple opportunities to serve as a programming source while either decreasing or eliminating opportunities for other programmers.

In that regard, multicast must carry would not promote "fair competition," and in fact would impede that objective. Competition has already been skewed by the Act's must-carry regime in that it insulates broadcasters' primary video from competition and gives some of them inordinate bargaining power to gain carriage of affiliated programming through the leverage of retransmission consent. As the Supreme Court recognized, all must carry mandates favor broadcasters and disfavor cable programmers, so any cable system capacity that must be dedicated to broadcast signals is not available to other programmers, to the detriment of competitive interests.

Finally, must carry would burden more speech than is acceptable under *Turner's* constitutional analysis. To the extent it cannot advance any of the objectives discussed above, *any* additional burden on cable speech would be sufficient to render

multicast must carry obligations unconstitutional due to the lack of fit between the rule's benefits and burdens. Moreover, increasing the number of channels reserved for broadcasters unconstitutionally favors broadcasters over cable programmers, as evidenced by its anti-competitive effects, and this is not limited solely to capacity issues given the wealth of regulatory benefits that broadcasters already enjoy.

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**COMMENTS OF A&E TELEVISION NETWORKS**

A&E Television Networks ("AETN"), by its attorneys, hereby files comments in response to the Notice of Proposed Rulemaking in the captioned proceeding. 1/

In the NPRM, the Commission requested comment on a number of issues arising out of the digital television ("DTV") transition, in order to ensure that the introduction of DTV service and the recovery of broadcast spectrum following that transition will fully serve the public interest. AETN limits its comments herein to that aspect of the NPRM that appears to re-open the issue of whether cable operators must

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

carry broadcasters' multicast transmissions, an issue that the appeared to have been put to rest over two years ago, *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, ¶ 12 (2001) ("*Digital Must Carry Order*"), but the broadcast industry refuses to let die peacefully. See, e.g., Ted Hearn, *Fritts Keeps Pressing for Dual Must-Carry*, MULTI-CHANNEL NEWS, Apr. 14, 2. In addition, some commenters have proposed cable carriage requirements which, stripped of embellishment, would require cable operators to carry multicast digital signals of local television broadcasters,<sup>2/</sup> though the Commission has determined a broadcaster's "primary video" entitled to compulsory carriage means a single program stream, even if a digital broadcast allotment is used for multicasting rather than HDTV service. *Digital Must Carry Order*, 16 FCC Rcd 2598, ¶ 57.

AETN has already demonstrated to the Commission that there is a substantial disconnect between the imperative to speed the digital transition and the statutory goals underlying federal must carry mandates.<sup>3/</sup> In short, AETN showed that expediting the digital transition was not one of the legislative objectives the Supreme Court relied upon on narrowly affirming the constitutionality of the must carry

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<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*"); 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*").

<sup>3/</sup> See Comments of A&E Television Networks, in CS Docket No. 98-120, filed June 11, 2001; Reply Comments of A&E Television Networks in CS Docket No. 98-120, filed August 16, 2001.

requirements, 4/ and that the goal of facilitating the DTV conversion may not be substituted for those Congress specifically identified. 5/ AETN also showed that, in any event, digital must carry mandates would not advance the three congressionally identified interests to which the Supreme Court deferred in upholding must carry: (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 (quoting *Turner I*, 512 U.S. at 662). AETN respectfully submits that refocusing the must carry debate from dual must carry to multicast must carry does not change the foregoing analysis, and that the FCC accordingly should not consider modifying its stance on digital must carry as it assesses the progress of the digital transition here.

#### **I. NEITHER DIGITAL MUST CARRY NOR MULTICAST MUST CARRY WILL PLAY A DETERMINATIVE ROLE IN THE DTV TRANSITION**

Both the instant NPRM and a recent report by the General Accounting Office (“GAO”), *Additional Federal Efforts Could Help Advance Digital Television Transition* (November 2002) (“Second GAO Report”), underscore that must carry will, at best, play

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4/ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”).

5/ See *Turner II*, 520 U.S. at 190-191 (rejecting rationales “inconsistent with Congress’ stated interests in enacting must carry”); *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) (both invalidating FCC must carry rules predating congressional findings relied upon by the Supreme Court in *Turner* cases). See also *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (rejecting efforts to “supplant the ... interests put forward by the State”).

a tangential role in the digital transition. The NPRM reveals just how many issues other than digital must carry the Commission – as well as the equipment, programming, and broadcast and cable industries – must resolve before widespread adoption of DTV technology will be feasible or likely. These issues involve some of the most basic aspects of digital broadcasting that will shape how that service will evolve. They include equipment compatibility, establishing broadcasters’ simulcast obligations, balancing the value of simulcasting with the ability to “innovate” in a DTV environment, determining the “kind of programming” that can “take advantage of the capability of DTV,” and understanding broadcasters’ multicasting efforts and future plans. NPRM ¶¶ 21, 65-68. Some of these issues even involve the interaction of DTV broadcast obligations and statutory limits on cable operator must carry burdens. *Id.* ¶ 67 (acknowledging need to resolve relationship between simulcasting requirements and must carry substantial duplication exclusions) (citing 47 U.S.C. §§ 614(b)(5), 615(b)(3)(C)).

The GAO Second Report also confirmed that public acceptance will perhaps play the most significant role in making the DTV transition happen. The GAO suggested that the Commission must work to increase public awareness of the transition and what it means to them, consider strengthened digital-tuner mandates to prime the pump, and assess the merit of establishing a date-certain for cable systems to switch from analog to digital carriage. *Id.* at 39-40. *See also* NPRM ¶ 22, 95 (noting consumer awareness and DTV consumer equipment availability and marketing issues). Notably, while the GAO indicated that clearer digital must carry rights could “assist”

the DTV transition, it gave no indication whatsoever that those rights should extend to multicast broadcast offerings, and in fact acknowledged that dual carriage would violate the First Amendment. GAO Second Report at 25.

Notwithstanding the limited role digital must carry will play in the digital transition, broadcasters continue to insist that “full digital multicast must carry is an essential element of the digital conversion.” Paxson Letter at 6. Paxson demands “full digital multicast must carry” wherein broadcasters would be empowered to replace their existing analog signals on cable systems with a down-converted analog version of their “primary” digital signal to be carried on a cable system’s analog tier, plus obtain carriage of an HDTV signal or digital multicast signals (consisting of multiple program streams) on the digital tier. See Paxson Letter at 1-2. More recently, another group of broadcasters proposed to require cable systems to “carry, in both digital and analog, the noncommercial television stations they are now required to carry only in analog,” under a plan that, while limited to 28 percent of cable system capacity dedicated to broadcast signals, would also require carriage of multicast broadcast programming. See Noncommercial Broadcaster Letter, Att. A at 1-2. In the balance of these comments, we show that these proposals, and similar broadcaster demands, fly in the face of both the statutory must carry obligation and the constitutional limits to which it must be subject.

## **II. THE COMMISSION ALREADY CORRECTLY DECIDED THE PRIMARY VIDEO ISSUE**

The Commission reached the right conclusion in determining that, as applied to digital broadcast signals, the requirement that cable operators carry a broadcaster’s

“primary video” signal means a single programming stream and its related content, even if the broadcaster opts to use its DTV spectrum to multicast several program offerings. <sup>6/</sup> Section 614(b)(3)(A) of the Act requires cable operators, where broadcasters exercise their must carry rights, to “carry in its entirety . . . the *primary video*, accompanying audio, and line 21 closed captioning transmission . . . and to the extent technically feasible, any *program-related* material transmitted on the vertical blanking interval [VBI] or on subcarriers.” The “primary video” language in this provision arose from a 1986 Joint Agreement between NCTA and NAB leading up to the FCC’s initial efforts to implement carriage rights (imposed by FCC rules) that year. <sup>7/</sup> The Joint Agreement explained that “[r]etransmission of material in the VBI or other enhancements of the primary audio and video signal (including multi-channel sound, teletext, and material [ ] on subcarriers) is not required.” This same language essentially replicated from the Joint Agreement was inserted into the Cable Act of 1992. *See* 47 U.S.C. § 534(b)(3). In fact, in the legislative history of 1992 Cable Act, Congress expressly recognized that the primary video restriction was based on “agreement reached between public broadcasters and cable industry,” and other parts of the legislative history also reflect that the provision came from the Joint Agreement. *See,*

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<sup>6/</sup> *Digital Must Carry Order* ¶ 57 (“‘primary video’ means a single programming stream and . . . program-related content”) (construing 47 U.S.C. §§ 534(b)(3), 535(g)(1)).

<sup>7/</sup> *See Amendment of Part 76 of the Commission’s Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864, ¶ 155 (1986).

*e.g.*, H.Rep. No. 628, 102nd Cong., 2nd Sess. 1992, at 49; S.Rep. 102-92, 102nd Cong., 1st Sess. 1991, reprinted in 1992 U.S.C.C.A.N. 1133, 1196.

In the *Digital Must Carry Order*, the Commission noted that incorporating the “primary video” construct into the 1992 Act was contemporaneous with a gradual change in the common understanding of new television service from ATV/HDTV – which focused on improving technical quality of traditional analog television – to DTV and the ability to broadcast HDTV, standard definition television with multicasting, and non-video services. 16 FCC Rcd 2598, ¶ 56. The Commission contrasted a hypothetical DTV broadcast of a sporting event including multiple camera angles, which is “program related” and thus entitled to carriage, with dividing digital spectrum into several separate, independent and unrelated programming streams, where only one could be considered primary and entitled to mandatory carriage. *Id.* ¶ 56 n.158. It left to broadcasters the choice as to which, among several possible video programming streams, should be considered “primary.” This, AETN submits, was the correct result, and nothing in the intervening time since the *Digital Must Carry Order* merits a change in the analysis.

### **III. MULTICAST MUST CARRY WOULD VIOLATE THE CONSTITUTION**

Even if digital must carry could play a meaningful role in the DTV transition, and even if the issue of broadcasters’ “primary video” entitled to carriage had not already been properly decided, the Commission would still be required to reject proposals for multicast must carry on constitutional grounds. As a threshold matter,

AETN notes that the open issues raised in Section I above involving simulcasting, DTV innovation, and other matters, render impossible any meaningful FCC constitutional analysis of multicast must carry. Until it is clear what form multicasting will take, the Commission cannot ascertain what interests, if any, carriage of multicasting will serve, whether such interests are relevant to those Congress and the Supreme Court set out as supporting constitutionally permissible must carry obligations, and the extent of the burdens multicast carriage would impose on cable operators and programmers. Though these imponderables preclude the Commission from making its necessary showings on multicast must carry at this time, <sup>8/</sup> it is clear that, regardless of how they are resolved, multicast must carry cannot pass constitutional muster.

The Act's must carry provisions survived constitutional scrutiny only because the Supreme Court was able to find they were not-content based. Indeed, the one point that a majority of the Court agreed upon in *Turner I* was that if the government sought to justify must carry based on the value of broadcast programming, its effort would be presumptively invalid. *Id.* at 644-646; *see also id.* at 678-681 (O'Connor, J., concurring in part, dissenting in part). Yet broadcasters make clear that there is a substantial content component to their clamor for additional must carry rights. For example, in demanding full must carry rights for whatever digital programming it produces, Paxson lauds itself

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<sup>8/</sup> *Turner I*, 512 U.S. at 665 ("the Government still bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further the government's legitimate interests") (internal quote and citation omitted).

as “a safe haven of over-the-air television ... free of explicit sex, gratuitous violence and foul language.” Paxson Letter at 1. Since “government intervention and control” via must carry “can prove appropriate” only “when not content based,” <sup>9/</sup> the Commission must turn aside any thought of modifying its must carry stance based on calls for new mandates that are clearly content based. <sup>10/</sup>

Even aside from the content issue, any digital must carry requirement, including multicast carriage, must materially advance important government interests unrelated to suppressing speech, and cannot burden substantially more speech than necessary in doing so. *Turner II*, 520 U.S. at 189. The Commission was correct in finding that dual carriage of both a broadcasters’ analog and its digital program streams could not satisfy this standard, *see Digital Must Carry Order*, 16 FCC Rcd 2598, ¶ 12, and there is consequently no way that forced carriage of a broadcaster’s multiple programming streams could do so.

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<sup>9/</sup> *Turner II*, 520 U.S. at 228 (Breyer, J., concurring in part) (internal quotation and citations omitted).

<sup>10/</sup> This is equally true of expressions of congressional support for multicast must carry. Last fall, the Commission received a letter from Senator Trent Lott suggesting that multicast carriage is needed to promote “constructive and positive programming which [broadcasters] offer,” such as “religious and multilingual” programming, “local, family friendly, and spiritual programming” and “wholesome programming of local and regional interest.” Letter to Hon. Michael K. Powell, from Sen. Trent Lott and Sen. Larry Craig, October 11, 2002. Clearly there is no way, in the wake of the *Turner* cases, that the Commission can credit these reasons as supporting multicast must carry.

Mandatory carriage of multiple broadcast video streams would not further any relevant government interest. First, advancing the digital transition was never one of the objectives of the must carry provisions (or any other part) of the 1992 Cable Act, and the Commission cannot now simply exchange the objectives set forth in that legislation for new imperatives it currently faces. *See supra* note 5 and cases cited therein. Toward that end, it is significant that the Supreme Court noted that the Act's must carry provisions were designed to "preserve the *existing* structure of the Nation's broadcast television medium" based on its "tradition and use for decades" in the face of potential "bottleneck control" over local television markets by cable systems. <sup>11/</sup> Given that multicasting is an entirely new business opportunity previously unknown to broadcasters, it cannot be said that multicast must carry would be preserving *anything* in the context of what the Supreme Court relied upon in upholding must carry.

Moving on to the three interests the Supreme Court accepted as supporting the constitutionality of must carry requirements, it is clear that multicast must carry satisfies none of them. Multicast must carry is not necessary to preserve free over-the-air local broadcasting, because the Commission's decision in the *Digital Must Carry Order* to allow broadcasters to replace their analog must carry signal with a digital

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<sup>11/</sup> *Turner II* 520 U.S. at 193-94 (citing *Turner I*, 512 U.S. at 652-653; *Turner I*, 512 U.S. at 661. Notably, the Supreme Court also acknowledged Congress' "concomitant [interest in] expansion and development of cable television." *Turner II*, 520 U.S. at 193. To the extent that all must carry mandates result in "[b]roadcasters ... [being] favored, while cable programmers ... are disfavored," *Turner I*, 512 U.S. at 645, additional must carry rights run counter to Congress' concurrent interest in cable's well-being.

signal effectively assures them a place on each cable system. 16 FCC Rcd 2598, ¶ 41 (“cable operator[s] must provide each local television station ... entitled to mandatory carriage with sufficient ... capacity [for] its primary digital video signal”). To the extent must carry seeks to prevent broadcasters from losing so much audience share via loss of access to cable households such as to render infeasible their continued service to non-cable households, *Turner I*, 512 U.S. at 634, carriage of the “primary digital video signal” as the Commission has already required is sufficient to accomplish this result.

Next, multicast must carry would not promote a multiplicity of video programming sources. At best, it would mean that the broadcasters who already have a chance to offer programming through existing must carry rights would have additional opportunities to do so, but there would be no net increase in programmers. In fact, given that “compulsory carriage ... displace[s] cable program providers,” *Turner II*, 520 U.S. at 226 (Breyer, J., concurring in part); *see also id.* at 214 (discussing “limited channels remaining” to cable programmers), and given that the Supreme Court upheld must carry on the basis of its support for a diversity of programmers, *id.* at 192-94, multicast carriage would run directly counter to the Court’s finding that must carry is constitutional.

Multicast must carry would also do nothing to promote “fair competition,” and in fact would undermine that objective. As a threshold matter, competition has already been skewed by the Act’s must-carry/retransmission-consent regime in that it gives some broadcasters inordinate bargaining power to secure carriage for affiliated

programming at the expense of other programmers who lack this leverage.<sup>12/</sup> Multicast must carry would simply exacerbate this problem. As noted, all must carry mandates favor broadcasters and disfavor cable programmers. Any cable system capacity that must be dedicated to broadcast signals is not open for competitive access by other programmers. Every guarantee of carriage for a multicast offering beyond a broadcaster's primary video stream means that one other programmer loses the opportunity to gain carriage. More importantly, it insulates the broadcaster's multicast offerings from the competitive pressures all other programmers place to produce quality programming that piques viewer interest and garners carriage. This is the antithesis of "promoting competition."

Finally, must carry would burden more speech than is acceptable under *Turner's* constitutional analysis. First, to the extent that multicast must carry cannot advance any of the objectives discussed above, *any* additional burden on cable speech would be sufficient to render multicast must carry obligations unconstitutional due to the lack of fit between the rule's benefits and burdens. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("there is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification"); *Greater New Orleans Broad. Ass'n v. United*

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<sup>12/</sup> *See American Cable Association Petition for Inquiry Into Retransmission Consent Practices* (filed October 1, 2002); *Cf. Digital Must Carry Order*, 16 FCC Rcd 2598, ¶¶ 34-35 (discussing tying arrangements).

*States*, 527 U.S. 173, 183 (1999) (where the burden on speech is not balanced by furthering statutory objectives, even a small restriction violates the First Amendment).

Second, increasing the number of channels reserved for broadcasters unconstitutionally favors broadcasters over cable programmers. This is most evident from the above discussion of the anti-competitive effects that multicast must carry would entail. In addition, multicast must carry rules would only serve to enhance the many regulatory advantages broadcasters have already enjoyed, including that fact that they have received free spectrum and guaranteed carriage, and they are, unlike cable programmers, freed from the prospect of having to pay for carriage should they ever have to compete for it. 47 U.S.C. § 534(b)(10). These significant regulatory benefits already accorded to broadcasters, coupled with broadcaster demands for the “guarantee[ of] cable carriage,” Paxson Letter at 5, before they will offer compelling digital content to attract viewers, necessarily mean that multicast must carry will burden more cable speech than necessary to achieve *any* objective. The Supreme Court recognized “must-carry provisions impose special obligations upon cable operators and special burdens on cable programmers.” *Turner I*, 512 U.S. at 641. It is highly doubtful the Court would uphold a multicast must carry requirement that serves only to widen the gap of disparate treatment between cable programmers and broadcasters without serving any statutorily authorized objective.

