TESTIMONY OF KYLE McSLARROW
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on

COMPLETING THE TRANSITION TO DIGITAL TELEVISION

before the

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE
WASHINGTON, D.C.

JULY 12, 2005

INTRODUCTION

Mr. Chairman, Mr. Co-Chairman, members of the Committee, my name is Kyle McSlarrow. I am the President and CEO of the National Cable & Telecommunications Association and it is a privilege to appear before you today. NCTA is the principal trade association for the cable television industry in the United States. It represents cable operators serving more than 90 percent of the nation's 66 million cable television households and more than 200 cable program networks, as well as equipment suppliers and providers of ancillary services to the cable industry.

I appreciate your invitation to testify on pending Congressional efforts to speed the transition to digital television. As I have mentioned during our listening sessions with this Committee, cable is at the forefront of the digital revolution and was the first industry to deliver on the promises of the 1996 Telecommunications Act, including high speed access to the Internet and facilities-based competition for the telephone companies. Cable was also the first in 2002 to respond to the FCC's calls for assistance in expediting the broadcasters' transition to digital television.[1]

[1] In 2002, the cable industry was the first to embrace then-FCC Chairman Powell's call for voluntary industry action to speed the digital television transition. Ten top cable operators – AT&T Broadband, AOL Time Warner, Comcast, Charter Communications, Cox Communications, Adelphia Communications, Cablevision Systems, Mediacom Communications, Insight Communications, and CableOne – pledged to support the DTV transition by: (1) carrying a complement of commercial and public television stations and cable program networks that offered HDTV programming , (2) offering value-added DTV programming that would create an incentive for consumers to purchase DTV sets, (3) placing orders for integrated HD set-top boxes with digital connectors, and (4) providing these boxes to customers who requested them.

Mr. Chairman, while the cable industry has taken no formal position on a "hard date" for the broadcasters' return of the analog spectrum, we understand and applaud your Committee's leadership in grappling with the important policies inherent in the return of that spectrum, particularly for public safety purposes.

That is why when you asked us for our assistance, we committed to providing a constructive solution for an early return of the spectrum that would ensure all cable customers would face a seamless transition at no cost to the government.

Our solution is to provide cable operators the flexibility, once the analog spectrum has been returned, to "down-convert" the digital signals from must carry broadcasters at the cable headend.

What this means, as a practical matter, is that the over 40 million cable customers who can only receive an analog service will not lose access to must carry stations, and will enjoy the same service the day after the transition that they received the day before.

It means that many stations – including public television stations, network affiliates, and other stations that have negotiated retransmission consent agreements with the cable industry – would be carried in digital as well, just as they are today.

It means that those of our customers who have the capability to receive high definition television signals will continue to receive increasing numbers of high definition channels from among the 23 cable networks offering high definition and many commercial and public broadcasters as well.

And, although it will cost the cable industry tens of millions of dollars to re-engineer our facilities to provide down-conversion, it won't cost the government a dime.

Our solution is straightforward. Our solution does not attempt to make other industries' businesses more difficult. And our solution allows this Committee and Congress to concentrate on how to address those Americans who only receive over-the-air video programming.

But instead of embracing our down-conversion solution, the broadcasters continue to ask for special favors.

Mr. Chairman, the broadcasters are urging you to impose requirements on the cable industry that they have repeatedly failed to convince Congress and the FCC to impose, and that would be unconstitutional under the *Turner* line of Supreme Court cases.

Broadcasters are not the only ones in America making the transition to digital, and they should not be given preferential treatment in a competitive marketplace – especially by government mandate.

Whether the proposal is called "either/or," or down-conversion "in addition" to digital must carry, what they are asking for is obvious: carriage of both an analog and a digital version of the same signal. But dual must carry – and multicast must carry, another one of the broadcasters' proposals – will do nothing to forward the digital transition and harms consumers, cable operators, and cable programmers alike.

The broadcasters' attempts to appropriate additional channel capacity on cable systems through dual and multicast must carry will harm consumers by slowing the deployment of broadband and a host of other new digital services. The reason is simple: these services – such as 100+ megabits per second Internet access, VoIP telephone service, and digital programming tiers – all compete for a finite amount of space on cable systems.

The more the broadcasters get, the less capacity there is for innovative new applications sought by our customers.

Awarding the broadcasters dual or multicast must carry rights would do nothing to further ensure the viability of programming from a multiplicity of sources. It would, however, use valuable capacity on cable systems that would otherwise be available to cable operators and non-broadcast cable program networks to offer the array of services that provides the greatest value to consumers. Both dual must carry and multicast must carry are at odds with fundamental First Amendment and Fifth Amendment rights and do not pass muster from either a public policy or legal standpoint.

However, this Committee can discharge its responsibilities and advance public safety without wading into this morass. Current law, which gives broadcasters the right to mandatory carriage of their primary digital video stream after the transition is complete and the broadcasters are transmitting exclusively in digital, presumes a world in which the vast majority of consumers have digital televisions. An early return of the spectrum before most customers have purchased TVs with digital tuner changes that picture and requires a little flexibility. If you adopt our down-conversion proposal, you can guarantee that 66 million cable households will have access to the same programming the day after the transition as the day before. You will also allow the cable industry to continue to rollout broadband services and serve greater numbers of customers with digital and high definition programming.

THE CABLE INDUSTRY IS LEADING THE BROADER NATIONAL TRANSITION TO THE DIGITAL AGE

In the United States, the broadcasters' transition from analog to digital is only a small part of the larger digital transition that is occurring in every area of our nation's economy. Since 1996, when Congress enabled cable's investment in new technology and programming by substantially reducing regulation, cable operators have nearly rebuilt their facilities.[2] With an investment of almost $100 billion, operators have replaced coaxial cable with fiber optic technology and installed new digital equipment in homes and system headends, thus enabling the transmission of voice, video, and Internet services in digital format. As a result, cable customers are already enjoying a full complement of digital programming and advanced information services independently of the broadcasters' conversion to digital.

For example, cable customers can purchase digital programming tiers that include a diverse array of video networks and commercial-free music channels. Digital customers also have access to video-on-demand programming, digital video recording, and enhanced electronic program guides. These features allow programs to be viewed at the customer's convenience and at a time of the customer's choosing. They also allow cable subscribers to block access to programming they do not want their children or households to see. All of cable's digital services can be enjoyed by consumers with analog TV sets who use digital set-top boxes that convert digital signals to analog. More innovative interactive video services are on the way, in addition to the Internet and digital telephone services that are already attracting large numbers of customers.

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[2] In return for deregulation, the cable industry promised Congress and American consumers that it would provide: (1) facilities-based competition to the telephone companies, and (2) a new generation of advanced information and video services – both of which we have done.

Cable customers with High Definition TV (HDTV) sets have even more options.[3] They can receive a wide selection of programming transmitted in high definition, including 23 HD cable networks that transmit much of their programming in high definition.[4] In addition, cable operators are now voluntarily carrying the digital channels of a substantial number of over-the-air broadcast stations in addition to those stations' analog signals – either through retransmission consent agreements with individual commercial stations[5] or voluntary initiatives such as cable's recent carriage agreement with public television stations[6]. Significantly, cable's contractual carriage agreement with public television stations was reached through private negotiations – not federal legislation or FCC regulations.

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[3] The cable industry is rapidly rolling out high definition programming. As of January 1, 2005, cable companies had launched high definition television service on systems passing 92 million homes. At least one cable operator in all of the top 100 markets now offers HDTV, and HD over cable is available in 184 of the 210 U.S. television markets.

[4] Including Cinemax HDTV, Comcast SportsNet HDTV, Discovery HD Theater, ESPN HD, ESPN2 HD, FSN HD, HBO HD, HDNet, HDNet Movies, INHD, INHD2, MSG Networks in HD, NBA TV, NFL Network HD, Outdoor Channel 2 HD, Showtime HD, Spice HD, STARZ! HDTV, The Movie Channel HD, TNT in HD, Universal HD, and YES-HD.

[5] As of January 1, 2005, cable operators voluntarily carried 504 digital broadcast signals – a 66 percent increase over the 304 stations carried in December 2003.

[6] On January 31, 2005, NCTA reached agreement with the Association of Public Television Stations (APTS) to ensure that the digital programming offered by local public TV stations is carried on systems serving the vast majority of cable subscribers across the nation. The boards of NCTA, APTS, and PBS ratified the agreement on February 4, 2005.

CABLE'S CARRIAGE OF BROADCAST SIGNALS TODAY

The vast majority of cable customers have analog television sets, and most of those sets – as in over-the-air households – are not equipped with digital set-top boxes.[7] Today, cable operators provide the analog signals of virtually all local television stations, which can be viewed by all customers – those with and without digital boxes, and those with and without digital television sets. In addition, operators provide the digital signals of some, but not all, broadcast stations – especially those that provide compelling digital programming that is likely to enhance the value of cable service for the growing number of customers with high definition sets.

Cable's current carriage practices fully comply with what both the marketplace and the "must carry" rules dictate. Existing law requires cable operators to carry the analog signals of all "must carry" broadcast stations during the digital transition, while making carriage of the digital signals optional and subject to "retransmission consent" agreements with broadcasters. The FCC has recognized that requiring "dual carriage" of the analog and digital signals of all must carry stations – regardless of whether the digital programming is valuable to the cable households capable of viewing it on their TV sets – would do nothing to further the purposes of the must carry requirements or the digital transition while unduly burdening the First Amendment rights of cable operators and programmers.

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[7] There are approximately 172 million television sets in the 66 million cable households across the country. 26 million cable homes subscribe to digital service, but not all digital households have digital boxes on all their TVs. This means that there are approximately 28 million analog TVs in digital homes that will require boxes after the transition. If one adds these 28 million sets to the approximately 106 million analog TVs in homes with only analog cable service (41 million), there are a total of around 134 million analog TV sets in cable homes that will require digital boxes in order to get digital service. The cost of deploying 134 million set-top boxes is $9 billion for a simple $67 digital-to-analog box and $29 billion for a $200 interactive digital cable box.

This sensible balance, which serves the interests of must carry broadcasters, cable operators, cable programmers, and cable customers alike, can be preserved without any disruption to cable customers after broadcasters stop transmitting analog signals – with one key adjustment. Current law requires cable operators to carry must carry signals without "material degradation." The FCC has interpreted this to mean that – after the transition, when broadcasters are transmitting only in digital – "a broadcast signal delivered in HDTV must be carried in HDTV."[8] This "no material degradation" requirement makes sense if – as is the case under current law – the transition to digital-only broadcasting does not occur until most households are equipped to receive digital signals on their television sets. However, if Congress is going to impose a "hard date" before most consumers have digital sets or set-top boxes, then the requirement to transmit the broadcasters' digital signals in "un-degraded" digital format will be costly and disruptive for cable customers who do not have digital TVs or set-top boxes, i.e., most of our subscribers. It will require them to acquire digital sets or set-top boxes to continue watching the same broadcast programming that they watch today.

To prevent this costly disruption, Congress should allow cable operators to "down-convert" the digital signals of must carry broadcasters to analog at the headend and provide the primary video programming stream of those down-converted signals to cable homes in lieu of the primary digital video stream. This will ensure that all cable households can receive the programming provided by those must carry broadcasters without having to purchase digital television sets or digital set-top boxes.

Households with HDTV sets would, of course, be able to watch the increasing number of HD channels, as they do now. I would note that cable operators would still have

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[8] *In re Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 2598, 2629 (2001) (emphasis added).

every incentive to voluntarily provide the digital signal – as they frequently do today – in addition to the down-converted analog signal if the digital version were uniquely compelling and attractive to customers with digital and HDTV equipment. As a result, a "hard date" transition to digital broadcasting would be seamless and non-disruptive for cable customers.

Today, we offers analog to our analog customers, analog and digital to our digital customers, and increasingly the opportunity for customers with high definition sets to watch a growing number of channels in high definition. In addition, many of our operators have already announced their own plans to simulcast analog channels in digital. And what is true today will still be true the day after the transition under our proposal. In the meantime, increasing numbers of our subscribers will continue to switch to digital services, and many of them will become high definition subscribers. We believe our proposal minimizes costs and inconvenience to consumers, and allows you as policy-makers not to have to worry about disrupting anyone who is a cable customer – and to do so at no cost to the government.

We are pleased to see that the SAVE LIVES Act (S. 1268), introduced by Senators McCain and Lieberman, appears to recognize the consumer benefits of permitting down-conversion in lieu of digital carriage.[9] While we have concerns about the bill's "convert one-convert all" obligation on any operator who chooses to down-convert, the bill recognizes that this obligation should end when it is no longer necessary to ensure the continued ability of audiences for foreign-language and religious television broadcast stations to view the signals of such stations. Finally, the bill also recognizes that only a single digital program stream from each broadcaster should be entitled to carriage on a cable operator's basic service tier.

[9] While S. 1268 establishes a baseline digital carriage requirement with respect to any must carry station that relinquishes its analog spectrum, it gives cable operators the flexibility to convert digital signals to analog at the headend "notwithstanding" this baseline requirement.

Thus, S. 1268 offers a sound starting point for crafting a digital transition bill that best serves the interests of consumers and is fair to all of the affected industries.

DUAL AND MULTICASTING MUST CARRY ARE LIKELY TO BE FOUND UNCONSTITUTIONAL

A. Down-Conversion and Dual Carriage

Cable operators seek authority to fulfill their must carry obligations in some cases by carrying a down-converted analog signal in lieu of a broadcaster's digital signal. Some commercial broadcasters are insisting, however, that cable operators be permitted to carry down-converted analog versions of their digital signals only in addition to – not instead of – the original signals. This would effectively impose a dual carriage obligation if operators wanted to make broadcast signals readily available to the majority of their customers who do not have digital equipment – as they would obviously have to do. Any such dual carriage requirement would impose untenable burdens on cable operators and programmers alike and should be rejected.

- By preempting an excessive amount of capacity on cable systems, dual carriage would interfere with the ability of cable operators to offer consumers the broadest array of programming and to deploy broadband and innovative digital services.
- Dual must carry would be especially unfair to non-broadcast program networks (such as A&E's Biography Channel, C-SPAN, Discovery Kids Channel, Hallmark Channel, The Outdoor Channel, Oxygen, Sí TV, and TV One), which have no guarantee that their programming will be carried in analog or digital format – much less in both.

As the FCC has determined, imposing such burdens on cable operators' and programmers' speech would raise serious Constitutional problems because it would not advance the governmental interests identified by the Supreme Court as justifications for "must carry" rules – or any other valid government interest. Specifically,

- Dual carriage will do nothing to preserve or enhance the availability or quality of broadcast signals available to over-the-air viewers. To the contrary, guaranteed carriage of a broadcaster's signal in analog and digital format will diminish the broadcaster's incentive to provide programming that is uniquely compelling in its digital format, e.g., HDTV.
- Dual carriage will do nothing to promote the dissemination of information from a multiplicity of sources since the two channels would simply be digital and down-converted analog versions of the same programming. Indeed, it would have the opposite effect: it would decrease the multiplicity of voices by granting preferential treatment to one broadcaster over different programming from other sources.
- Dual carriage will do nothing to promote the purchase of digital sets by consumers or set-top boxes by cable operators since cable systems already provide a broad array of digital and high definition programming (both broadcast and non-broadcast). In these circumstances, the additional carriage of must carry broadcast stations in digital format will provide no additional incentive to cable customers to purchase digital equipment.

Not surprisingly, the FCC has voted twice (by a margin of 5-0 in 2005) that dual carriage would raise serious First Amendment problems and should not be imposed under the current must carry statute. Changing the law to allow cable operators to carry down-

converted analog versions in lieu of digital versions of must carry signals makes good sense. But changing the law in a manner that effectively requires cable operators to carry must carry signals in both digital and analog formats would not only be counterproductive and contrary to the public interest, it would be unconstitutional as well.

B. Multicast Must Carry

If Congress grants cable the authority to fulfill its must carry obligations by carrying down-converted analog signals, all cable customers will be able to watch those signals – the same channels of programming that we are required to carry today – without having to acquire additional set-top boxes or new digital television sets. Meanwhile, cable operators would continue, voluntarily and pursuant to retransmission consent, to carry additional digital signals from broadcasters who provide compelling high definition and multicast programming that is attractive to cable customers.

But commercial broadcasters are continuing to urge Congress to force cable operators to carry every digital multicast channel from every must carry broadcast station.[10] Never mind that they failed to persuade the FCC that such a requirement was in any way necessary to preserve the viability and availability of over-the-air broadcast stations, or that it would promote the availability of broadcast programming from a variety of sources. The broadcasters also failed to persuade the FCC that such a requirement could be implemented without burdening cable operators and programmers in a way that raised serious Constitutional problems. But broadcasters are now hoping

[10] *See, for example, "Completion of the Digital Television Transition"* (June 24, 2005), a paper being circulated in Congress by the National Association of Broadcasters.

that the same arguments that failed to persuade the Commission will somehow prove persuasive here.

There is no reason why they should. A multicast must carry requirement would force cable operators to use channel capacity that they spent nearly $100 billion deploying (so that they could offer compelling programming and advanced broadband services) to carry the broadcasters' multicast programming instead. While this trade-off would reduce the value of cable service to cable customers, it would do nothing to preserve the availability – and would be more likely to diminish the quality – of over-the-air television from a multiplicity of sources.

First of all, we should put to rest the notion, which the broadcasters keep resuscitating, that cable operators have anticompetitive reasons for refusing to carry the broadcasters' multicast programming – even if consumers find it attractive. In 1992, when Congress enacted the current must carry provisions, it worried that such discrimination might occur with respect to the broadcasters' analog signals. But when the Supreme Court narrowly upheld (5-4) the Constitutionality of analog must carry, a majority of the Court found that this was not a supportable justification for the rules.[11]

Whatever fears Congress may have had in 1992, the subsequent launch of two vigorous and successful national direct broadcast satellite (DBS) services has removed any likelihood that a cable operator could profitably refuse to carry a programming service – broadcast or non-broadcast – that would attract a significant viewership and might be carried by its competitors. The Supreme Court found no basis for such fears in

[11] *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 225 (1997) (Breyer, J., concurring in part) ("I join the opinion of the Court except insofar as [it] relies on an anticompetitive rationale.")

1997, and today, with satellite competition stronger than ever, the prospect of anticompetitive conduct by cable operators is even more remote. As an argument for multicast must carry, it is a red herring.

In fact, where broadcasters are currently offering compelling digital content, cable operators are voluntarily agreeing to carry such programming. At present, cable operators have agreed to carry the digital signals of over 500 unique broadcast stations, and this includes not only HDTV signals but also multicast streams. Of course, operators continue to carry the broadcasters' analog channels as well.

- As of May 2005, cable operators were carrying commercial broadcasters' multicast programming in over 50 markets ranging from many of the nation's largest (including at least 7 of the top 10 markets)[12] to numerous small-to-midsized markets across the country. For example, in the Washington metropolitan area, Comcast is carrying WJLA's local Weather Now channel (ABC) and WRC's Weather Plus channel (NBC), as well as WETA's Prime, Kids, and Plus channels (PBS).
- In January 2005, NCTA and the Association of Public Television Stations (APTS) entered into an agreement that ensures that local public television stations' digital programming – including multicast channels – is carried on cable systems serving the vast majority of cable customers across the nation.
- Comcast has digital carriage agreements with public broadcasters in at least 45 markets and has reached digital multicast carriage agreements with a growing

[12] In at least one additional top 10 television market, cable carried the multicast signal of the recent NCAA men college basketball tournament games.

number of commercial broadcasters for channels that Comcast believes bring value to its customers.

- During the recent NCAA men's college basketball tournament, CBS stations in a dozen markets offered – and cable operators agreed to carry – extra games on multicast channels.

The Supreme Court found that the analog must carry requirements were justified as a means for preserving the viability of over-the-air broadcast stations and the availability of programming from a multiplicity of sources. It found, after remanding the matter to the FCC to develop an extensive evidentiary record,[13] that non-carriage of a broadcaster's single analog channel would threaten the viability of a significant number of broadcasters and therefore threaten to reduce the diversity of programming sources available over-the-air. But there is no reason to believe that mandatory carriage of multiple program streams provided by every broadcaster is necessary to protect against such threats.

Although the broadcasters persistently claim that a multicast must carry requirement is essential to maintain their economic viability, they have not produced a shred of evidence demonstrating that this is the case. They certainly had ample

[13] In remanding the case, the Court made clear that it is not sufficient merely to assert that must carry rules are necessary to prevent some hypothetical harm: "That the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' *Quincy Cable TV, Inc.* v. *FCC*, 768 F. 2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994).

opportunity to do so throughout the FCC's lengthy rulemaking proceeding. Yet the Commission found nothing in the record to support their claim:

> Unlike in the analog carriage debate, here broadcasters fail to substantiate their claim that mandatory multicasting is essential to ensure station carriage or survival. Broadcasters argue that carriage of multicast streams is essential to help them develop and support additional programming streams, but they have not made the case on the current record that these additional programming streams are essential to preserve the benefits of a free, over-the-air television system for viewers. Broadcasters will continue to be afforded must carry for their main video programming stream, which can be in standard definition or high definition, and any additional material that is considered program-related. Broadcasters can also rely on the marketplace working without mandatory carriage in order to persuade cable systems to carry additional streams of programming. There is evidence from the record, as well as news accounts, that cable operators are voluntarily carrying the multiple streams of programming of some broadcast stations, including public television stations, that are currently multicasting …. Under these circumstances, the interests of over-the-air television viewers appear to remain protected.[14]

Indeed, while broadcast groups have argued that multicast carriage is especially vital to the survival of smaller and financially weaker broadcast stations, one independent broadcaster, Entravision Holdings, LLC, specifically told the FCC that it and other similarly situated independent broadcasters have little to gain – and much to lose – from a multicast must-carry requirement. According to Entravision:

> Network-affiliated broadcasters have characterized multicast services as an integral component of the future business plans of broadcasters, and as indispensable to a successful DTV transition and the continuing vitality of free over-the-air television service. However, while digital multicast services may already be a reality for some network affiliates with the programming and financial resources to advance and support such technology, independent stations simply do not have access to the

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[14] *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4534-35 (2005) (footnotes omitted) ("Second Report and Order").

> programming or the capital to invest in such technology at this time, or in the foreseeable future.[15]

As a result, Entravision noted that "… multicasting will simply increase the power of network-affiliated stations and further diminish the ability of independent broadcasters to make their voices heard."[16]

As this broadcaster suggests, a multicast carriage requirement will not serve – and may actually disserve – the purpose of promoting the availability of programming from a variety of sources. The FCC itself found it hard to see how carriage of multiple streams from the same broadcast station could serve such a purpose:

> [B]ased on the current record, there is little to suggest that requiring cable operators to carry more than one programming stream of a digital television station would contribute to promoting "the widespread dissemination of information from a multiplicity of sources." Under a single-channel must-carry requirement, broadcasters will have a presence on cable systems. Adding additional channels of the same broadcaster would not enhance source diversity. Furthermore, programming shifted from a broadcaster's main channel to the same broadcaster's multicast channel would not promote diversity of information sources. Indeed, mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system.[17]

Nor would a multicast carriage requirement do anything to promote the digital transition by accelerating the acquisition and use of digital equipment – television sets or set-top boxes – by cable customers. Cable customers already have access to hundreds of channels of programming, including many channels of high definition programming. It is

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15 "Why The Commission Should Not Promulgate A Digital Multicast Must-Carry Requirement At This Time Given The Harm Such A Decision Could Inflict On Independent Broadcasters" Ex Parte Filing of Entravision Holdings, LLC, CS Docket No. 98-120, March 1, 2004 (emphasis added).

16 *Id.*

17 Second Report and Order, *supra*, 20 FCC Rcd at 4535 (footnote omitted).

unlikely that the availability of additional digital multicast programming will persuade any additional customers to acquire digital sets or set-top boxes.

Since a multicast carriage requirement would not serve the purposes that justified the analog must carry provisions – or any other important government policy – there is no basis, Constitutional or otherwise, for imposing the burdens of such a requirement on cable operators and programmers.

But that does not deter the NAB, which asserts that mandatory carriage of multicast streams would not require any more capacity than is required of cable operators under current law and would pose no Constitutional problems. The broadcasters' claim is wrong, both as a matter of fact and as a matter of law.

First, if Congress adopts a hard date that ends the transition before most cable customers have purchased digital television sets or digital set-top boxes, a multicast requirement almost certainly will take up more capacity than is currently used to carry broadcast stations. This is because cable operators will need to down-convert and carry each broadcaster's primary video signal in analog format, using the same 6 MHz they use today to carry such stations. Any requirement to carry additional digital multicast signals will add to this burden on cable's capacity.

Second, "current law" contemplates that broadcasters must return their free analog spectrum and that they are entitled to carriage of their one "primary" digital video signal after the transition. Adding a multicast carriage requirement to this obligation obviously increases the burden on a cable system's capacity and restricts an operator's ability to deploy significant new services and applications that enhance the value of cable service to local consumers.

In any event, the burden of a must carry requirement, for Constitutional purposes, is not simply the physical amount of channel capacity an operator is required to devote to must carry, but the extent to which must carry obligations: (1) intrude on a cable operator's editorial discretion to use his system's capacity in a manner that best serves viewers, and (2) discriminate against cable programmers who do not have the broadcasters' preferential, guaranteed access to channels on a cable system.

As I have mentioned, cable operators have invested nearly $100 billion in facility upgrades to bring a variety of new digital broadband services to their customers. Each channel that would have to be used to carry a must carry stream of broadcast programming in lieu of some other service imposes an incremental burden that can only be justified if it advances an important government interest.

Any multicast programming that is likely to be attractive to viewers will be – and is already being – carried by cable operators. But requiring cable operators to carry every multicast stream of every broadcast station would impose significant burdens on the speech rights of cable operators and cable program networks, and would disserve the interests of cable customers. Imposing a multicast requirement would raise serious Constitutional problems under the First Amendment. A multicast carriage requirement, like dual must carry, would also raise serious Fifth Amendment problems. It would result in the permanent, physical occupation of a substantial portion of a cable operator's system without just compensation – indeed, without any compensation at all.

CONCLUSION

Congress should reject the broadcasters' renewed calls for digital must carry, including dual must carry and multicast must carry. When the broadcasters suggest that they are not asking for dual must carry but want "either/or" carriage or carriage of "just" their digital signal, policy makers should realize that these proposals are tantamount to dual must carry. In what is still primarily an analog television world, cable companies cannot plausibly be expected to cut off the bulk of their video customers by carrying only digital signals during the broadcasters' transition to DTV.

If Congress decides that the analog spectrum needs to be returned before most television viewers are equipped to receive digital signals, there is a way of minimizing consumer costs and service disruptions. Instead of permitting operators to carry down-converted signals in addition to mandated carriage of the digital signals transmitted by must carry broadcasters, one need only to allow carriage of down-converted signals in lieu of the digital signals, while giving operators the discretion to carry both the down-converted and digital versions of the signal. Mandating dual carriage or multicast carriage would do nothing further to advance any legitimate public policy objective and would only impose Constitutionally impermissible burdens on cable operators and cable program networks.

I am grateful for this opportunity to discuss the transition to digital television with you. We look forward to continuing to work with this Committee on these important issues.