PRESS STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules

Today we hold that Congress did not give broadcasters the statutory right to free carriage of all their channels on a cable provider's system. This is the second time we have held the statute does not authorize "multi-casting." New digital technology allows broadcasters to take what once was one channel, and divide it into four to six or even more channels as compression technology advances. While that affords them expanded business opportunities, we hold nonetheless the statute limits cable carriage rights to one. They, of course, remain at liberty to commercially negotiate for carriage of other channels, just as public broadcasters have recently done and as other cable programmers must do.

The must-carry statute limits the video signal that must be carried to the "primary video." While, admittedly, lawyerly wordsmiths can argue what "primary" means, it clearly evidences intent to restrict, or limit the video that must be carried. If some video is primary, it necessarily follows that some is secondary. The view urged by broadcasters that primary video includes *all* their video streams without limitation proves too much and, to my mind, effectively strikes the restriction from the books.

When interpreting a statute that is susceptible to different interpretations, the commission is admonished to read it in a manner that best avoids raising serious constitutional issues. Must-carry unquestionably imposes a first amendment burden on cable providers. Indeed, the Supreme Court upheld the must-carry statute only by a slim 5-4 margin. I believe reading the statute now as expansively as broadcasters urge would likely wither before a First Amendment challenge. At a minimum, a serious constitutional question would be raised. In such circumstances, the law directs the agency to endorse the reasonable interpretation that avoids such a question, if possible. Reading the statute to authorize one video stream gives effect to the primary restriction and best avoids constitutional infirmity.

Moreover, in contrast to how the statute is applied in the analog context, Congress has made no factual findings about the need for multi-cast must-carry in a digital context. In fact, it has not spoken directly to the point at all. The Commission would be on weak ground if it interpreted Congress' will to authorize multi-cast must carry without a better legislative foundation. Consequently, it would be wholly improper for this agency to expand the must-carry regime—concurrently expanding the First Amendment imposition—without a clearer directive from Congress.

Finally, the record simply does not demonstrate with any strength that vital or important government interests are advanced, sufficient to justify further encroachment on the First Amendment rights of cable providers. Broadcasters provide a valuable

service to the American people, and their voice remains one government should work to preserve, but it simply is not the case, in our judgment, that an expansion of carriage rights are necessary for their survival, or to preserve diversity and localism. Recognizing the expense of making the digital transition, the government has taken steps to subsidize it by providing billions of dollars of spectrum for free, and through other government actions, such as mandatory digital tuners in televisions and broadcast flag protection. I do not believe a constitutionally suspect reading of the must-carry statute needs to be added to the list.

Over the course of the last four years, the Commission has taken nearly every step within our authority to bring the public the wonders of digital television and put our country in a position to reclaim needed spectrum for future public safety and broadband use. Today, we finally strike off our list another open question about the terms of that transition.