

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Carriage of Digital Television Broadcast)
Signals: Amendments to Part 76) MB Docket No. 98-120
of the Commission's Rules)

**OPPOSITION OF COMCAST CORPORATION
TO PETITIONS FOR RECONSIDERATION**

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EXECUTIVE SUMMARY

In 1998, the Commission initiated this proceeding in order to determine “the broadcast signal carriage responsibilities of cable television operators in the evolution toward digital broadcast television.” Over the intervening years, broadcasters have advanced numerous imaginative and frequently imaginary rationales in their efforts to persuade the Commission to require cable operators to carry both the analog and the digital transmissions of each broadcast licensee during the transition (“dual must-carry”) and multiple channels of programming for each digital broadcaster post-transition (“multicast must-carry”). After seven years, two notices of proposed rulemaking, and nearly 1300 comments, reply comments, ex parte submissions, and other pleadings, the Commission -- on two separate occasions -- has rejected these rationales and declined to expand broadcasters’ must-carry rights.

Both the Commission’s “*First Order*” in 2001 and its “*Reconsideration Order*” in 2005 reaffirm what has been clear since the outset: (1) the must-carry provisions enacted thirteen years ago do not provide a basis for imposing on cable operators a requirement to carry more than a single channel of programming for each broadcast licensee; and (2) any expansion of existing must-carry requirements would present serious problems under the First Amendment. The petitions for (further) reconsideration fail to show any reason why these determinations should be changed.

The Commission’s rules expressly state that the Commission may dismiss petitions for reconsideration that are repetitious, and the Commission has consistently done so in the past. The *Reconsideration Order* does not modify any rules adopted by the *First Order*, and the petitions for reconsideration of the *Reconsideration Order* invoke essentially the same arguments

made in the prior petitions for reconsideration. Accordingly, the petitions should be summarily dismissed.

To the extent the Commission decides to address the merits of the petitions, it is clear that they provide no bases for the Commission to revise the conclusions it made in the *First Order* or the *Reconsideration Order*. First, claims that the Communications Act mandates (or even contemplates) either dual or multicast must-carry are plainly wrong. There are many reasons -- grounded in the text, structure, history, and purpose of the applicable provisions -- why neither dual nor multicast must-carry is authorized. And even if this were a close question (which it is not), a result adverse to the Petitioners would be compelled by the Commission's duty to endorse a reasonable interpretation that avoids serious constitutional questions.

Second, neither dual nor multicast must-carry would further any important or substantial government interest. Thus, under the intermediate scrutiny test set forth in *United States v. O'Brien*, any expanded must-carry requirements would violate cable operators' First Amendment rights.

Third, even if dual or multicast must-carry would further an important or substantial government interest, the burden it would impose on cable operators' First Amendment rights would be greater than necessary to further any such interest. The demands on cable bandwidth have grown at least as much as has cable's capacity, and the notion that cable operators can be forced to carry multiple streams per broadcaster (either dual or multicast) without displacing additional non-broadcast programming or other services is erroneous and unsupported. Thus, there is no legally permissible way in which cable operators can be compelled to increase their carriage of broadcast programming beyond one program stream per broadcaster, at the expense

of programming and other services that cable operators would prefer to carry and programming and services that cable viewers would prefer to watch or use.

In short, the Commission should refuse to allow Petitioners to have a third bite at the dual and multicast must-carry “apple.” The Commission has considered and reconsidered the broadcasters’ arguments, and it has twice reached the correct conclusions. Petitioners’ latest efforts provide no new evidence, no persuasive legal analysis, and no other credible reasons why the Commission should reach a different result. Accordingly, either by summary dismissal or by ruling (yet again) on the merits, the Commission should once again reject efforts to expand broadcasters’ must-carry rights.

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Pursuant to Section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f), Comcast Corporation ("Comcast") hereby opposes the petitions seeking reconsideration of the Commission's Second Report and Order and First Order on Reconsideration ("*Reconsideration Order*")¹ filed in the above captioned proceeding.² As shown below, these petitions are without merit and should be summarily denied.

I. INTRODUCTION AND SUMMARY

In the *Reconsideration Order*, the Commission addressed petitions for reconsideration of its First Report and Order and comments on its Further Notice of Proposed Rulemaking ("*First Order*").³ The Commission rightly determined, *for the second time* (and after a total of *seven years of deliberation*), that broadcasters' must-carry rights cannot properly be expanded to

¹ *In re Carriage of Digital Television Broad. Signals: Amendments to Part 76 of the Commission's Rules, Second Report & Order and First Order on Reconsideration*, 20 FCC Rcd. 4516 (2005) ("*Reconsideration Order*").

² Petition of ABC, CBS, and NBC Affiliates and ABC and NBC/Telemundo-owned stations (Apr. 21, 2005) (collectively, "Joint Petitioners Petition"); Petition of Nat'l Ass'n of Broad. and Ass'n for Maximum Serv. Television (Apr. 21, 2005) ("NAB/MSTV Petition"); Petition of DIC Entm't Corp. (Apr. 21, 2005) ("DIC Petition"); Petition of Minority Media & Telecomm. Council (Apr. 21, 2005) ("MMTC Petition"); Petition of Paxson Communications Corp. (Apr. 21, 2005) ("Paxson Petition"). For purposes herein, unless otherwise designated, all citations to comments, reply comments, ex parte pleadings, and petitions are to filings made in CS Docket No. 98-120.

³ *In re Carriage of Digital Television Broad. Signals: Amendments to Part 76 of the Commission's Rules, First Report & Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd. 2598 (2001) ("*First Order*").

encompass either forced carriage of (1) both analog and digital broadcast transmissions (“dual must-carry”) or (2) any additional video streams (beyond the primary) that any given broadcaster may choose to include in its digital broadcast transmissions (“multicast must-carry”). None of the reconsideration petitions presents an even remotely persuasive case to the contrary. In fact, the numerous deficiencies in the broadcasters’ petitions for further reconsideration -- including their continued misconstruction of the Communications Act, their reliance on mischaracterizations of the facts and the record, their misunderstanding of the constitutional analysis in the Supreme Court’s *Turner* decisions,⁴ their confusion of broadcasters’ own commercial interests with the public interest, and their reliance on legally irrelevant considerations -- merely underscores the correctness of the Commission’s conclusions.

Based on statutory and constitutional considerations, the *Reconsideration Order* concluded that broadcasters’ first round of reconsideration petitions were without merit. Comcast agrees with this conclusion. In fact, the case is even stronger than is reflected in the *Reconsideration Order*. The record demonstrates that dramatic changes in the marketplace have substantially undermined the defensibility of *any* must-carry requirement; the original analog, one-channel-per-broadcaster must-carry requirement was upheld by the Supreme Court by the narrowest possible margin, and in that decision the plurality relied explicitly on Congressional findings concerning a 1992-era marketplace that are now grossly outdated. It is abundantly clear that any *expansion* of forced carriage requirements presents even more serious issues under the First and Fifth Amendments of the U.S. Constitution; accordingly, the Commission was duty-bound to construe the statute so as to avoid new constitutional conflicts. Purely as a matter of

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

statutory interpretation, the text, structure, history, and purpose of the must-carry provisions provide no support for Petitioners' efforts to expand broadcasters' must-carry privileges.⁵ And, there are many policy considerations that make expanded must-carry requirements contrary to the public interest.

Nonetheless, even on the grounds that are articulated in the *Reconsideration Order*, the Commission's decisions to reject (again) the broadcasters' demands for dual and multicast must-carry are manifestly correct. There is absolutely no basis for finding that the statute mandates dual or multicast must-carry; in fact, *even if constitutional considerations are ignored*, the better reading of the statute would be that such additional must-carry obligations are not authorized. Moreover, it is clear that neither mandatory dual carriage nor mandatory multicast carriage furthers the government interests identified as relevant by the Supreme Court in the *Turner* litigation (or even any of the other asserted government interests that broadcasters have conjured up in this third bite at the apple). Expanding broadcasters' must-carry rights through dual or multicast must-carry would not preserve the benefits of free over-the-air television for viewers and would not promote the widespread dissemination of information from a multiplicity of sources; nor would it promote fair competition in the marketplace for television programming or advance the digital transition. Thus, the Commission correctly concluded that dual must-carry would violate the First Amendment rights of cable operators. In addition, because multicast must-carry would not advance any important government interest, the Commission reasonably construed Sections 614 and 615 of the Communications Act *not* to impose such a regulatory burden on cable operators.

⁵ See *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (“Under the first step of *Chevron*, the reviewing court ‘must first exhaust the “traditional tools of statutory construction” to determine whether Congress has spoken to the precise question at issue.’ *The traditional tools include examination of the statute’s text, legislative history, and structure, as well as its purpose.*” (emphasis added) (internal citations omitted)).

II. THE PETITIONS FOR RECONSIDERATION ARE REPETITIOUS AND SHOULD BE SUMMARILY DISMISSED.

More than four years ago, in the *First Order*, the Commission determined that “the statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station’s digital and analog signals” and tentatively determined that “a dual carriage requirement appears to burden cable operator’s First Amendment interests substantially more than is necessary.”⁶ With respect to multicast must-carry, the Commission determined that “the terms ‘primary video’ . . . are susceptible to different interpretations,” but concluded -- based on the legislative history indicating that “must-carry provisions were not intended to cover all uses of a signal” and on dictionary definitions of the word “primary” -- that “‘primary video’ means a single programming stream and other program-related content.”⁷

In response to the *First Order*, numerous petitions were filed by broadcasters seeking reconsideration of the Commission’s findings that the Communications Act did not mandate dual and multicast must-carry.⁸ After receiving extensive comments and reply comments, numerous legal analyses, and ex parte submissions creating a comprehensive factual record over the past four years, the Commission reached the same result in the *Reconsideration Order*.⁹ The Commission concluded that: (1) “[t]he arguments the parties have presented in support of a statutory reading to require dual carriage essentially are no different from those that have

⁶ *First Order* ¶¶ 2, 3.

⁷ *Id.* ¶¶ 53, 55, 57.

⁸ See NAB/MSTV/ALTV Petition (Apr. 25, 2001); Walt Disney Co. Petition (Apr. 25, 2001); Telemundo Communications Group Petition (Apr. 25, 2001); Paxson Communications Corp. Petition (Apr. 25, 2001); Arizona State Univ. *et al.* Petition (Apr. 25, 2001) (representing several broadcasters).

⁹ Comcast alone submitted 29 pleadings detailing a number of bases -- constitutional, statutory, competitive, and technical -- for why dual and multicast must-carry are neither mandated nor warranted. Many of these pleadings have never been challenged, let alone rebutted.

previously been submitted, considered, and rejected”;¹⁰ and (2) “we affirm our earlier decision, and decline, based on the current record before us, to require cable operators to carry any more than one programming stream of a digital television station that multicasts.”¹¹

Petitioners now seek further reconsideration. The Commission should reject Petitioners’ efforts to relitigate issues that the Commission has considered and reconsidered. Although the Commission’s rules expressly invite reconsideration petitions regarding orders that change the outcome of an earlier order and specify that a new order is, *to the extent of the modification*, subject to reconsideration in the same manner as the original order, these rules also clarify that, “[e]xcept in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious.”¹²

The *Reconsideration Order* does not modify any rules adopted by the original order, and the petitions are repetitious because they assert essentially the same arguments made in the prior petitions for reconsideration. The Commission has consistently dismissed petitions that seek reconsideration of issues that the Commission has already reconsidered.¹³ As the Commission has clearly explained:

The Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented. This is particularly true where a petitioner advances arguments that the Commission previously considered and rejected in a prior order on reconsideration. If this were not the case, the Commission “would be involved

¹⁰ *Reconsideration Order* ¶ 13.

¹¹ *Id.* ¶ 33.

¹² 47 C.F.R. § 1.429(i).

¹³ See *In re Amendment of Part 95 of the Commission’s Rules To Provide Regulatory Flexibility in the 218-219 MHz Service*, Third Order on Reconsideration and Memorandum Opinion & Order, 17 FCC Rcd. 8520 (2002) (“*Regulatory Flexibility Third Order on Recon*”); *In re Applications of Warren Price Communications, Inc.*, 7 FCC Rcd. 6850 ¶ 2 (1992) (“LIMBC’s arguments were previously considered and rejected by the Commission and it is well established that reconsideration will not be granted to debate matters upon which we have already deliberated and spoken.” (citing *WWIZ, Inc.*, 37 FCC 685 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1964))).

in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion."¹⁴

That is precisely the situation here.

III. PETITIONERS FAIL TO DEMONSTRATE ANY ERROR IN THE COMMISSION'S DETERMINATIONS THAT DUAL MUST-CARRY IS NOT MANDATED BY THE ACT AND WOULD VIOLATE CABLE OPERATORS' FIRST AMENDMENT RIGHTS.

The issue of dual must-carry scarcely warrants discussion, but Petitioners' insistence on rehashing their stale arguments compels a response. In two decisions, involving nine different Commissioners, not a single member of the Commission has read the statute to require cable operators to carry both the analog and digital signals of a broadcaster. Moreover, in both decisions, the Commission found (first tentatively and then definitively) that adopting the reading urged by the broadcasters would violate the First Amendment rights of cable operators.¹⁵

A. The Commission Correctly Concluded for the Second Time That the Communications Act Does Not Mandate Dual Must-Carry.

Even if the Commission were to decide to accept and address these repetitious petitions, it should affirm its prior conclusions that the Act does not mandate dual must-carry. There are many reasons -- grounded in the text, structure, history, and purpose of the must-carry provisions -- why the far better reading of the Act is that dual must-carry is not authorized. And even if this were a close question (which it is not), a result adverse to the Petitioners would be compelled by

¹⁴ *Regulatory Flexibility Third Order on Recon* ¶ 15.

¹⁵ Comcast notes that dual and multicast must-carry would also violate the First Amendment rights of non-broadcast networks. *See Turner I*, 512 U.S. at 645 ("The must-carry provisions also burden cable programmers by reducing the number of channels for which they can compete."). While this Opposition mainly presents Comcast's perspective as a cable operator, Comcast's interests as a provider of cable programming are emphasized to a greater extent in a separate pleading being filed jointly by multiple non-broadcast networks.

the Commission's duty to endorse a reasonable interpretation that avoids serious constitutional questions.¹⁶

As Comcast has previously explained, the natural reading of the Act strongly suggests that dual must-carry *cannot* be required.¹⁷ After first specifying in Section 614(b)(4)(A) the must-carry obligation that was being imposed on analog signals at the time of the 1992 Cable Act, Section 614(b)(4)(B) went on to address how must-carry would apply to “advanced television”: “At such time as the Commission prescribes modifications of the standards for television signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of . . . broadcast signals of local commercial television stations *which have been changed* to conform with such modified standards.”¹⁸ On its face, this clearly indicates that the cable carriage obligation for the DTV signal of any given broadcaster is a replacement for, not an addition to, the cable carriage obligation for that same broadcaster's analog signal. But in the meantime, so long as the transmissions covered by Section 614(b)(4)(A) are continuing, and the signals have *not* been changed, Section 614(b)(4)(B) cannot be invoked as a source of authority for carriage rights for broadcasters.

In addition, there is absolutely no evidence that Congress ever even considered the question of dual must-carry, much less that it conclusively resolved it in broadcasters' favor.

The absence of any evidence of congressional intent to authorize dual must-carry is not

¹⁶ See *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress's power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”).

¹⁷ See Comcast Corp. Reply Comments at 3-4 (Aug. 16, 2001) (“*Comcast Reply*”); Comcast Corp. Ex Parte, att. at 1 (Feb. 1, 2005); Comcast Corp. Ex Parte at 2 (Nov. 10, 2003); Comcast Corp. Ex Parte, att. at 1 (July 30, 2003); see also Nat'l Cable & Telecomm. Ass'n (“NCTA”) Comments at 3-6 (June 11, 2001).

¹⁸ 47 U.S.C. § 534(b)(4)(A) & (B). NAB/MSTV's Petition faults the Commission's statutory analysis, but tellingly does not acknowledge the “have been changed” language. See NAB/MSTV Petition at 4-5.

surprising since, at the time this language was written, it was by no means settled that broadcasters would be “loaned” a second channel for purposes of a “transition.”¹⁹ It is inconceivable that Congress could have mandated simultaneous cable carriage of two separate versions of the same broadcaster’s signal before it had decided to allow broadcast licensees to transmit two separate versions at the same time.

B. The Commission Correctly Determined That Dual Must-Carry Would Not Further Important Governmental Interests.

In the *Reconsideration Order*, the Commission found that dual must-carry would not further *any* government interest (“important,” “substantial,” or otherwise).²⁰ Accordingly, based on the intermediate scrutiny test set forth in *United States v. O’Brien*,²¹ the Commission determined that such a requirement would violate cable operators’ First Amendment rights. Nothing in the petitions for reconsideration warrants a result to the contrary.

In *Turner I*, a majority of the Supreme Court made clear that “the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.”²² Therefore, a must-carry requirement “will be sustained if ‘it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free

¹⁹ The decision to award broadcasters a second 6 MHz channel was not made until 1996. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 201, 110 Stat. 56, 107. Notably, when the issue of awarding broadcasters a second 6 MHz channel arose, broadcasters fell over themselves in a rush to assure Congress that they would use these channels to provide HDTV and not multicasting. See Ellen P. Goodman, *Digital Television and the Allure of Auctions: The Birth and Stillbirth of DTV Legislation*, 49 Fed. Comm. L.J. 517, 540-41 (1997) (“Responding in November 1995 to a request for comments on how the DTV channel should be used, a group of more than 100 broadcasters, including all the major networks and trade associations, deemphasized ancillary and supplementary services, stressed the importance of HDTV and their support of the transition plan contemplated by the then-pending legislation.” (emphasis added)).

²⁰ *Reconsideration Order* ¶ 27 (“We find that there has not been an adequate showing that dual carriage is necessary to achieve any valid governmental interest.”).

²¹ 391 U.S. 367 (1968).

²² *Turner I*, 512 U.S. at 662.

expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”²³ In order to pass constitutional muster, a content-neutral regulation must meet each of the three prongs of the *O’Brien* test. If the regulation fails to meet the first prong of the test, i.e., it does not further an important or substantial government interest, then that concludes the constitutional analysis: the regulation violates the First Amendment.²⁴ No further analysis regarding the other two prongs is necessary or warranted.²⁵

In the *Reconsideration Order*, the Commission evaluated the evidence regarding the three government interests recognized in the *Turner* decisions (two interests recognized by five Justices and one interest recognized by four Justices) and, on its own initiative, also chose to treat “advancing the digital transition” as an important governmental interest.²⁶ Irrespective of whether the Commission was right in considering asserted government interests that have not

²³ *Id.* (quoting *O’Brien*); *Reconsideration Order* ¶ 15.

²⁴ *See Clark v. City of Lakewood*, 259 F.3d 996, 1015 (9th Cir. 2001) (“We need not determine whether the Ordinance satisfies [all] prongs of the *O’Brien* test, for even if it did, there is a material fact in dispute as to the [governmental interest] step in the analysis. . . . The crucial question on which our decision turns . . . is whether these regulations further those significant [government] interests.”); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1459 (D.C. Cir. 1985) (striking the Commission’s must-carry rules under the *O’Brien* test based on the Commission’s failure to adequately demonstrate that must-carry furthered an important governmental interest).

²⁵ If a regulation does not further a government interest, any burden on “First Amendment freedoms” would necessarily be “greater than is essential to the furtherance of that interest.”

²⁶ *Reconsideration Order* ¶¶ 16-25. In the *Turner* decisions, a majority of Justices recognized only two important governmental interests that were served by (single-channel analog) must-carry -- preserving the benefits of free over-the-air broadcast television for viewers and promoting the widespread dissemination of information from a multiplicity of sources. *See Turner II*, 520 U.S. at 189-90. Four Justices – but not five -- also identified a potential third important governmental interest -- promoting fair competition in the market for television programming. *See id.* at 226 (Breyer, J., concurring in part) (“My conclusion rests, however, not upon the principal opinion’s analysis of the statute’s efforts to ‘promot[e] competition,’ but rather upon its discussion of the statute’s other [two] objectives[.]” (internal citation omitted)).

received the approval of a Supreme Court majority,²⁷ the Commission was correct in concluding that none of these interests were furthered by dual must-carry.²⁸

Only the NAB/MSTV Petition challenges the Commission's finding on the constitutionality of dual must-carry. Relying on a semantic sleight-of-hand, the petition claims that the Commission improperly applied strict scrutiny rather than intermediate scrutiny.²⁹ The petition pulls isolated words out of the Commission's discussion, emphasizing where the words "necessary" and "essential" appear, while conveniently overlooking the overall context of the Commission's discussion and the specific language that shows the Commission actually determined precisely what it needed to: that dual must-carry would not further an important government interest. The Commission used the words "necessary" and "essential" simply to characterize and respond to the broadcasters' own claims, using their own words.³⁰ Moreover, the Commission's wording is a common formulation of the intermediate scrutiny standard in the must-carry context, one that has been used by the Supreme Court -- and by NAB.³¹

²⁷ NAB/MSTV's assertion that a Congressional finding trumps the Supreme Court's subsequent interpretation of a statute, *see* NAB/MSTV Petition at 17 n.36, is notably devoid of any legal support.

²⁸ *Reconsideration Order* ¶¶ 18, 19, 22, 25.

²⁹ *See* NAB/MSTV Petition at 9-10.

³⁰ *See* NAB Comments at 6 (June 11, 2001) ("[multicast] is *necessary* to the swift transition that Congress mandated" (emphasis added)); *id.* at 8 ("DTV Must Carry Is *Necessary* To Achieve a Swift and Successful DTV Transition" (emphasis added)); CBS Comments at 4 (Jan. 13, 2004) ("A neutral carriage requirement that does not favor HDTV over multicast services . . . is *necessary* to ensure public access to broadcast television offerings" (emphasis added)); NBC Ex Parte at 6 (Jan. 12, 2004) ("Multicast carriage is *necessary* to future broadcast viability." (emphasis added)); ABC, CBS, NBC Affiliate Associations Ex Parte at 1 (Mar. 16, 2004) ("We have shown that cable carriage is *essential*." (emphasis added)).

³¹ *See Turner II*, 520 U.S. 180, 211 ("The question is not whether Congress, as an objective matter, was *correct* to determine must-carry is *necessary* to prevent a substantial number of broadcast stations from losing cable carriage and suffering significant financial hardship. Rather, the question is whether the legislative conclusion [that must-carry is *necessary* to prevent a substantial number of broadcast stations from losing cable carriage and suffering significant financial hardship] was reasonable and supported by substantial evidence in the record before Congress." (emphasis added)); Brief for Appellees National Association of Broadcasters and Association of Local Television Stations, 1996 WL 427727, at *26 (U.S. June 17, 1996) (brief in *Turner II*) ("[T]he issue is whether Congress reasonably concluded -- based on the historical evidence, the conditions that existed in 1992, and rapidly developing trends -- that must-carry *was necessary* to maintain the level of broadcasting available to noncable

The Commission expressly stated that it applied the intermediate scrutiny test of *O'Brien*.³² Although it stated that “[a]fter close examination of the information submitted, we find nothing in the record that would allow us to conclude that mandatory dual carriage is *necessary* to further the governmental interest,” the very next sentence clarifies precisely what the Commission means by “necessary”: “In addition, even if it could be shown that dual carriage could further any of the governmental interests”³³ Thus, the claim that the agency applied the wrong standard can readily be dismissed.

Turning then to the merits, the sole discussion regarding how dual must-carry furthers a government interest appears in the NAB/MSTV Petition where it asserts that the Commission “failed to consider how digital carriage would advance the digital transition.”³⁴ NAB/MSTV allege without further elaboration that “[t]he private decision of a cable operator to benefit one station by carrying its digital signal or its multicast programming, and to harm another station by denying carriage, results in exactly the threat to the Commission’s allocation of station licenses that Congress adopted must-carry to prevent.”³⁵ This conclusory assertion fails to explain how requiring a cable operator to simultaneously carry analog and digital signals would further the digital transition. Beyond NAB/MSTV’s vague assertion, not a single petitioner contends that

homes.” (emphasis added)); *see also* Brief of Appellee National Association of Broadcasters, 1993 WL 638229, at *45 (U.S. Dec. 7, 1993) (brief in *Turner I*) (“For all these reasons, Congress’ carefully considered judgment that [must-carry] legislation *is necessary* should not be disturbed.” (emphasis added)).

³² *See Reconsideration Order* ¶ 15.

³³ *Id.*; *see id.* ¶ 22 (“The record, however, does not evidence a connection between mandating dual carriage and remedying any allegations of cable operators’ anti-competitive action against local broadcast stations. Because operators must carry local broadcaster’s analog signal, there is no obvious need for cable operators to carry two signals for each local station, and it has not been proven necessary to guarantee such access for both analog and digital signals to ensure fair competition.”).

³⁴ NAB/MSTV Petition at 17.

³⁵ *Id.* at 17-18.

the Commission's finding -- that no government interest would be furthered by dual must-carry - is erroneous.³⁶ The lack of discussion by the broadcasters on this issue speaks volumes.

In the absence of any record evidence that dual must-carry would further an important governmental interest, the Commission correctly concluded that mandatory dual must-carry would violate the First Amendment. Nothing in the petitions for reconsideration even begins to repair that deficiency in the broadcasters' case.

C. The Commission Correctly Found That Dual Must-Carry Would Substantially Burden Cable Operators' First Amendment Rights.

In its *Reconsideration Order*, the Commission concluded that, "even if it could be shown that dual carriage could further any of the governmental interests based on the current record, the burden that mandatory dual carriage places on cable operators' speech appears to be greater than is necessary to achieve the interests that must-carry was meant to serve."³⁷ The Commission correctly reasoned that "[m]andatory dual carriage would essentially double the carriage rights and substantially increase the burdens on free speech beyond those upheld in *Turner*."³⁸

Petitioners assert that "[o]verwhelming record evidence shows that the capacity of the average cable system has grown so large that, combined with the benefits of digital compression technology, requiring cable systems to carry both digital and analog signals of local commercial television stations . . . would not foreclose cable systems from carrying any other programs of

³⁶ NAB/MSTV's discussion of government interests is almost exclusively dedicated to discussing the purported benefits of multicast must-carry. Because NAB/MSTV's discussion of this issue is subsumed under the heading "The Commission Entirely Ignored Record Evidence That Mandatory Carriage of Multicasting Would Further Congress' Express Policy Objectives," it is unclear whether NAB/MSTV even intended to raise the issue of the governmental interest in dual must-carry. The Joint Petitioners focus exclusively on multicast must-carry.

³⁷ *Reconsideration Order* ¶ 15.

³⁸ *Id.*

their choice. Likewise, it would not diminish any cable programmer's opportunity to place its programs on cable systems."³⁹ This is a gross mischaracterization of the state of the record.

As Comcast has previously demonstrated in considerable detail, the broadcasters are badly mistaken with respect to their assessment of the unused capacity of cable systems; while the bandwidth of cable systems has indisputably grown since 1992, the demands on that bandwidth have grown even more.⁴⁰ The notion that cable operators can be forced into dual must-carry without displacing any other programming or services is simply absurd and contrary to the record evidence.⁴¹

Although the Commission reached the correct conclusion on this issue, the case is even stronger than the *Reconsideration Order* conveys. In terms of the burden on cable operators' rights of Free Speech and Free Press,⁴² the record is devoid of any evidence, or even an argument, that the burden of being required to carry unwanted digital signals *in addition to* unwanted analog signals is as light as the Supreme Court believed analog must-carry alone to be. But, given that the Commission was correct in reading the statute not to require must-carry and

³⁹ NAB/MSTV Petition at 12-13.

⁴⁰ Comcast Corp. Ex Parte att. B (Feb. 3, 2005) (presentation by David Fellows, Executive Vice President and Chief Technology Officer, Comcast Corporation); Comcast Corp. Ex Parte at 1-2 (Nov. 15, 2004); Comcast Corp. Ex Parte at 2-3 (Sept. 16, 2004).

⁴¹ NCTA Comments at 15-16 (June 11, 2001) (explaining that digital must-carry requirements "would relegate cable programmers to second class status yet again behind broadcasters that, in many cases, have yet to show any innovative uses for the spectrum that they managed to 'borrow' from the government on a promise of innovative high definition pictures"); A&E Television Networks Comments at 15-16 (June 11, 2001) ("If the Commission imposes a dual carriage requirement . . . the costs attendant to cable carriage for independent cable programmers . . . will only rise as they compete for a decreasing number of available channels."); Filipino Channel, Golf Channel, Inspirational Network, Outdoor Life Network, Speedvision Network, and The Weather Channel, Inc. Comments at 16 (June 11, 2001); HBO Comments at 2 (June 11, 2001); *Comcast Reply* at 6-7.

⁴² See *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (noting that cable programmers and operators "seek[] to communicate messages on a wide variety of topics and in a wide variety of formats" and are "engaged in 'speech' under the First Amendment"); *Turner I*, 512 U.S. at 636 ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press protections of the First Amendment."); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers.").

correct in finding that dual must-carry did not advance important government interests, the burden that dual must-carry would impose -- though considerable -- is a moot point.

IV. PETITIONERS HAVE PRESENTED NO CREDIBLE CHALLENGE TO THE COMMISSION'S CONCLUSION THAT THE STATUTE DOES NOT ADDRESS MULTICAST MUST-CARRY AND THAT MULTICAST MUST-CARRY WOULD NOT FURTHER IMPORTANT GOVERNMENT INTERESTS.

Although the *Reconsideration Order* concluded “that the language of the Act may be less definitive” than the Commission had previously thought, the Commission nonetheless determined that “the best construction of the must-carry provisions . . . is that cable operators need not carry more than one programming stream.”⁴³ Petitioners have failed to demonstrate that this conclusion was incorrect. And, even if they could overcome this problem, they would face insurmountable constitutional impediments to their demands for multicast must-carry.

A. The Commission Correctly Determined That the Act Did Not Mandate Multicast Must-Carry.

In the *First Order*, the Commission concluded that the plain language of the Act -- in particular, its reference to carriage of each broadcaster’s “primary video” -- makes clear that broadcasters are not entitled to multicast must-carry.⁴⁴ In the *Reconsideration Order*, the Commission determined that the reference to “primary video” was more ambiguous than it originally concluded in the *First Order*.⁴⁵ Comcast believes that the Commission’s first

⁴³ *Reconsideration Order* ¶ 33.

⁴⁴ *First Order* ¶¶ 54, 57. In the *First Order*, the Commission explained that because “the terms ‘primary video’ as used in sections 614(b)(3) and 615(g)(1) are susceptible to different interpretations,” it examined the “statutory context, consider[ed] the legislative history, and examine[d] the technological developments at the time the must-carry provisions were enacted.” *First Order* ¶ 53.

⁴⁵ In the *Reconsideration Order*, the Commission explained: “We recognize that Sections 614(b)(3) and 615(g)(1) do not directly translate to digital technology generally, much less to associated multicasting capabilities specifically, and thus do not appear to compel a particular result for multicasting must-carry.” *Reconsideration Order* ¶ 34. The Commission concluded “that Congress -- although aware of digital technology when it drafted the must-carry requirement -- did not expressly compel a particular result with respect to the application of ‘primary video’ to digital television generally, and multicasting specifically.” *Id.* To support its conclusion that Congress was “aware of digital technology when it drafted the must-carry requirement,” the Commission cites its findings in

conclusion was correct, and it is unclear what has changed in the definition of “primary” over the past four years to create “more” ambiguity. However, even if the term “primary video” is somehow more ambiguous now than it was thought to be in 2001, all other tools of statutory construction support the Commission’s determination that carriage of broadcasters’ multiple digital video signals is *not* required.

Because the Commission found ambiguity in the words of the statute, it examined the Act’s legislative history to determine whether Congress intended for broadcasters to have multicast must-carry rights. The Commission found that the legislative history did not “suggest precisely which video signal(s) is (are) primary and which is (are) not” and similarly, that the legislative history of the later-enacted Section 336, which relates to digital television implementation, did not reveal “any clear intention of Congress with respect to the multicasting must-carry issue.”⁴⁶ The Commission’s finding about the ambiguity of the legislative history is more injurious to the broadcasters’ claims than the Commission appears to have recognized. The

paragraph 57 of the *First Order* and a 1995 House Report. As discussed below, *see infra* note 46, the sources relied on by the *First Order* are highly suspect. In addition, although the 1995 House Report the Commission cites does mention multicast must-carry, *see* H.R. Rep. No. 104-204, pt. 1, at 220 (1995) (stating that “H.R. 1555 does not extend must-carry rights to any new channels offered by broadcasters” and that “[a]lthough numerous broadcasters in a locality might be using digital compression technology to create 3, 4, or 5 additional TV channels each, the cable system is not obligated to carry these additional channels”), it makes no mention of whether Congress was aware of digital (in particular multicasting) technology in 1992.

⁴⁶ *Reconsideration Order* ¶ 36. In the *First Order*, the Commission cited four articles to support its statement that “the incorporation of the primary video construct into the Act in 1992 was reasonably contemporaneous with the gradual change in common understanding of the new television service from ATV (advanced television) and HDTV . . . to . . . SDTV (standard definition television) with multicasting possibilities.” *First Order* ¶ 56 & n.158. But the earliest article is from September 28, 1992 -- one week prior to when the 1992 Act was enacted -- well *after* the language of the must-carry provisions was drafted. *See* H.R. 3380, 102d Cong. (1991). More importantly, no evidence has been adduced (e.g., through legislative findings, committee reports, or Floor statements) that Congress ever expressly contemplated multicast must-carry and intended, by the language that was enacted into law, to impose this burden on cable operators and non-broadcast networks.

To the contrary, all the extrinsic evidence (including the evidence cited by the Supreme Court in the *Turner* cases) suggests that the original must-carry provisions were adopted solely for the purpose of ensuring carriage of a single analog signal (and, at some point, the new advanced television signal that was expected to replace it). The Paxson Petition admits as much. *See* Paxson Petition at 9 (“As the Commission now recognizes, the must-carry provisions were written with analog, not digital, in mind.”).

absence of any evidence that those who drafted and voted on this legislation had any inkling that advanced television might enable the broadcasters to transmit multiple program streams is devastating to the proposition that Congress intended to require multicast must-carry, much less that it had “substantial evidence” to support its assessment of the government interests that would thereby be advanced or the burdens that would thereby be imposed on cable operators.⁴⁷

Even if the legislative text and other indicia of legislative intent left any remaining ambiguity, the broadcasters’ claims would be defeated by the settled principle that the Commission is duty-bound to resolve any such ambiguities so as to avoid creating a significant constitutional question.⁴⁸

B. The Commission Correctly Concluded That Multicast Must-Carry Would Not Further Important Government Interests.

In the *Reconsideration Order*, the Commission made its own assessment of present day circumstances and found that, viewed through that lens, it was “a reasonable construction of the must-carry provisions” not to require cable operators to designate “‘shelf space’ for multicasting programming streams at the expense of other competing interests.”⁴⁹ It did so even though for purposes of this inquiry it took into account not only those government interests that had secured the endorsement of a (bare) majority of the Supreme Court but also one asserted government

⁴⁷ See *Turner II*, 520 U.S. at 211. Years after the must-carry provisions were enacted, broadcasters were describing the capabilities of advanced television in terms inconsistent with their current focus on multicasting. See, e.g., Broadcasters’ Comments on the Fourth Notice of Proposed Rulemaking, MM Docket No. 87-268, at 3 (Nov. 20, 1995) (“In conducting its reevaluation of ATV, we believe it is vital that the Commission remain focused on the principal purpose underlying its original decision to award broadcasters a second 6 MHz channel: namely, to enable broadcasters to offer to the public the *same* free over-the-air programming service they have historically offered but with the *highest possible picture resolution and sound quality.*” (emphasis added)), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1523890001.

⁴⁸ See Lawrence Tribe, *Why the Federal Communications Commission Should Not Adopt a Broad View of the “Primary Video” Carriage Obligations: A Reply to the Broadcast Organizations* 6-7 (filed as attachment to NCTA Ex Parte (July 9, 2002)).

⁴⁹ *Reconsideration Order* ¶ 41.

interest that failed to secure majority support in the Supreme Court and one asserted government interest that was never even presented to the Supreme Court. Thus, even assuming the permissibility of creating new justifications long after a statute's enactment in order to justify an intrusion on First Amendment rights, broadcasters still cannot meet the standard necessary to sustain a multicasting carriage requirement.

1. Multicast Must-Carry Would Not Further the Government's Interest in Preserving the Benefit of Free, Over-the-Air Local Broadcast Television for Viewers.

The Commission recognized in the *Reconsideration Order* that, in the analog context, broadcasters could “invoke explicit Congressional findings that the benefits of free, over-the-air television for viewers would be jeopardized without must-carry,” but Congress made no comparable findings regarding multicast must-carry.⁵⁰ Nonetheless, even if one allows for the consideration of new facts and new arguments, the Commission found that “broadcasters have not made a convincing argument that over-the-air broadcasting would be jeopardized in the absence of mandatory multicasting.”⁵¹ This finding was manifestly correct, and the broadcasters' efforts to attack it are unavailing.

Petitioners attempt to enlarge the governmental interest, arguing that it is within the Commission's discretion to conclude that multicast must-carry is “necessary to allow broadcasters to thrive”⁵² and to “maintain the economic vitality of their services -- main-channel

⁵⁰ *Id.* ¶ 38. Inexplicably, the Joint Petitioners emphasize the “extensive factual findings and policy conclusions” reached by Congress in 1992. Joint Petitioners Petition at 1. The glaring absence of any such findings with respect to multicast must-carry speaks volumes.

⁵¹ *Reconsideration Order* ¶ 38.

⁵² Paxson Petition at 13-14. NAB/MSTV make a similar argument, alleging that the Commission unjustly failed to consider evidence that the lack of a must-carry obligation would impair the financial health of broadcasters. *See* NAB/MSTV Petition at 18-19.

services as well as multicast services.”⁵³ Petitioners mistakenly construe the interest recognized in the *Turner* decisions as an entitlement by Congress to a certain financial position in the marketplace. The must-carry provisions, however, were no such entitlement. There is absolutely no support for the proposition that Congress intended for cable operators to shoulder the burden of multicast must-carry in order to ensure that broadcasters “thrive” as opposed to “survive.”⁵⁴ In considering the underlying purposes of the Act, the Commission properly focused -- as did the Supreme Court in the *Turner* decisions⁵⁵ -- on whether broadcasters require carriage of additional programming streams to *preserve* the benefit of free, over-the-air broadcast television for viewers.⁵⁶

Paxson encourages the Commission to “bear in mind that the Supreme Court in *Turner* noted that Congress’s intent was . . . to ‘preserve the existing structure of the Nation’s broadcast television medium while permitting the concomitant expansion and development of cable television.’”⁵⁷ In the *Reconsideration Order*, the Commission gave due regard for that “existing structure,” noting that 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.”⁵⁸ But no *expansion* of broadcasters’ must-carry rights is needed to preserve that *existing* structure.

⁵³ Joint Petitioners Petition at 8.

⁵⁴ Nor is there any credible evidence that multicasting provides broadcasters with a more sustainable business model than transmitting the HDTV programming that they previously promised Congress and the Commission they would offer.

⁵⁵ See *Turner II*, 520 U.S. at 193 (“In short, Congress enacted must-carry to ‘preserve the existing structure of the Nation’s broadcast television medium while permitting the concomitant expansion and development of cable television.’” (quoting *Turner I*, 512 U.S. at 652)).

⁵⁶ *Reconsideration Order* ¶ 38.

⁵⁷ Paxson Petition at 14 (quoting *Turner II*, 520 U.S. at 193).

⁵⁸ *Reconsideration Order* ¶ 38.

Finally, Petitioners assert that there is no basis for the Commission’s finding that the natural workings of the marketplace obviate the need for multicast must-carry.⁵⁹ For example, Paxson claims that cable operators’ “selective multicast carriage will simply widen the already yawning competitive gap between the powerful network affiliates who will be able to barter for carriage and the smaller independent, religious, and foreign language broadcasters.”⁶⁰ The record, however, shows that the Commission was on solid ground in relying on the marketplace to ensure carriage of programming that viewers want.⁶¹ The Commission expressly cited “evidence from the record, as well as news accounts, that cable operators are voluntarily carrying the multiple streams of programming of some broadcast stations” and recognized that “the Association of Public Television Stations and the NCTA recently announced an agreement that involves cable operators carrying up to four programming streams of at least one public TV station in a DMA during the transition from analog to digital technology, and every public TV station in a DMA after the transition.”⁶²

Comcast carries worthwhile local programming of value when broadcasters make it available.⁶³ In addition, Comcast goes to great lengths to meet the diverse needs of its

⁵⁹ See Paxson Petition at 15-16; Joint Petitioners Petition at 16-19.

⁶⁰ Paxson Petition at 16.

⁶¹ See *Reconsideration Order* ¶ 38; Comcast Corp. Ex Parte att. 1 (Feb. 3, 2005) (“Meeting the Demands of Competition and Consumers: Voluntary Carriage of Commercial Multicast Signals”) (reporting that as of February 3, 2005, Comcast had entered into voluntary agreements that include carriage of multicast digital signals with over 130 commercial broadcast stations located in 62 markets across the nation). In fact, these numbers have continued to increase. As of today’s date, Comcast has agreements requiring multicast carriage of 140 commercial broadcast stations, and additional agreements with 36 stations whereby Comcast’s access to the stations’ HD signals is contingent on multicast carriage. For example, in the greater Washington, D.C. area, Comcast currently carries ABC WeatherNow and NBC WeatherPlus, both innovative weather programming services.

⁶² *Reconsideration Order* ¶ 38. This NCTA/APTS agreement does *not* give public broadcasters the right to carriage of as many programming streams as they can cram into a 6 MHz over-the-air signal. Rather, carriage rights are more narrowly circumscribed, but because public broadcasters have good plans for their multicast broadcasts, cable operators are interested in carrying them.

⁶³ See Comcast Corp. Ex Parte att. 1 (Feb. 3, 2005).

customers, and is a leading provider in international/multicultural programming, local and regional programming, and religious programming.⁶⁴ Other cable operators similarly find ways to provide an assortment of diverse programming, including many voluntarily negotiated arrangements for carriage of local digital broadcast programming.⁶⁵ Thus, the evidence is clear that the marketplace is working. Petitioners have presented no evidence of a market failure such that the absence of multicast must-carry would jeopardize the benefits of free, over-the-air broadcasting.

2. Multicast Must-Carry Would Undermine, Not Advance, the Government's Interest in Promoting the Widespread Dissemination of Information from a Multiplicity of Sources.

The Commission concluded in the *Reconsideration Order* that “adding additional channels of the same broadcasters would not enhance source diversity.”⁶⁶ The Commission found that multicast must-carry “would arguably diminish the ability of other, independent voices to be carried.”⁶⁷ Comcast agrees. Incredibly, petitioners once again claim that a multicast carriage mandate would promote the widespread dissemination of information from a

⁶⁴ See Comcast Corp. Ex Parte att. 2 (Feb. 3, 2005) (“Comcast Is Meeting the Diverse Needs of Its Customers”). Comcast sincerely appreciates the recognition by MMTC that “Comcast . . . regards diversity as a high priority.” MMTC Petition at 9 n.16.

⁶⁵ See NCTA Ex Parte at 2 (Feb. 3, 2005) (reporting that cable operators in 184 of 210 television markets are already voluntarily offering their customers packages of HDTV programming; as of January 1, 2005, 504 local digital broadcast stations were being carried by cable systems); NCTA Ex Parte at 2 (Jan. 7, 2004); Time Warner Cable Ex Parte at 1-2 (Nov. 19, 2003).

⁶⁶ *Reconsideration Order* ¶ 39.

⁶⁷ *Id.* In contrast to broadcasters, whose incentive is to provide programming that appeals to the largest viewing audience, cable operators have every incentive to carry a diverse array of programming in order to attract as many customers as possible. As Comcast previously explained, and the Commission expressly recognized, cable systems carry an ever-increasing variety of programming. See Comcast Corp. Comments filed in MB Docket No. 04-207, at 9-10 (July 15, 2004), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516284143; FCC, *Report to Congress on the Packaging and Sale of Video Programming Services to the Public* 63, 65 (Nov. 18, 2004) (reporting that “[p]rogram choice, through marketplace forces, is growing,” and that “in response to . . . competitive pressures and technological options, cable operators now offer a variety of channels and packages”). The Commission recently noted that Comcast “offers over 1,000 program and price combinations.” *Id.*

multiplicity of sources.⁶⁸ Petitioners' claims, however, continue to be unsubstantiated and irrational.

As Comcast previously explained, any additional bandwidth that must be allotted to compulsory carriage of broadcasters' services necessarily diminishes the bandwidth that can be used to accommodate other video programming channels, making it more difficult for producers of non-broadcast programming -- including those not affiliated with cable operators -- to obtain carriage of their programming services.⁶⁹ Thus, to the extent that expanded must-carry rights force multiple other programming channels to be dropped, the result is necessarily to reduce the number of independent sources of programming that are carried on a cable system. Conversely, the certain result of requiring multicast must-carry is that voices that are already represented will be duplicated, crowding out voices otherwise not represented. For a broadcaster operating two broadcast stations in a single market, and using multicasting to transmit six streams of programming on each 6 MHz over-the-air channel, multicast must-carry would mean that twelve channels would be under the control of a single "source." This is the antithesis of the government interest the Court found to be valid in the *Turner* litigation.

3. Multicast Must-Carry Would Not Advance, and May Impede, the Government's Interest in Facilitating the Digital Transition.

Petitioners focus much of their arguments in support of multicast must-carry on the government's interest in the transition to digital broadcasting. The Commission properly concluded that "no persuasive case has been made on the current record that a multicasting

⁶⁸ See NAB/MSTV Petition at 20-21; Joint Petitioners Petition at 9-11; Paxson Petition at 16.

⁶⁹ See Comcast Corp. Ex Parte att. A at 1 (July 30, 2003).

carriage requirement will facilitate the digital transition.”⁷⁰ It found that “[h]igh quality programming in a digital format is a major factor that will drive this transition.”⁷¹

Petitioners have not provided any additional evidence to demonstrate that compulsory carriage of multicast streams would further the digital transition. Notably, those broadcasters that would invoke must-carry (the majority of broadcasters, as the Commission knows, invoke retransmission consent) have not submitted any concrete evidence that they will provide high quality digital programming that would drive the transition.⁷² In fact, the evidence points to the opposite conclusion.⁷³ On the very day the reconsideration petitions were filed, Paxson ignited a firestorm of opposition from its business partner for its decision to “substantially reduce or eliminate” its few hours per day of conventional advertiser-supported programming in favor of a greater reliance on infomercials (of which it was *already* broadcasting approximately 14.5 hours per day).⁷⁴ And that was for its analog signal, which already receives guaranteed carriage. With multicast must-carry, Paxson would be free to transmit -- and demand cable carriage of -- six

⁷⁰ *Reconsideration Order* ¶ 40.

⁷¹ *Id.*

⁷² They fail to explain – and it is not intuitively obvious -- why a greater quantity of *non*-HD programming would impel consumers to buy HDTV displays; logic suggests that sales of HD sets will be stimulated more by the increased availability of HDTV programming. *See* NCTA Ex Parte at 3 (Feb. 3, 2005) (“As in the case of dual carriage, a multicast requirement would also do nothing to promote the digital transition. Carriage of multicast standard definition programming on cable systems will not encourage anyone to purchase digital sets.”).

⁷³ *See* HBO Ex Parte at 4 (Jan. 22, 2004) (“[T]he plans for new non-broadcast services, as well as the plans to expand HDTV and VOD for existing non-broadcast services, could be jeopardized -- to the detriment of consumers - - if the Commission accedes to the broadcasters’ expanded must-carry proposals.”).

⁷⁴ *See* Paxson Communications Corp., Form 10-Q at 7 (May 10, 2005) (“During the first quarter of 2005, the company adopted a plan to substantially reduce or eliminate the sales of spot advertisements that are based on audience ratings and to focus its sales on long form paid programming and non-rated spot advertisements.”), available at <http://www.sec.gov/Archives/edgar/data/923877/000095014405005264/g95220e10vq.htm>; John M. Higgins, *NBC: Pax “Abandoning” Net Programming*, *Broad. & Cable*, Apr. 21, 2005 (“Paxson apparently intends to abandon network programming and rely primarily on infomercials, direct-response advertising and paid programming as revenue sources,” NBC said in a statement.”).

channels of 23.5-hour-per-day of infomercials.⁷⁵ It boggles the mind to think that anyone would contend that expanded carriage rights for infomercials serves any valid government interest.

To be sure, many other broadcasters have other plans for -- or at least ideas about -- ways in which they might use their multicasting capability to offer worthwhile programming. Still, the evidence on this point is far less compelling than the Petitioners suggest.⁷⁶ In many cases, the declarations that were submitted to the record showed that entities were *thinking about beginning a process to develop ideas* for programming that they *might decide to* air using their multicast capabilities.⁷⁷ None of this suffices to prove how the digital transition would be advanced. Moreover, the fact that *some* broadcasters intend to use their multicasting capability to provide *some* praiseworthy programming *some* of the time provides no reason why *all* broadcasters should obtain mandatory carriage rights for *all* of their multicast channels *all* of the time. Instead, it provides every reason why carriage negotiations are best left to the marketplace.

⁷⁵ Presumably Paxson will continue to transmit its required 3 hours-per-week of children's programming. Paxson's announcement should compel the Joint Petitioners to retract their criticism of Commissioner Adelstein's concern that imposing multicast must-carry "could theoretically be mandating carriage of 24-hour a day infomercials," *Reconsideration Order* (Separate Statement of Commissioner Adelstein). Joint Petitioners Petition at 20-21.

⁷⁶ The Media Policy Program of the Campaign Legal Center recently reported that "[t]here is a near black-out of local public affairs programming on digital television," and that there is "little evidence that broadcasters will use their multicasting capabilities to provide enhanced public interest service to their local communities." Media Policy Program, Campaign Legal Ctr., *Broken Promises: How Digital Broadcasters Are Failing To Serve the Public Interest* 11, 13 (May 23, 2005), available at <http://www.campaignlegalcenter.org/attachment.html/Broken+Promises.pdf?id=1379>.

⁷⁷ NAB/MSTV and Joint Petitioners rely on the submission of the CBS Affiliates, CBS Affiliates Special Factual Submission (Jan. 13, 2004) ("*CBS Affiliates Submission*"), and the NBC Affiliates, NBC Affiliates Special Factual Submission (Jan. 8, 2004), to support their assertion that multicasting will drive the digital transition by creating incentives to develop new programming that will stimulate consumer sales of digital tuners. See NAB/MSTV Petition at 22; Joint Petitioners Petition at 11-12. Most of the plans described in those submissions, however, were entirely speculative. The Affiliates' pleadings and declarations were replete with words and phrases like "plan to," "considering," "developmental," "potential," "looking at the possibility," "would like to," "intends to," "will be able to," "may be able to," "exploring the opportunity," and "considering how they might." At the extreme, one CBS affiliate's progress as of the date of the submission apparently consisted of nothing more than having "commenced internal discussions to look at options for providing and building business plans around multicast programming." *CBS Affiliates Submission*, Declaration of Benjamin W. Tucker, President, Fisher Broad. Co. ¶ 2.

It is also somewhat suspect to rely on the virtuous characteristics of what might be carried on a multicast channel without fully establishing the virtues of the programming that will be aired on the *main* channel. To the extent that a broadcaster wishes to claim that it will provide important coverage of civic affairs, or children’s education programming, or other “worthwhile” programming on one of its multicast channels, it is fair to ask whether the broadcaster is prepared equally to justify the programming that it is airing on its *primary* channel.⁷⁸ A broadcaster that airs nothing but home shopping programming on its primary channel cannot credibly demand multicast carriage rights on the ground that it will air “worthwhile” programming on an auxiliary channel; after all, the broadcaster *already* has the right, under the Commission’s prior order, to designate that second channel as the one that is entitled to carriage.⁷⁹

Finally, there is no basis on which the Commission could reasonably conclude that the programming the broadcasters would offer via their multicast channels is “superior” to the non-broadcast programming that the cable operator would otherwise carry.⁸⁰ To the extent the Commission makes such value judgments regarding content, it will leave behind the regime that allowed must-carry to be evaluated under a standard of intermediate scrutiny and instead invite

⁷⁸ Cf. Media Policy Program, *supra* note 76, at 12 (finding that “[t]here are few differences between programming offered on digital broadcasters’ primary channels compared to their non-primary channels”); Steve Effros, *MultiCasting: An Indecent Idea*, CABLEFAX, Vol. 15, No. 28 (Feb. 12, 2004) (“But rather than compete, the broadcasters have apparently decided to ‘bottom feed.’ Hence we have ‘accidental’ wardrobe failures, ‘fear factor’ programs, and ‘greatest car crashes.’ . . . [H]ow can the FCC . . . then say that broadcasters are still wearing the mantle of ‘public interest’ and therefore have a ‘right’ to have all of their ‘multicast’ programming carried on cable . . . ?”).

⁷⁹ *First Order* ¶ 57 (“The broadcaster must elect which programming stream is its primary video.”).

⁸⁰ HBO Ex Parte at 2 (Jan. 22, 2004) (“There certainly is no credible argument that broadcasters deserve *expanded* digital must-carry rights because they provide uniquely important programming. Indeed, it has been non-broadcast programmers, *not* the broadcasters, that have led the way in developing new and innovative digital content and applications.”).

strict scrutiny review of multicast must-carry requirements, thereby leaving them with zero chance of affirmance.⁸¹

4. Petitioners' Hypothetical Benefits Do Not Establish a Governmental Interest in Multicast Must-Carry.

NAB/MSTV claim that the Commission fundamentally erred by failing to examine a multitude of hypothetical benefits of multicasting, such as “promoting diversity of programming, local news and information, children’s and other educational programming, programming for non-English speaking and other minority communities,” and “bring[ing] emerging networks (like UPN and WB) to communities not otherwise reached by them over the air.”⁸² These hypothetical benefits of multicasting, however, cannot cure the statutory and constitutional hurdles that stand in the way of any expansion of the broadcasters’ must-carry rights.⁸³ Contrary to Petitioners’ beliefs, the hypothetical benefits to broadcasters do not always equate to benefits to the government or consumers. Indeed, as explained above, in the case of multicast must-carry, the claimed potential benefits to broadcasters may actually *harm* consumers and the government’s interests in promoting the widespread dissemination of information from a

⁸¹ In the same vein, the hints of Paxson and others that expanded carriage requirements could be tied to expanded “public interest” commitments would likewise create a content-based regime that would necessarily be subject to strict scrutiny. *See* Paxson Petition at 5-7; Joint Petitioners Petition at 13-14; DIC Petition at 2.

⁸² NAB/MSTV Petition at 3. NAB/MSTV also assert that the Commission’s decision “purports to engage in a constitutional analysis of . . . multicasting carriage without ever examining an issue that the Supreme Court and the Commission deemed crucial – the actual ‘burden’ that the proposed carriage requirements would have on cable.” NAB/MSTV Petition at 3; *see also* Joint Petitioners Petition at 15-16. Petitioners fundamentally misapprehend the basis for the Commission’s decision as well as the applicable constitutional law. Any analysis of the burden on cable operators’ First Amendment rights would only be necessary if the Commission determined that it should impose a multicast must-carry requirement. Absent such a requirement, which in this case the Commission determined was not mandated by the statute, not contemplated by the legislative history, and would not further an important governmental interest, the Commission did not need to conduct a full First Amendment analysis. Of course, had such an analysis been conducted, it would have further weakened the case for expanding must-carry rights.

⁸³ Joint Petitioners make a vague reference to the Commission being permitted to “balanc[e] policy benefits and disadvantages” in determining whether to impose multicast must-carry. Joint Petitioners Petition at 5-6. Given the significant problems with interpreting and construing the statute to support multicast must-carry (and, in fact, the strong argument that the statute prohibits it), as well as the substantial constitutional issues with imposing such a requirement, the Commission has no discretion to engage in a “balancing [of] policy benefits and disadvantages.”

multiplicity of sources and in completing the digital transition. The Commission correctly focused its analysis on the governmental interests already recognized by the Supreme Court as important government interests (erring, if at all, only by also considering one interest that a majority of the Supreme Court did not recognize and one that it did not even mention).⁸⁴

DIC Entertainment (“DIC”) contends that the Commission erred because it “rendered virtually unachievable DIC Entertainment’s plan to offer nationally a free advertiser-supported digital children’s television service using broadcaster’s digital signal capabilities.”⁸⁵ DIC argues that compulsory carriage of its programming would “serve[] the public interest” because it would enable “early establishment of a digital free service uniquely responsive to the needs and interests of children” and because “no competitive children’s service of the kind DIC wishes to introduce can expect to arrange reasonable carriage terms with MSO’s.”⁸⁶ DIC’s assertions provide no reason to alter the Commission’s decision. As an initial matter, DIC assumes, without evidence, that it could persuade broadcasters to give it one of their multicast channels to

⁸⁴ Petitioners imply that they may now agree to accept some public interest obligations in exchange for expanded must-carry rights. See Paxson Petition at 5, 8; NAB/MSTV Petition at 8. It is somewhat late for the broadcasters to show some willingness to make some as-yet-unspecified compromises in this area, especially considering the miniscule progress that has been made in establishing meaningful public interest obligations despite Commission efforts that now span nearly a full decade. See *In re Advanced Television Systems & Their Impact Upon the Existing Television Broad. Serv.*, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, 10 FCC Rcd. 10540 ¶¶ 33-36 (1995) (asking various questions about the public interest obligations that should attach to advanced television broadcasting). Furthermore, it was only a few months ago that the broadcasting industry objected to the Commission even conducting an *inquiry* into the issue of localism. See, e.g., NAB Comments filed in MM Docket No. 04-233, at i (Nov. 1, 2004) (explaining that NAB “oppose[d] the Notice of Inquiry on localism,” arguing that the “*Notice* forecasts a departure from the deregulatory approach the Commission has followed over the past three decades, [and] sets out on a path that is unlawful, unnecessary and fraught with Constitutional peril”), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516792123; State Broadcasters Ass’n Joint Comments filed in MM Docket No. 04-233, at 4 (Nov. 1, 2004) (recommending that the “Commission take no further action with respect to its *Notice Of Inquiry*”), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516792242. And, in any event, the issues of public interest requirements and must-carry requirements are entirely separate; whatever public interest obligations are adopted should be in exchange for the broadcasters’ right to occupy the *public* airwaves, not their right to occupy valuable bandwidth (and displace other speakers) on a *privately* constructed cable system.

⁸⁵ DIC Petition at 2.

⁸⁶ *Id.* at 3, 4.

launch its service. In addition, DIC assumes, without evidence, that its service would be of greater value to the public than the programming that it would displace.⁸⁷ Last, but not least, DIC assumes, contrary to all the evidence, that cable operators will refuse to negotiate reasonable carriage terms for content that presumably would be of interest to viewers because of their desire “to protect the children’s services they are already carrying.”⁸⁸

Such assumptions might have been plausible in an environment in which cable faced no competition and offered a mere dozen or two channels, but today’s realities are that cable faces intense (and growing) competition and that satisfying consumer expectations compels them to carry multiple news channels, multiple sports channels, multiple movie channels, multiple children’s channels, and so on, where the content is attractive to customers. Indeed, many cable systems already carry multiple children’s channels from multiple sources. Thus, DIC has not provided a remotely credible reason why it should receive legally preferred carriage rights on cable systems rather than negotiating directly with cable operators as its competitors do. More important for present purposes, DIC has not even attempted to show that multicast must-carry is required by statute or that, even if it was considered to be a content-neutral regulation,⁸⁹ it would further important government interests and burden substantially no more speech than is necessary to advance those interests.

⁸⁷ Some children’s programming advocates have taken issue with DIC’s children’s programming. It was broadcasters’ reliance on programming supplied by DIC that led the Office of Communications of the United Church of Christ to file the first-ever license renewal challenge based on failure to meet the children’s television processing guidelines and prompted former-Commissioner Tristani to ask the Commission “to send an unequivocal message that it will deny a TV station’s license renewal if that station has failed [its] child audience.” UCC Press Release, *Church Challenges License Renewals on Children’s Programming Issue* (Sept. 1, 2004), available at <http://www.ucc.org/news/u090104.htm>.

⁸⁸ DIC Petition at 3.

⁸⁹ Any decision granting must-carry rights on the basis of the nature or quality of the programming that would be carried would not be content-neutral and accordingly would be subject to strict scrutiny.

C. Even If the Commission Assumed Multicast Must-Carry Furthered an Important Government Interest, Imposing Multicast Must-Carry Would Violate the First and Fifth Amendment Rights of Cable Operators.

The Commission correctly concluded that multicast must-carry would not further an important government interest. This conclusion not only justifies the Commission’s statutory interpretation but also demonstrates that multicast must-carry would violate the First Amendment rights of cable operators under the first prong of *O’Brien*. However, even if the Commission assumed that multicast must-carry furthered an important government interest, such a requirement would violate the First Amendment because it would significantly burden cable operators’ First Amendment speech rights. Moreover, multicast must-carry would effect a “Taking” of cable operators’ property in violation of the Fifth Amendment.

The broadcasters have never presented evidence that carriage of *any* multicast signals (beyond the primary video) is needed to preserve free, over-the-air broadcasting or to promote the widespread dissemination of information from a multiplicity of sources; and yet, even if they had, the constitutional standard is more rigorous than that. To secure judicial affirmance of the multicast rights they have sought, broadcasters would have to show that carriage of *all* of their multicast channels is needed to advance an important government interest.⁹⁰ So, even if one assumed (contrary to all evidence) that compulsory carriage of two or three multicast channels per broadcast license is needed to preserve free over-the-air broadcasting, the burden would remain on broadcasters to demonstrate how governmentally coerced carriage of a fourth and fifth and sixth channel “*is no greater than is essential to the furtherance of that interest.*”

Broadcasters have not done so.

⁹⁰ It is important to note that there is no conceivable way in which the Commission can address this part of the analysis when it has not identified an important government interest that would be furthered by multicast must-carry. The lack of an important government interest that will be furthered by multicast must-carry ensures that any burden on cable operators’ First Amendment rights is greater than necessary.

Petitioners, instead, focus on the irrelevant issue of increased cable capacity as a measure of the burden on cable operators' First Amendment rights.⁹¹ Joint Petitioners claim that cable capacity has "doubled and tripled" since 1992, and that "multicast carriage would add only negligibly to the modest capacity cable uses for local broadcasters."⁹² Joint Petitioners assume that broadcasters' digital signals can be carried in much smaller amounts of bandwidth than broadcasters' existing analog signals, ignoring the cable industry's need to serve *all* of their customers by continuing to carry many channels in analog for long after broadcasters are scheduled to discontinue their analog transmissions.⁹³ They also ignore that, even though cable plant capacity has grown, the demands on that capacity have grown even more. Thus,

⁹¹ See NAB/MSTV Petition at 11-15; Joint Petitioners Petition at 15. Petitioners' focus on cable capacity as the metric for determining burdens on cable operators' editorial discretion completely misses the mark. The burden on a cable operator's editorial discretion is not dependent on the amount of capacity the operator has. As NCTA explained, the burden is directly related to the government interest sought to be furthered:

What matters is not simply whether the amount of capacity required to accommodate must-carry obligations has increased or diminished. What matters is whether the intrusion of carriage obligations on a cable operator's editorial discretion and channel capacity -- and the discriminatory effects of such obligations on *non-broadcast* program networks -- is no greater than necessary to serve the statutory purposes of the must-carry provisions. If those purposes can be met by requiring carriage of a single video programming stream, there is no constitutional basis for requiring additional carriage -- even if, as a result of technological advances, that single stream requires less bandwidth than before.

NCTA Ex Parte at 3 (Feb. 3, 2005); see Tribe, *supra* note 48, at 7-10.

⁹² Joint Petitioners Petition at 15. NAB and MSTV similarly argue that increased cable capacity has obviated any burden on cable operators' First Amendment rights. See NAB/MSTV Petition at 11. Petitioners' argument that increased cable capacity ensures that digital must-carry rules will not have a material impact on cable speech is the equivalent of saying that broadcasters' increased digital capacity, *i.e.*, their ability to multicast, ensures that public interest obligations that require broadcasters to dedicate one or more multicast channels to programming of someone else's choosing will not have a material impact on broadcaster speech.

⁹³ As Comcast has explained at some length, cable operators face substantial bandwidth burdens during the next several years of the transition. While a growing number of consumers wish to see broadcasters' programs in high-definition (where they are in fact transmitting any particular volume of quality HD programming), and competitive considerations compel cable operators to offer consumers the option of viewing their entire channel line-up in all-digital (standard-definition) formats, the need to protect customers against disruption will also compel transmission of broadcast signals in analog. See Comcast Corp. Ex Parte at 2-3 (Sept. 16, 2004). Thus, for the foreseeable future, cable operators will need to *increase* the bandwidth dedicated to carriage of broadcast signals, even with no expansion of must-carry rights. See Comcast Corp. Ex Parte att. B (Feb. 3, 2005) (presentation by David Fellows, Executive Vice President and Chief Technology Officer, Comcast Corporation); Comcast Corp. Ex Parte at 1-3 (Sept. 16, 2004).

compulsory carriage of multicast channels would generally cause a one-for-one displacement of desired non-broadcast programming.

Moreover, Petitioners' claims that multicast must-carry would impose no greater burden on cable operators' than must-carry of a single HD channel per broadcaster is wholly unsupported in the record and, in fact, affirmatively refuted. Comcast has presented un rebutted evidence that it will have the technical capability to make productive use of extra bandwidth during times when an HDTV stream is not occupying a full 19.4 Mbps.⁹⁴ Thus, the burden imposed by multicast must-carry would be inevitably greater than the burden imposed by requiring must-carry of as many channels as a broadcaster can cram into a 19.4 Mbps bitstream.

Multicast must-carry would not only violate the First Amendment but the Fifth as well. Four Justices in *Turner I* recognized that must-carry could raise Takings concerns.⁹⁵ The Commission expressly declined to address the Takings issue with respect to dual must-carry,⁹⁶ and did not need to address it in the multicast must-carry context because it reasonably interpreted the statute not to require multicast must-carry. Even if the Commission assumed that multicast must-carry was consistent with the statute, furthered an important or substantial government interest, and did not burden cable operators' First Amendment rights more than necessary to further that interest, it would still have to address the significant Takings issues

⁹⁴ Comcast Corp. Ex Parte at 1-2 (Nov. 15, 2004).

⁹⁵ See *Turner I*, 512 U.S. at 684 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., concurring in part and dissenting in part); see also *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting).

⁹⁶ *Reconsideration Order* ¶ 26 ("Given that we have declined to impose dual carriage on other grounds, we need not address the cable industry's Fifth Amendment argument.").

because multicast must-carry deprives cable operators of the exclusive use of a portion of their cable systems without any form of compensation.⁹⁷

V. CONCLUSION

For the foregoing reasons, the Commission should summarily dismiss the petitions for reconsideration as repetitious. To the extent the Commission addresses the merits of the petitions, the Commission should affirm its two prior decisions and reject petitioners' calls to impose dual and multicast must-carry burdens on cable operators.

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⁹⁷ Comcast Corp. Ex Parte at 1-2 (Aug. 13, 2003); Comcast Corp. Ex Parte at 5-6 (Oct. 16, 2003); Tribe, *supra* note 48, at 18-24.