

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

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

OPPOSITION OF THE NATIONAL CABLE & TELECOMMUNICATIONS
ASSOCIATION TO PETITIONS FOR RECONSIDERATION

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May 26, 2005

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INTRODUCTION AND SUMMARY

The FCC first issued a Notice of Proposed Rulemaking³ in this proceeding seven years and more than thirteen hundred comments ago. In 2001, the Commission tentatively concluded not to impose a dual must carry requirement and ruled that after the transition to an all-digital broadcast system, cable operators would continue to be required to carry one stream – not multiple streams – of programming from each must carry digital broadcast station.⁴

In February 2005, after four years of deliberation, the FCC upheld its prior determinations. As to the question of whether cable operators would be required to carry a broadcaster’s digital signal in addition to its analog signal, the agency “den[ie]d the petitions on this issue and affirm[ed] [the FCC’s] tentative decision not to impose a dual carriage requirement.”⁵ The FCC also denied the petitions seeking reconsideration of the determination to not impose mandatory multicast carriage and “affirm[ed its] decision in the First Report and Order.”⁶ The Commission has now twice provided the rules of the road for cable carriage of digital television issues – providing the regulatory certainty that broadcasters at a

³ Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rulemaking, 13 FCC Rcd. 15092 (1998).

⁴ Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 2598 (2001) (hereinafter “First Report and Order”).

⁵ Second Report and Order at ¶ 2.

⁶ Id.

variety of points in this seven year history have claimed was important to their digital plans.⁷

The broadcasters, however, have now come back to the FCC for a third time. They ask that Commission resources be spent to replot the statutory, constitutional, and policy grounds that already have been thoroughly explored and definitively resolved. The FCC was right in finding that the 1992 Cable Act should not be interpreted to impose these expanded carriage obligations on cable operators and programmers. The reconsideration petitions should be dismissed.

ARGUMENT

I. THE COMMISSION SHOULD DISMISS THE PETITIONS, WHICH SEEK RECONSIDERATION OF THE RECONSIDERATION ORDER

Nothing about the FCC's February 2005 decision altered the status quo, as established by the First Report and Order in 2001.⁸ Since 2001, cable operators have not been required to "dual carry" broadcasters' analog and digital signals. And cable operators have only been required, in the case of "digital-only" signals, to carry a single digital program stream. The existing carriage rules accordingly were not modified in any way by the Second Report and Order.

⁷ See, e.g., In re Paxson Communications Corp., D.C. Cir. No. 04-1290 (Petition for Issuance of Writ of Mandamus, filed Aug. 27, 2004).

⁸ The FCC's 2001 decision finding that dual carriage would not be required was a "tentative conclu[sion]"; its decision denying multicasting was a final rule. First Report and Order, 16 FCC Red at 2599, 2600.

That alone is sufficient grounds for dismissal of the Petitions. Section 1.429(i) of the Commission’s rules provides that unless a rule is modified on reconsideration, “a second petition for reconsideration may be dismissed by staff as repetitious.”⁹ This rule is designed to provide certainty to the parties and conserve FCC resources. In rulemakings, as in adjudications, the FCC has long held that “there must be some finality to the administrative process; and absent extraordinary circumstances, the Commission’s decision on petition for reconsideration exhausts a party’s administrative remedies.”¹⁰ This general rule is based on sound principles, as the FCC explained: “If this were not the case, we would be involved in a never ending process of review that would frustrate the Commission’s ability to conduct its business in an orderly fashion.”¹¹

Dismissing the broadcasters’ reconsideration petitions of the reconsideration order is particularly appropriate here. This proceeding has been the subject of exhaustive deliberation and extensive comment. The Commission’s decision-making was anything but “hurried[]”¹² or “rushed,”¹³ as some broadcasters now claim. In fact, the FCC deliberated for more than four years before issuing its February 2005 decision. The docket consists of more than 1290 pleadings that have

⁹ 47 C.F.R. § 1.429(i). The exception applies to “any order disposing of a petition for reconsideration which modifies rules adopted by the original order....” As described above, the Second Report and Order reaffirmed its earlier rulings.

¹⁰ VHF Drop-Ins, 3 RR2d 1549, 1551 n. 3 (1964) (quoting Atlantic City Broadcasting Company, 21 P&F RR 194a (1961)).

¹¹ Id.

¹² Paxson Reconsideration Petition at 2. Paxson’s claim on reconsideration is particularly ironic, given that it petitioned the U.S. Court of Appeals for a writ of mandamus to compel the FCC to act in this docket.

¹³ Network O&O and Affiliates Reconsideration Petition at 24.

already been filed. NAB on its own is listed as making more than 40 separate filings; MSTV separately filed two dozen documents; NAB and MSTV have jointly filed others, including their petition for reconsideration of the FCC's 2001 must carry order. Paxson alone is listed on 115 filings, which includes its April 2001 reconsideration petition. The network affiliates have also had ample opportunity to make their views known. They have filed more than a dozen ex parte letters and comments, and the Walt Disney Company and Telemundo each filed petitions for reconsideration in 2001 as well.

Moreover, this is not one of those extraordinary cases where new facts that could not have been known to the petitioner have come to light, post-decision, that warrant reconsideration.¹⁴ Indeed, the sheer volume of broadcaster filings in this proceeding – including multiple ex parte submissions in the weeks preceding the Commission's February vote – make it hard to conceive of any new facts that could have come to light in the mere three months since this issue was decided.

Thousands of pages have already been filed in this proceeding. Two Commissions made up of almost entirely different Commissioners have reached the same conclusions as to cable's digital carriage obligations. This is precisely the type of case where the FCC should dismiss as repetitious the second set of petitions for reconsideration of the reconsideration order.

¹⁴ 47 C.F.R. § 1.429(b)(1) (petition for reconsideration which relied on facts that have not been presented to the Commission granted only if “the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission” or the facts relied on “were unknown to the petitioner until his last opportunity to present them to the Commission...”).

II. THE RECONSIDERATION PETITIONS FAIL ON THE MERITS

Even if the Commission does not dismiss the reconsideration petitions simply because they are repetitious, it should reject them on the merits. The petitions essentially repeat the broadcasters' argument that the 1992 Cable Act unambiguously requires dual and multicast carriage. The Commission, however, has twice rejected this reading. And to the extent the Act is at all ambiguous, constitutional and policy considerations wholly support the FCC's statutory interpretation. Petitioners offer nothing to warrant changing the agency's well-reasoned conclusions.

A. **The Commission Correctly Found that the Cable Act Does Not Mandate Dual Carriage**

1. **The Plain Language of Section 614 Does Not Require Dual Carriage**

NAB/MSTV resurrect their argument that the "plain language of Section 614" requires dual carriage during the transition.¹⁵ The broadcasters complain that the FCC rejected this reading and take issue with the Commission's failure to explain why the 1992 Cable Act does not unambiguously require dual carriage.¹⁶ The broadcasters' repetition of their statutory arguments¹⁷ does not make the arguments any more persuasive.

The FCC has twice refused to read the Act to require dual carriage.¹⁸ NCTA previously showed that the statute can easily be read to require carriage of only the

¹⁵ NAB/MSTV Reconsideration Petition at 4.

¹⁶ Id.

¹⁷ Id. at 5-6.

analog signal – and not the digital signal – during the transition. Specifically, the Act directs the Commission to adapt its rules to ensure carriage of those signals which have been changed to a new advanced television standard. So long as broadcasters continue to transmit analog signals, those signals have not been changed, and therefore the additional digital signals are not entitled to carriage in addition to the analog signals. We argued that this was, in fact, the only reasonable construction of the statute.¹⁹ But, at most, the language is ambiguous; it certainly does not unambiguously require dual carriage, as the broadcasters persist in contending.

2. The Commission Properly Construed Section 614 to Avoid Serious Constitutional Problems

NCTA and others have repeatedly pointed out that even if the statute is ambiguous, the Commission must still construe the language in a manner consistent with established canons of statutory construction. It must look to the purposes of the statute. And, under the long-established Supreme Court “avoidance” doctrine, the Commission must avoid interpretations of the statute that would raise serious constitutional questions.²⁰

The Second Report and Order undertakes this exercise in statutory construction. The FCC’s starting point is the Supreme Court’s two-step framework for analyzing the constitutionality of must carry rules, as established in the Turner

¹⁸ First Report and Order, 16 FCC Rcd at 2606; Second Report and Order, at ¶¶ 11-13.

¹⁹ NCTA Opposition to Petitions for Reconsideration at 5-8.

²⁰ Ex Parte Comments of NCTA (filed July 9, 2002) (attaching analysis prepared by Professor Laurence Tribe).

case. The Commission “[found] nothing in the record that would allow [it] to conclude that mandatory dual carriage is necessary to further the governmental interests identified in Turner, or other potential governmental interests put forward by commenters.”²¹ However, even if the record showed that dual carriage could further any of the governmental interests, the FCC concluded that “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.”²²

Broadcasters object to the Second Report and Order’s use of the word “necessary,” claiming that the FCC misapplied the Turner test for intermediate scrutiny under the First Amendment and instead applied the higher standard used in strict scrutiny cases.²³ The Commission, however, committed no error here. Its test mirrored that articulated in Turner: “A content-neutral regulation will be sustained under the First Amendment if it advances important government interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”²⁴ The FCC concluded that dual carriage could not pass this test.²⁵

²¹ Second Report and Order at ¶ 15.

²² Id.

²³ NAB/MSTV Reconsideration Petition at 9.

²⁴ Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 189 (1997) (hereinafter “Turner II”) (citing U.S. v. O’Brien, 391 U.S. 367-377 (1968) (emphasis supplied)).

²⁵ Second Report and Order at ¶ 15.

The Commission fully explained why dual carriage was not only not “necessary” to further any of the governmental interests identified in Turner “or other potential governmental interests put forward by commenters,” but also why it would not advance those interests to any meaningful extent at all.²⁶ The FCC found “no evidence that the absence of a dual carriage requirement will substantially diminish the availability or quality of broadcast signals available to non-cable subscribers.”²⁷ The record similarly “fail[ed] to demonstrate that dual carriage is needed to further [the governmental interest in promoting the widespread dissemination of information from a multiplicity of sources] because program diversity is not promoted under a dual carriage requirement, given that it would not result in additional sources of programming and that digital programming largely simulcasts analog programming.”²⁸

As to the purported interest in “promoting fair competition in the market for television programming,” the FCC recognized that this interest did not form the basis of the Turner decision and in any event could not be shown here, either: “[T]he record... 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

²⁶ Id.

²⁷ Id. at ¶ 18 (emphasis supplied).

²⁸ Id. at ¶ 19 (emphasis supplied).

station, and it has not been proven necessary to guarantee such access for both analog and digital signals to ensure fair competition.”²⁹

Moreover, the FCC did not credit arguments that dual carriage would advance the newly-crafted interest in completing the digital transition that the broadcasters propound. The Commission instead found that “the voluntary carriage of network television stations by [cable] operators, as well as carriage of high definition digital programming from non-broadcast sources like HBO, are more likely to spur the sale of digital television equipment (thereby, facilitating the transition) than the forced dual carriage of all television stations.”³⁰

Thus, the Commission found that a dual carriage requirement would flunk the first part of the Turner test because none of the governmental interests would be advanced at all – precisely the standard that the broadcasters now put forward. Having found no evidence that the governmental interests would be served, a regulation that would impose even incidental burdens on speech cannot stand.³¹ In any event, the FCC did not confine its analysis to the fit between governmental interests found important in Turner and any dual carriage rules; it went on to explain why dual carriage would not pass the second part of the test, either. The Commission concluded that “the burden that mandatory dual carriage places on cable operators’ speech appears to be greater than is necessary to achieve the

²⁹ Id. at ¶ 22 (emphasis supplied).

³⁰ Id. at ¶ 25.

³¹ Satellite Broadcasting and Communications Association v. FCC, 275 F. 3d 337, 356 (4th Cir. 2001).

interests that must carry was meant to serve.”³² As to that burden, the FCC found that a dual carriage requirement would essentially “double the carriage rights and substantially expand the burdens on free speech beyond those upheld in Turner.”³³

Broadcasters object to that analysis as well. They complain that the FCC reached this seemingly obvious conclusion – that carrying twice as many broadcast signals would increase the burdens on cable operators and programmers – without discussing the merits of the broadcasters’ “study” of cable channel capacity.³⁴ But that “study” – which broadcasters erroneously assert was “undisputed”³⁵ – was discredited by record evidence that showed that carriage of both an analog and digital version of each television station would seriously strain cable capacity limits.³⁶

The Commission got it right in recognizing that the new burden imposed by digital channels required to be added under a dual carriage requirement could not be sustainable under the Turner test.

B. The Commission Correctly Ruled Against Multicast Carriage

In rejecting the broadcasters’ arguments in favor of multicast must carry for a second time, the FCC reasoned that although the term “primary video” could

³² Id. at ¶ 15.

³³ Id.

³⁴ NAB/MSTV Reconsideration Petition at 14.

³⁵ Id. at 3.

³⁶ See, e.g., Ex Parte Filing of the National Cable & Telecommunications Association, Docket No. 98-120 (filed Oct. 16, 2001) (attaching PDS Consulting study of capacity issues and critiquing broadcasters’ Weiss capacity study; PDS finds that NAB study materially underestimates capacity that would be required for dual carriage and finds “its conclusions have little to do with actual burden”); Ex Parte Letter from Daniel L. Brenner, NCTA to FCC Chairman Michael K. Powell, Docket No. 98-120 (filed Apr. 9, 2002) (further rebutting Weiss Group capacity claim).

conceivably be read to require carriage of more than one stream of video programming, “we continue to hold that the best construction of the must carry provisions, based on the current record before us, is that cable operators need not carry more than one programming stream.”³⁷ The broadcasters argue that the Commission’s acknowledgement that the statute’s language is not wholly unambiguous somehow constitutes “a reversal of its earlier conclusion that the Cable Act required carriage of only one programming stream in a digital signal.”³⁸ But this modified reasoning – which led to the identical conclusion – should not provide the broadcasters with a third chance to press their twice-rejected statutory interpretation.

1. The Second Report and Order Shows that Multicast Must Carry will not Advance any Important Governmental Interests

The Commission concluded that the “best construction” of the term “primary video” was the narrow one adopted in its First Report and Order. To derive a “reasonable interpretation” of the term the Commission found ambiguous, it considered the legislative history of Sections 614 and 615, as well as Section 336. The FCC did not find the legislative history to “reveal any clear intention of Congress with respect to the multicasting must-carry issue.”³⁹ The Commission also looked to the “underlying purposes of the statutory provisions, and evaluate[d] whether requiring cable operators to carry more than one programming stream of a

³⁷ Second Report and Order at ¶ 33.

³⁸ NAB/MSTV Reconsideration Petition at 6.

³⁹ Second Report and Order at ¶ 36.

multicasting station would fulfill those purposes.”⁴⁰ Just like its dual carriage analysis, the answer was an unambiguous “no.”

Here, too, broadcasters object to what they argue is application of a higher standard of proof than the Supreme Court would require under intermediate scrutiny. They point to the Second Report and Order’s use of the terms “essential” or “necessary”⁴¹ as conflicting with the Turner test.⁴² But, the Commission in fact determined – and the record showed – that multicast must carry would not “fulfill [the] purposes” of the Act.⁴³ Thus, even under the standard put forward by the broadcasters, it would not “materially advance” or “promote” any important or substantial governmental interests.⁴⁴

The Commission recognized that, in contrast to the analog must carry rules, there are no explicit congressional findings that the benefits of free, over-the-air television for non-cable viewers would be jeopardized without multicast carriage.⁴⁵ Nor did the record before the agency support any such agency finding.

The broadcasters’ petitions try once again to persuade the Commission that absent carriage of multicast services, some broadcasters may be in financial jeopardy.⁴⁶ But by the broadcasters’ own admission, their financial woes are unrelated to multicast carriage and are instead a result of the broadcaster-inspired

⁴⁰ Id. at ¶ 37.

⁴¹ NAB/MSTV Reconsideration Petition at 10.

⁴² Network O&O and Affiliates Reconsideration Petition at 5.

⁴³ Second Report & Order at ¶37.

⁴⁴ Id.

⁴⁵ Id. at ¶ 38.

move to digital television. As the NAB petition admits, “small-and medium-sized broadcasters are particularly challenged in today’s environment, in large measure because the cost of the digital transition is proportionally far greater for those broadcasters.”⁴⁷ Pinning the blame on lack of cable carriage of multicast digital signals, when broadcasters’ analog signals have been carried since must carry went into effect in 1992, is especially far-fetched; to the extent the digital transition is adversely affecting the financial well-being of broadcasters, the record contains no evidence that forced multicast cable carriage is the cure.

It is equally unsurprising that the affiliates of ABC, CBS and NBC, as well as the ABC and NBC owned and operated stations, were unable to convince the FCC that their multicast streams must be forced on cable by government fiat. They repeat their remarkable assertion that these strong broadcast stations – which overwhelmingly choose to negotiate for carriage of their primary signal through retransmission consent – should be eligible for must carry rights for their multicast streams.⁴⁸ This interpretation flies in the face of the 1992 Cable Act, which requires stations to choose between must carry protection under Section 614 and retransmission consent under Section 325.

⁴⁶ Id. at 19; see also Network O&O and Affiliates Reconsideration Petition at 7.

⁴⁷ Id.

⁴⁸ The Network O&O’s and Affiliates try to shoehorn their purported must carry rights for multicast signals of retransmission consent stations into Section 614(b)(4)’s requirement that cable operators shall carry signals of local commercial television stations without “material degradation.” That provision – which stands only for the proposition that operators cannot degrade the quality of local broadcast signals – says nothing about the number of individual digital streams that a cable operator must carry under the statute. And it certainly does not override the explicit provision that “television stations... make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under section 614.” 47 U.S.C. § 325((b)(3)(B) (emphasis supplied).

These strong broadcast stations have proven themselves to be highly capable negotiators for carriage of programming in addition to their main analog program service. In fact, according to an NCTA survey, as of January 2005, more than 100 digital signals of commercial stations owned by or affiliated with each of the ABC, CBS and NBC networks were already being carried.⁴⁹

Under these circumstances, the FCC was surely correct in determining that “broadcasters fail to substantiate their claim that mandatory multicasting is essential to ensure station carriage or survival.”⁵⁰ The Network O&Os and Affiliates’ Reconsideration Petition does not show otherwise. It simply asserts that multicasting “may well be important to local broadcasters’ ability to maintain the economic vitality of their services – main channel as well as multicast services.”⁵¹ But that pure conjecture is no basis for reading the statute to impose multicast must carry. Courts have made clear that a must carry requirement must “materially advance[] an important or substantial interest by redressing past harms or preventing future ones. These harms must be ‘real, not merely conjectural,’ and

⁴⁹ Digital signals of 109 different ABC owned or affiliated stations are being carried; 102 stations owned by or affiliated with CBS; and 103 stations owned by or affiliated with NBC. NAB/MSTV complain that cable operators are only carrying the multicast streams of some broadcasters, arguing that “such an approach exacerbates the very problem that the Cable Act was intended to address – namely, giving cable operators the power to choose which broadcast local signals should thrive and which should fail.” NAB/MSTV Reconsideration Petition at 20. But even with respect to analog broadcast stations, Congress sought to preserve some measure of operator decision-making. Cable operators generally have discretion to choose which stations to carry above those required by Section 614. 47 U.S.C. § 614 (a) (“Carriage of additional broadcast television signals on such system shall be at the discretion of the operator, subject to section 325(b)[s retransmission consent requirements]”).

⁵⁰ Second Report and Order at ¶ 38.

⁵¹ Network O&O and Affiliates at 8.

the regulation must ‘alleviate these harms in a direct and material way.’⁵²

Broadcasters have been unable to make that showing over the course of this proceeding’s seven year history, and repeating those arguments here – or asking the FCC to “develop or ask for whatever additional evidence it feels it needs and weigh this evidence in the balance of the other factors at issue here”⁵³ – fails to provide grounds for reconsideration.

The broadcasters also take issue with the FCC’s conclusion that “based 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.’”⁵⁴ The Commission observed that “adding additional channels of the same broadcaster would not enhance source diversity.”⁵⁵

The broadcasters now try to redefine “source diversity” to include any program stream they offer.⁵⁶ But the Commission in other contexts has recognized that “multiple views from the same programmer does not provide the benefits of source diversity since that programmer decides what programs will be produced

⁵² Satellite Broadcasting and Communications Assoc. v. FCC, 275 F. 3d at 356 (citing Turner I, 512 U.S. at 664) (emphasis supplied).

⁵³ Network O&O and Affiliates Reconsideration Petition at 7.

⁵⁴ Second Report and Order at ¶ 39.

⁵⁵ Id.

⁵⁶ Network O&Os and Affiliates, for example, argue that “even though the licensee would, properly, retain ultimate control over the programming, multicasting will provide an opportunity for more diverse programs, produced from a multiplicity of sources.” (Reconsideration Petition at 11).

and offered.”⁵⁷ It made no error in its determination that the multiplicity of sources would not be furthered by requiring carriage of multiple digital broadcast streams from the same broadcast source.

DIC Entertainment, a potential program supplier to digital broadcast stations, argues that its digital multicast plans for a children’s service will be harmed by the absence of mandatory carriage.⁵⁸ But there is no reason why the government should provide DIC the preferential treatment it seeks. Non-broadcast program networks have had to invest in their services, create programming that appeals to the viewing public, and compete for an audience on the merits of their sources. DIC’s Petition merely shows, yet again, that its interest in making that same sort of investment appears to depend on wholly inappropriate and unjustifiable government favoritism.

In contrast to the broadcasters’ empty promises about using this new spectrum to make room for new types of programmers, the record is replete with examples of cable program networks – networks that exist today and that have invested in programming – that would be unfairly disadvantaged in competing for channel space against digital broadcast programmers.⁵⁹ Unlike broadcasters, who can be transmitted over the air to all homes in a community on free digital

⁵⁷ Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, 19 FCC Rcd 5647, 5672 (2004).

⁵⁸ DIC Reconsideration Petition at 2-3.

⁵⁹ See, e.g., Programmers Ex Parte Submission (filed Feb. 3, 2005) (Crown Media, The Outdoor Channel, GSN – The Network for Games, and International Channel Networks); Ex Parte Comments of A&E Television Networks and Courtroom Television Network (filed Mar. 16, 2004); Ex Parte Comments of Discovery Communications and Oxygen Media Communications (filed Sept. 29, 2004).

spectrum, diverse cable programmers have no such alternative pathway into cable homes. And these cable networks already are harmed by the forced carriage of a single primary digital program stream from each digital must carry broadcast station. The Commission was absolutely right in finding that “mandatory multicast carriage would arguable diminish the ability of other, independent voices to be carried on the cable system,”⁶⁰ thereby harming the interest in source diversity.

The FCC also rejected arguments that “a multicasting carriage requirement will facilitate the digital transition.”⁶¹ Even assuming, arguendo, that the FCC could reasonably justify any digital must carry rules on any bases not intended by Congress in adopting Section 614, the broadcasters have provided nothing on reconsideration that warrants revisiting this conclusion. They try again to conjure up some sort of connection between forced multicast broadcast carriage and “provid[ing] incentives for viewers to purchase digital sets.”⁶² But the logical connection is missing.⁶³ The Petition provides no reason to believe that carriage of multicast standard definition digital programming on cable systems would

⁶⁰ Second Report and Order at ¶ 39.

⁶¹ Id. at ¶ 40.

⁶² Network O&Os and Affiliates Reconsideration Petition at 11-12.

⁶³ The only digital station cited by the Network O&O’s to support this claim (WDBJ), however, already is being voluntarily carried in digital on local cable systems. The record similarly does not support NAB/MSTV’s claim that many cable operators will not voluntarily carry multicast services absent government compulsion (NAB/MSTV Reconsideration Petition at 17). Cable operators already carry multicast non-commercial programming in a variety of markets, and will be adding more such stations over time pursuant to the recently-concluded agreement reached with public television. Operators have also entered into agreements with a number of commercial broadcast stations to carry their digital multicast signals where those signals contain programming of interest to their customers. See, e.g., Ex Parte Filing of Comcast (Feb. 3, 2005) (detailing Comcast’s commercial multicast digital carriage agreements with over 130 commercial stations located in 62 markets across the country). Digital multicast local news and weather services are also being provided on a variety of cable systems throughout the country.

encourage anyone to purchase digital television sets. But even if carriage of standard definition signals would, cable operators already voluntarily carry multicast digital programming from a variety of non-commercial and commercial broadcasting sources, in addition to a wide selection of cable programming standard definition digital fare.

Other broadcast programmers try to base their multicast must carry claims on the supposed public interest value of the content that they would offer, if only cable carriage was required. For example, Paxson claims that “full digital multicast must carry... likely will lead to an explosion of local and other public interest programming.”⁶⁴ Paxson, of course, already provides multicast programming – but not of the “local and other public interest programming” variety. Instead, three of the multicast streams for which Paxson sought carriage consisted of time-shifted versions of the identical programming aired on its analog channel.⁶⁵ That programming, reportedly, increasingly will consist of infomercials.⁶⁶

MMTC’s Reconsideration Petition also asks the FCC to adopt multicast must carry requirements limited to certain broadcasters – primarily low power television

⁶⁴ Paxson Reconsideration Petition at 5.

⁶⁵ Paxson Chicago License, Inc. v. 21st Century TV Cable Inc., 16 FCC Rcd 2185, 2186 (CSB, 2001) (Paxson also provided 3 nationally-delivered religious programming networks: The Worship Network, The Praise Network and The TLN Network).

⁶⁶ See, e.g., Daily Variety, “NBC irked at Paxson’s infomania” (Apr. 22, 2005) (“In a filing Thursday with the Securities and Exchange Commission, Paxson announced plans to sever its business ties to NBC Universal as part of a shift in the station group’s business model from network programming to infomercials, direct-response advertising and paid programming....Pax’s network service has been marching toward the end for some time; ... Pax already schedules infomercials outside of primetime.”); Communications Daily (May 13, 2005) (NBC arbitration claim filed against Paxson alleging breach of contract; “Paxson said it wants to rely on infomercials, direct response ads and paid programming as revenue sources.”)

stations – that provide a minimum amount of local programming. There are several problems with this proposal, not the least of which is that low power television stations for the most part are not entitled to mandatory carriage at all.⁶⁷ The FCC has no power to expand this narrow class of eligible low power stations. Moreover, any effort to impose must carry rules on the basis of a broadcast station’s content would inevitably be struck down as unconstitutional. The Turner I court made plain that if the purpose had been “to force programming or a ‘local’ or ‘educational’ content on cable subscribers,”⁶⁸ the rules would have been deemed content based and subject to strict, not intermediate, scrutiny.⁶⁹

2. Multicast Must Carry Would Burden Cable Operators and Programmers

The broadcasters argue again that the Commission improperly ignored evidence of cable capacity growth since the 1992 Cable Act. The Network O&O’s and Affiliates assert that “there is no evidence that digital carriage rules would burden cable’s First Amendment rights.”⁷⁰ NAB alleges that “the burden of digital carriage including multicast carriage is clearly less today than it was in 1992.”⁷¹

⁶⁷ Section 614(h)(2) (narrowly defining the class of low power stations that are eligible for mandatory carriage).

⁶⁸ Turner I, 512 U.S. at 648 (1994).

⁶⁹ Indeed, the Turner I Court questioned whether even the 1992 Cable Act’s reference to low power stations’ provision of local news and informational content made that existing statutory provision content-based. Turner I, 512 U.S. at 643 n. 6.

⁷⁰ Network O&O and Affiliates Reconsideration Petition at 11.

⁷¹ NAB/MSTV Reconsideration Petition at 15.

But even though cable has invested in upgrading its systems to introduce digital capacity for its customers, cable capacity is still constrained.

NCTA has repeatedly shown that what matters is not simply whether the percentage of capacity an operator is required to devote to must carry broadcasters has increased or diminished.⁷² What matters is whether the intrusion of multicast carriage obligations on a cable operator's editorial discretion and the discriminatory effects on non-broadcast program networks are no greater than necessary to advance the statutory purposes of the must carry provisions. "If a regulation places even incidental burdens on speech without yielding some genuine benefit, it must be struck down."⁷³

The broadcasters complain that the Commission failed to address their assertion that forcing carriage of multiple broadcast signals from each must carry broadcast station would not impose additional burdens on cable.⁷⁴ Having found that multicast must carry would not serve any of the underlying purposes of the statutory provisions,⁷⁵ there was no need for the Commission to address the broadcasters' capacity claims. But the record contained extensive rebuttals to the

⁷² Ex Parte letter from Robert Sachs, NCTA President, to FCC Chairman Michael K. Powell, dated Feb. 3, 2005; Ex Parte Submission of NCTA, attaching "Why the Federal Communications Commission Should Not Adopt A Broad View of the 'Primary Video' Carriage Obligation: A Reply to the Broadcast Organizations," prepared by Professor Laurence H. Tribe (filed Nov. 24, 2003).

⁷³ Satellite Broadcasting and Communications Association v. FCC, 275 F.3d at 356.

⁷⁴ Network O&O and Affiliates Reconsideration Petition at 15; NAB/MSTV Reconsideration Petition at 14-15.

⁷⁵ Second Report and Order at ¶ 38.

broadcasters' unsupportable assertions that operators and programmers would not be burdened by expanded must carry obligations.⁷⁶

CONCLUSION

For the foregoing reasons, the FCC should dismiss the Reconsideration Petitions.

Respectfully submitted,

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May 26, 2005

⁷⁶ See, e.g., NCTA Ex Parte Filing (Nov. 24, 2005) (Professor Tribe's Rebuttal); Ex Parte Letter of Comcast Corp., Docket No. 98-120 (filed Feb. 3, 2005) (rebutting NBC "burden" analysis).

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, do hereby certify that I caused one copy of the foregoing Opposition of the National Cable & Telecommunications Association to Petitions for Reconsideration to be served by mail, this 26th day of May 2005.

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