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

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

TIME WARNER CABLE'S OPPOSITION TO PETITIONS FOR RECONSIDERATION

In its *Second Report and Order* in this proceeding, the Commission addressed broadcasters' petitions for reconsideration of its January 2001 *First Report and Order*.[1] The Commission uniformly denied the petitions and left its previously existing rules unchanged. Undaunted, various broadcasters have now filed a second round of petitions for reconsideration.[2] The Commission's rules are clear that, where an order denying petitions for reconsideration makes no changes to the underlying rules, any further petitions for reconsideration "may be dismissed by the staff as repetitious."[3] We therefore respond only briefly to these petitions, and otherwise refer the Commission to our many prior filings in this docket.

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[1] *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005) ("*Second Report and Order*").

[2] *See, e.g.*, Petition for Reconsideration of the National Association of Broadcasters *et al.* (filed Apr. 21, 2005) ("NAB"); Petition for Reconsideration of the ABC Television Affiliates Association *et al.* (filed Apr. 21, 2005) ("Affiliates"); Petition for Reconsideration of Paxson Communications Corp. (filed Apr. 21, 2005) ("Paxson").

[3] 47 C.F.R. § 1.429(i).

I. THE COMMISSION DID NOT ERR IN ITS STATUTORY ANALYSIS OF THE CABLE ACT.

Broadcasters once again argue that Section 614 requires both dual carriage during the transition and carriage of all multicast signals. They are wrong.

A. The Commission Did Not Err in Refusing To Require Dual Carriage.

With respect to the argument that the statute requires dual carriage,[4] our previous filings demonstrate that the statute — far from requiring dual must-carry — does not permit dual must-carry. Assuming for the sake of argument that the statute does not forbid dual carriage, it does not follow that the statute requires a dual-carriage regime. At best, the statute would afford the Commission discretion to impose a dual-carriage regime without requiring it to do so.

The statute provides that, "[a]t such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards."[5] It does not say that the Commission must "ensure cable carriage" of *digital* signals. Instead, the statute provides that the Commission must "ensure cable carriage" of the "television broadcast signals" of "television stations which have been changed to conform" to modified standards.[6]

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[4] NAB at 4-6.

[5] 47 U.S.C. § 534(b)(4)(B).

[6] "Which" immediately follows "stations" — not "signals." Under the "grammatical 'rule of the last antecedent,' . . . a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhardt v. Thomas*, 540 U.S. 20, 21 (2003).

Thus, the Commission must ensure carriage of "signals" of these "stations" — an obligation discharged by requiring carriage of only analog signals.

B. The Commission Did Not Err in Refusing To Require Multicast Carriage.

Broadcasters also argue that Section 614 requires the carriage of multicast signals.[7] According to broadcasters, the "primary video" language in the statute was somehow intended to draw a line between free and subscription services. We adhere to our response to similar arguments four years ago: "It is hard to argue with these contentions because the broadcasters are making things up out of whole cloth. The text of Section 614 . . . nowhere says anything about any free/for-a-fee distinction. Instead, it draws a primary video/other video distinction. And that is the end of that."[8]

II. THE COMMISSION'S *TURNER* ANALYSIS IS CORRECT.

Broadcasters next argue that the Commission incorrectly identified the relevant First Amendment standard and misapplied it to the facts. Both points are baseless.

A. The Commission Did Not Misstate the *Turner* Standard.

According to broadcasters, the Commission mistakenly identified the relevant *Turner* standard as requiring rules to be "necessary" to furthering important governmental interests.[9] In reality, they say, the applicable First Amendment standard requires no more than that the regulation "materially advances" such an interest.[10]

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[7] NAB at 6-9; Paxson at 8-13.

[8] Time Warner Cable's Opposition to Petitions for Reconsideration, at 13 (filed May 25, 2001).

[9] *Id.* at 9-10; *see also* Affiliates at 3-6.

[10] NAB at 10.

But the broadcasters ignore what *Turner I* itself said: that a regulation subject to intermediate scrutiny can be upheld only "if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is *no greater than is essential to the furtherance of that interest*."[11] As the Court put it in *Turner II*, a regulation can survive intermediate scrutiny only if it "does not burden substantially more speech than *necessary* to further [important] interests."[12] Thus, the Commission identified the applicable standard correctly.

B. The Commission Did Not Misapply the *Turner* Standard.

Broadcasters next argue that, even though they adduced evidence that dual carriage and multicast carriage together would burden cable operators less than analog carriage, the Commission refused even to measure the extent of the comparative burden.[13] The Commission found, however, that with analog must-carry already on the books, neither dual carriage nor multicast carriage was at all "necessary to further the governmental interests identified in *Turner*, or other potential governmental interests put forward by commenters."[14] Thus, in the Commission's analysis, the precise extent of the burden simply did not matter.

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[11] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*") (emphasis added, internal quotation marks omitted); *see also id.* at 664 (regulation at issue must "alleviate [the posited] harms in a direct and material way") (internal quotation marks and citation omitted).

[12] *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*").

[13] *See* NAB at 11-16; Affiliates at 15-16.

[14] *Second Report* ¶ 15.

In any event, the broadcasters' arguments are flawed. The question is not how the burden of digital must-carry compares to the burden of analog must-carry. Rather, the question is whether the burden of carriage is greater than can be justified by its putative benefits. Moreover, the broadcasters are wrong in assuming that, when a cable system's overall channel capacity grows, the burden of a set number of must-carry channels declines proportionally. Carriage duties burden cable operators mostly by intruding upon their editorial discretion, and the impact of an unwanted channel on editorial discretion is the same regardless of a cable operator's overall cable system capacity.

III. THE COMMISSION'S DECISION WAS REASONABLE AS A MATTER OF POLICY.

Broadcasters also argue that the Commission "ignored" or "failed to give adequate weight to" various policy and evidentiary arguments that they believe would have led to a different outcome.[15] In reality, however, the Commission did not ignore anything. Rather, it weighed the broadcasters' arguments and evidence and simply reached a different conclusion. The broadcasters' suggestion that the Commission was required to respond to each of their individual arguments separately is unfounded.[16]

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[15] *See* NAB 16-25; Affiliates at 6-14.

[16] *See, e.g.*, *Texas Office of Public Utilities Counsel v. FCC*, 265 F.3d 313, 328 (2001) ("An agency need not respond to every study, and only has to address 'significant comments.'"); *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) ("An agency is not obliged to respond to every comment, only those that can be thought to challenge a fundamental premise.").

Conclusion

For the reasons set forth above, the Commission should deny the Broadcasters' petitions for reconsideration.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of May 2005, copies of Time Warner Cable's Opposition To Petitions For Reconsideration were served on the following by first-class mail, postage prepaid.

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