

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

In the Matter of:

Implementation of Section 210 of the
Satellite Home Viewer Extension
and Reauthorization Act of 2004 to Amend
Section 338 of the Communications Act

MB Docket No. 05-181

**PETITION FOR PARTIAL RECONSIDERATION OF
ECHOSTAR SATELLITE, L.L.C.**

David K. Moskowitz
Executive Vice President
and General Counsel
ECHOSTAR SATELLITE L.L.C.
9601 South Meridian Boulevard
Englewood, CO 80112
(303) 723-1000

Pantelis Michalopoulos
Chung Hsiang Mah
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue NW
Washington, D.C. 20036-1795
(202) 429-3000
Counsel for EchoStar Satellite L.L.C.

Karen Watson
Ross Lieberman
ECHOSTAR SATELLITE L.L.C.
1233 20th Street, N.W.
Washington, D.C. 20036-2396

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SUMMARY

EchoStar Satellite L.L.C. (“EchoStar”) is a Direct Broadcast Satellite (“DBS”) operator providing hundreds of channels of programming to more than eleven million subscribers nationwide. Over the last five years, EchoStar has faced the challenge of finding capacity to retransmit the signals of thousands of local broadcast stations across the country, a challenge made even greater by the impending transition of broadcasting from analog to digital technology. Last year, Congress enacted legislation designed to ensure that satellite carriers begin to offer local-into-local analog and digital service to subscribers in Alaska and Hawaii within specified time frames. EchoStar supports that goal. This is why EchoStar has been the forerunner in providing local analog signals by satellite in every Alaska and Hawaii DMA.

Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) amends the Communications Act to require satellite carriers like EchoStar to commence local-into-local carriage of local broadcast stations in Alaska and Hawaii by December 8, 2005 for analog signals and June 8, 2007 for digital signals. EchoStar understands that the special needs of these two states may provide at least some justification for Congress to impose additional burdens on satellite carriers that would be totally inappropriate for the lower 48 states. Regrettably, however, the Commission has impermissibly extended and compounded these burdens by misconstruing the statute to impose a requirement on satellite carriers to carry the multicast digital signals of local broadcasters. Such a requirement could negatively affect the Alaskan and Hawaiian consumers that the statute was intended to benefit by restricting their access to popular

programming or forcing them to install larger satellite dishes than would otherwise be necessary.

In addition, by reading a multicast must-carry requirement into the statute, the Commission has implemented the statute in a manner that does not comport with the Constitution. A multicast requirement would fail both prongs of the intermediate scrutiny test in the *O'Brien* and *Turner* decisions. Under that test, content-neutral restrictions on the free speech rights of multichannel video programming providers are only constitutional if they (1) further an important or substantial government interest unrelated to the suppression of free expression, and (2) the incidental restriction on First Amendment freedoms was no greater than is essential to the furtherance of that interest.

No government interest, much less an important one, has been articulated by Congress or the Commission in support of a multicast requirement. Prior must-carry schemes have been upheld because of the threat that non-carriage would pose to the viability of broadcasters. No such threat is presented by the absence of a multicast requirement here. The primary signals of broadcasters in Alaska and Hawaii *will* be carried under the existing must-carry rules. No one has shown that any broadcaster will become non-viable if its second, third or fourth feed are not carried by a satellite carrier. Nor could such a showing reasonably be made. The only interest that is legitimately served by the multicast requirement is a potential increase in the revenues of the broadcaster. That is neither a proper governmental interest, nor is it important. As to the interests hypothesized by the FCC, they are unproven, implausible, and *post hoc*.

The multicast requirement would also fail the second prong of the *O'Brien* test. The Commission would likely impose burdens upon EchoStar in Alaska and Hawaii far

greater than those imposed on any multichannel video programming distributor (“MVPD”) there or anywhere else. In fact, the Commission recently refrained from imposing a multicast requirement on cable operators anywhere in the country precisely because of the constitutional infirmities of such a requirement.

The statute does not compel this friction with the Constitution. Indeed, the statute is best read as *not* requiring carriage of multicast signals. The Commission has thus completely failed in its acknowledged duty to construe the statute in a manner that avoids constitutional infirmities.

For these reasons, EchoStar respectfully asks the Commission to reconsider those portions of its *Order* requiring multicast carriage in Alaska and Hawaii.

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PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, EchoStar Satellite L.L.C. ("EchoStar") hereby petitions for partial reconsideration of the Commission's Report and Order ("*Order*") issued in the above-referenced proceeding and published in the Federal Register on August 31, 2005.¹ Specifically, the Commission has impermissibly interpreted Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") to impose a multicast requirement on satellite carriers.² Such a requirement is neither mandated by the statute nor permitted under the Constitution. Accordingly, the Commission should eliminate that requirement on reconsideration.

I. INTRODUCTION

EchoStar has always faced capacity constraints, because it must provide services to subscribers across the country using a limited amount of spectrum in a limited number

¹ See 70 Fed. Reg. 51658 (2005). See also *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, Report and Order, FCC 05-159, MB Docket No. 05-181 (Aug. 23, 2005) ("*Order*").

² *Order* at ¶¶ 15-22.

of orbital locations. As a result, EchoStar has continued to deploy ever more sophisticated technology to make more intensive use of valuable spectrum resources and provide better service to subscribers. Since passage of the Satellite Home Viewer Improvement Act (“SHVIA”) in 1999, it has faced the challenge of finding capacity for carriage of more than 1600 local broadcast stations across the country – a prospect made more daunting by the broadcasters’ ongoing conversion from analog to digital transmissions.

Last year, Congress enacted the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) – legislation designed in relevant part to require satellite carriers to provide local-into-local analog and digital service to subscribers in Alaska and Hawaii within specified time frames.³ EchoStar supports that goal. Indeed, EchoStar provided local analog signals in the Anchorage and Hawaii Designated Market Areas (“DMAs”) even before SHVERA was enacted and has since commenced such service in the remaining Alaskan DMAs.

Section 210 of the SHVERA inserts a new Section 338(a)(4) into the Communications Act to require satellite carriers with more than 5 million subscribers to commence local-into-local carriage of local broadcast stations in Alaska and Hawaii by December 8, 2005 for analog signals and June 8, 2007 for digital signals. EchoStar understands that the special needs of these two states may provide at least some justification for Congress to impose additional burdens on satellite carriers that would be totally inappropriate for the lower 48 states.

³ 47 U.S.C. § 338(a)(4); Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”), Pub. L. No. 108-447 § 210, 118 Stat. 2809, 3428-29 (2004).

Regrettably, however, the Commission has impermissibly extended and compounded these burdens by misconstruing the statute to require satellite carriers to carry the multicast digital signals of local broadcasters.

II. BACKGROUND

The Commission describes new section 338(a)(4) of the Communications Act as being “responsive to a long history of more limited DBS service in Alaska and Hawaii than in the lower 48 states.”⁴ Admittedly, DBS service has historically been more limited in Alaska and Hawaii than elsewhere – it is by no means easy to deliver service to Alaska and Hawaii from certain orbital locations.⁵

But while it is true that “Alaskans ‘*had* far fewer choices than other Americans’” or that “[i]n Hawaii, the DBS subscribers packages *were* not comparable to the subscriber packages in available in the lower 48 states,”⁶ EchoStar has ameliorated this problem dramatically. EchoStar provides its subscribers in Alaska and Hawaii with national programming comparable to the packages available to its subscribers in the contiguous United States (“CONUS”), and already provides analog local signals in all three DMAs in Alaska and the one DMA in Hawaii, even though some of these DMAs rank among the least populous in the country.

The Commission’s decision to require multicast carriage in Alaska and Hawaii thus cannot be characterized as ensuring “equitable”⁷ services to Alaska and Hawaii DBS

⁴ *Order* at ¶ 19.

⁵ *See* 47 C.F.R. § 25.148(c) (requiring service to Alaska and Hawaii only where such service is “technically feasible from the authorized orbital location”); *Policies and Rules for the Direct Broadcast Satellite Service*, Report and Order, 17 FCC Rcd. 11331, 11358 (2002) (stating that “[u]nderlying the Commission’s geographic service rules is the concept of technical feasibility”).

⁶ *Order* at ¶ 19 (emphases added).

⁷ *Order* at ¶ 19 (citing 47 U.S.C. § 307(b)’s reference to a “fair, efficient, and *equitable* distribution of radio services among the several States”) (emphasis in *Order*).

customers. It requires EchoStar to provide services in Alaska and Hawaii that it does not provide *anywhere else in the country*.

A multicast requirement, moreover, has consequences for both EchoStar and its customers in both Alaska and Hawaii that are neither “unclear” nor “speculative.”⁸ Superimposing a multicast requirement on the already burdensome HD carriage rule would likely result in EchoStar being unable to use available spectrum on a spot beam to provide regional programming that Alaskans and Hawaiians want, as opposed to programming dictated by government fiat. This would disserve subscribers in Alaska and Hawaii -- the very class of consumers that Congress intended to benefit.

III. SHVERA DOES NOT REQUIRE MULTICAST CARRIAGE

While it found ambiguity in other aspects of the provision,⁹ the Commission determined that section 338(a)(4) unambiguously requires multicast carriage in Alaska and Hawaii.¹⁰ This is not so. Indeed, the best reading of the statute is that it does not.

The Commission found that “section 338(a)(4)’s use of the plural term ‘signals’ in requiring carriage of ‘signals originating as digital signals’ . . . unambiguously mean[s] carriage of the entire free over-the-air digital broadcast, without limitation, being transmitted by the broadcaster.”¹¹ This phrase, however, cannot bear the weight the Commission placed upon it.

Indeed, the Commission’s interpretation of the statute does not withstand careful scrutiny. The very same sentence requiring carriage of “signals originating as digital signals” also refers to “signals originating as analog signals” and, as the Commission

⁸ *Order* at ¶ 21.

⁹ *See Order* at ¶ 14 (finding ambiguity regarding dual carriage).

¹⁰ *Order* at ¶ 16.

¹¹ *Id.*

recognized, there are no multicast signals in an analog broadcast stream.¹² It makes no sense, therefore, to construe “signals” in one part of the sentence to require multicast carriage when the term cannot have that meaning in another part of the *same sentence*.¹³ In the analog context, “signals” plainly means a single station’s signals over time – the meaning of “signals” in many of the Commission’s rules.¹⁴ The Commission should have assigned the phrase the same meaning in connection with digital signals.

The Commission also concluded that Congress would have used the phrase “primary video” (or something similar) had it meant to limit the carriage requirement to a single standard definition stream.¹⁵ This, the Commission reasoned, is because it had concluded in the cable context that Congress’s use of “primary video” required the retransmission of only a single programming stream.¹⁶ A Congress seeking the same

¹² *Id.*

¹³ *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (noting that “identical words used in different parts of the same act are intended to have the same meaning”).

¹⁴ *See, e.g.*, 47 C.F.R. § 74.701(b) (“Primary station. The analog television broadcast station (TV broadcast) or digital television station (DTV) which provides the programs and *signals* being retransmitted by a *television broadcast translator station*.”); 47 C.F.R. § 73.1750 (“The license of any *station* that fails to transmit *broadcast signals* for any consecutive 12 month period expires as a matter of law at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.”); 47 C.F.R. § 73.682 (a)(24)(iii)(A) (“The use of such *signals* shall not result in significant degradation to any portion of the visual, aural, or program-related data signals of the *television broadcast station*”); 47 C.F.R. § 74.631(g) (“Except as provided in paragraph (d) of this section, a *television translator relay station* is authorized for the purpose of relaying the *programs and signals of a television broadcast station* to television broadcast translator stations for simultaneous retransmission.”) 47 C.F.R. § 74.701(a) (“Television broadcast translator station. A station in the broadcast service operated for the purpose of *retransmitting the programs and signals of a television broadcast station*, without significantly altering any characteristic of the original signal other than its frequency and amplitude, for the purpose of providing television reception to the general public.”) (all emphases added).

¹⁵ *Order* at ¶ 16 (“Had Congress intended to limit digital carriage to only a single standard definition stream, we believe Congress would have included similar limiting language in the satellite context.”).

¹⁶ *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2622 (2001) (“*Carriage Order*”); *see also Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd. 4516, 4532 (2005) (“*Carriage Recon. Order*”).

result, the reasoning goes, would have used the same “primary video” language rather than the “signals originating as digital signals” language it chose.

But the Commission itself had already concluded that “primary video” is “susceptible to different interpretations.”¹⁷ Assuming Congress even thought about multicast carriage in the first place, why would it choose to repeat the use of an ambiguous phrase if it wanted to mandate such carriage, especially when no court has yet ruled on the Commission’s interpretation of that phrase? Congress was certainly aware that the Commission had tentatively concluded that cable operators are not required to carry multicast signals at the time it enacted SHVERA.¹⁸ Surely, then, Congress would have been explicit if it had intended to subject satellite carriers to a more burdensome requirement.

Nor is this a case, as the Commission suggests, where a specific mandate (section 338(a)(4)) “supersedes the general comparability directive set forth in § 338(j).”¹⁹ Rather, because section 338(a)(4)’s directive to carry “signals originating as digital signals” says nothing about multicast carriage, the Commission should have read the two provisions in concert rather than creating a conflict requiring a “specific-trumps-general” rule for resolution.²⁰

¹⁷ See *Carriage Recon. Order*, 20 FCC Rcd. at 4516 (concluding that “the language of the Act may be less definitive than portions of our earlier decision suggested”).

¹⁸ See *Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission’s Rules*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 2598, 2600 (2001) (“*Carriage Order*”). The Commission has since reaffirmed that conclusion. See *Carriage Recon. Order*.

¹⁹ *Order* at ¶ 16.

²⁰ See, e.g., *Ratzlaf v. U.S.*, 510 U.S. 135, 140-41 (1994) (stating that statutes must be read, as far as possible, to give independent effect to all their provisions); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) (requiring agency to interpret statute “as a symmetrical and coherent regulatory scheme”).

IV. THE COMMISSION FAILED TO CONSTRUE THE STATUTE TO AVOID CONSTITUTIONAL INFIRMITIES

The Commission's onerous interpretation of section 338(a)(4) would have been objectionable had it existed in a vacuum. Here, though, the Commission's interpretation is set against the backdrop of a provision that already rests on untested constitutional ground.²¹ In such cases, the Commission has an established "duty" to construe the statute so as to minimize constitutional concerns.²² Ignoring this duty entirely, the Commission has interpreted the statute in a manner that does not comport with the Constitution.

A. First Amendment

The Commission characterized its interpretation of section 338(a)(4) as "consistent with the First Amendment."²³ However, the Commission does not even come close to meeting the intermediate scrutiny test laid down in the *O'Brien* and *Turner* decisions.²⁴ Under that test, content-neutral restrictions on the free speech rights of multichannel video programming providers are only constitutional if they (1) further an

²¹ All carriage requirements, by their very nature, interfere with carriers' editorial judgment as to the programming they will and will not carry. As such, they always raise First Amendment concerns. In *Turner II*, the Supreme Court began its analysis of the cable must-carry requirements by stating: "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 provisions of the First Amendment. Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'seek to communicate messages on a wide variety of topics and in a wide variety of formats.'" *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 187 (1997) ("*Turner II*") (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991), and *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)).

²² *In re Telephone Company – Cable Television Cross-Ownership Rule*, 10 FCC Rcd 7887 ¶ 4 (1995); *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.").

²³ *Notice* at ¶ 17.

²⁴ See *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*") (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968)); *Turner II*, 520 U.S. at 187. See also *Satellite Broadcasting & Communications Association v. FCC*, 275 F.3d 337, 346 (4th Cir. 2001) ("*SBCA*").

important or substantial government interest unrelated to the suppression of free expression, and (2) the incidental restriction on First Amendment freedoms was no greater than is essential to the furtherance of that interest.²⁵ The Commission’s analysis in support of the multicast requirement not only hypothesizes a variety of government interests that are implausible, unproven and *post hoc*, but also underestimates the burdens created by the multicast requirement and fails to show how the burdens are no greater than essential to the furtherance of any important or substantial government interest.

No Important or Substantial Government Interest. First of all, the multicast requirement cannot be said to advance an important or substantial government interest. As an initial matter, Congress did not specify any interest it was advancing, which exposes the Commission’s aggressive interpretation of the statutory requirements to heightened scrutiny. In *Turner I*, the Supreme Court vacated a judgment upholding the cable must carry provisions because it was necessary to further study the evidence on which Congress relied in enacting the provisions to ensure that “Congress has drawn reasonable inferences based on substantial evidence.”²⁶ In *Turner II*, the Court refused to consider rationales “inconsistent with Congress’ stated interests in enacting must carry.”²⁷ Because Congress articulated no such interests here, the Commission should have proceeded with extra caution.²⁸

²⁵ Where, as here, the mandatory carriage requirement is unrelated to the suppression of free expression (*see Order* at ¶ 20), courts must balance the asserted government interest in mandating carriage against the corresponding burden on distributors’ free speech rights. In *Turner II*, Justice Breyer, who cast the critical fifth vote, was explicit about the need to balance the asserted government interest against the burden on free speech. *Turner II*, 520 U.S. at 227 (referring to “important First Amendment interests on both sides of the equation”).

²⁶ *Turner I*, 512 U.S. at 666.

²⁷ *Turner II*, 520 U.S. at 190-191.

²⁸ *See Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001) (finding it impermissible to “supplant the precise interests put forward by the State”).

But even assuming that the First Amendment permits the Commission to articulate government interests after Congress has failed to do so, the ones proffered here have precious little to do with the statute actually enacted by Congress. The Commission asserts first that the government has an interest in the “equitable distribution of satellite service.”²⁹ But this interest would – at most – justify a standard definition carriage requirement. The multicast carriage requirement created by the Commission rather than Congress is plainly *inequitable*, because it imposes burdens upon EchoStar in Alaska and Hawaii not imposed on any MVPD there or anywhere else.

The second alleged government interest advanced by the Commission – providing Alaskans full access to digital communications because many Alaskan communities are small and remote – is plainly the creation of the Commission rather than Congress.³⁰ To begin with, the only “evidence” supporting this rationale comes from materials from another FCC docket that the Commission entered into this docket several weeks before issuing the *Order*.³¹ Certainly no member of Congress ever made such a suggestion. Moreover, this rationale applies only to Alaska, and therefore could not have been Congress’s rationale for enacting a provision that applies to Hawaii as well as Alaska.

This second rationale is *post hoc* as well as implausible. Rural communities across the country have special communications needs,³² and EchoStar is proud of its

²⁹ *Order* at ¶ 19 (asserting that an expansive interpretation of section 338(a)(4) “further[s] a[n] . . . important governmental interest of ensuring Alaska and Hawaii an equitable distribution of satellite service”).

³⁰ *Order* at ¶ 18 (asserting that an expansive interpretation of section 338(a)(4) “ensures that the citizens of Alaska have full access to television programming”).

³¹ *See Order* at ¶ ¶18-19 n.71-79 (referencing materials “entered into MB docket 05-181 on July 26, 2005”).

³² While Alaska is the most rural state in America, it is by no means the only such state. Montana, North Dakota, South Dakota, and Wyoming all have less than ten residents per square mile. This, of course, is much less than the 150 or so residents per square mile in Hawaii. *See U.S. Census*

unique capabilities to address those needs. But it makes no sense to suggest that *multicast signals* have any particular role in providing critical communications to rural Alaskans, much less that such signals are so important that they should be provided even if that means that other services may have to be limited. The First Amendment simply does not permit a statutory interpretation that infringes on the editorial judgment of satellite carriers on the basis of a *post hoc* rationale that does not fit the statute Congress enacted.

Equally important, none of these asserted interests bears any resemblance to the kind of interest the courts have recognized as justifying this kind of restriction. In the *Turner* decisions, the Supreme Court upheld prior must-carry schemes because they advanced the important government interests of: (1) preserving the benefits of free over-the-air local television; (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the market for television programming.³³ Here, non-carriage of a broadcaster's multicast channels would pose no threat to the viability of broadcasters and therefore poses no threat to the benefits of free over-the-air local television. The primary signals of broadcasters in Alaska and Hawaii *will* be carried under the existing must-carry rules. No one has shown that any broadcaster will become non-viable if its second, third or fourth feed are not carried by a satellite carrier. Nor could such a showing reasonably be made. Moreover, multiple channels from the same source would not promote the widespread dissemination of

Bureau Table GCT-PH1. Population, Housing Units, Area, and Density: 2000, *available at* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-ds_name=DEC_2000_SF1_U&-_box_head_nbr=GCT-PH1&-CONTEXT=gct&-mt_name=PEP_2004_EST_GCTT1_US9&-redoLog=false&-geo_id=01000US&-_sse=on&-format=US-9&-_lang=en.

³³ See *Turner I*, 512 U.S. at 662; *Turner II*, 520 U.S. at 189.

information from a *multiplicity* of sources. Indeed, the Commission conceded this much when it refrained from imposing a multicast requirement on cable operators. In that decision, it stated that “we cannot find on the current record that a multicasting requirement is necessary to further either of these goals.”³⁴ Nothing warrants a different result in this proceeding. There can also be no doubt that a multicast requirement on satellite carriers but not cable operators would not promote fair competition in the video programming market.

In fact, the only interest that is served by the multicast requirement is a potential increase in the revenues of the broadcaster. That is neither a proper governmental interest, nor is it important or substantial. And it is certainly not an interest recognized by the Supreme Court as being sufficient to justify restrictions on the First Amendment rights of satellite carriers.

The Burdens of Multicast Carriage Are Substantial and Unjustifiable. Even if the multicast requirement did advance an important government interest (which it does not), the Commission cannot demonstrate how the restrictions on speech imposed by that requirement are no greater than is essential to the furtherance of that interest.

First, superimposing a multicast carriage requirement on top of an already onerous HD carriage requirement could well mean that EchoStar will be unable to provide regional programming that Alaskans and Hawaiians want to watch, as opposed to programming dictated by government fiat. This is a substantial restriction on the editorial rights of satellite carriers under the First Amendment.

³⁴ *Carriage Recon. Order* at ¶ 37 (referring to the first two interests recognized by the Supreme Court in the *Turner* decisions).

Second, a multicast carriage requirement (assuming it can be implemented (see below)) could inflict significant burdens on EchoStar by forcing it to use its spectrum less efficiently. Specifically, multicast carriage would render compression techniques less efficient. MPEG-2 and MPEG-4 compression simply work better on a single audiovisual feed than on multiple feeds. In addition, a multicast requirement may hamper EchoStar's use of "statistical multiplexing," a dynamic process of allocating bandwidth for programming depending on the varying bandwidth demands of different programming. Less efficient compression and statistical multiplexing means that EchoStar can provide consumers with fewer channels of programming using its available spectrum. EchoStar might also have to set aside bandwidth to accommodate multicast programming even if the broadcaster decides not to multicast for part of the day, resulting in an even greater waste of scarce spectrum resources. EchoStar could perhaps re-engineer its systems to overcome some of these problems, but only at substantial capital cost.

In addition, multicast carriage does not simply involve pulling the signal off the air and retransmitting it. The fact that the broadcaster can change the format and content of its multicast signal dynamically during the day creates significant problems for the stability of EchoStar's DBS platform if such signals were to be carried. EchoStar's current systems are simply not designed to handle such dynamic inputs. Multicasting is significantly more complicated than pulling a single feed off the air. A complex interface between each broadcaster and EchoStar would have to be developed (and actively managed) for the delivery of the station's multicast signal to EchoStar and for EchoStar to be able to separate, re-encode and re-multiplex the changing feeds in the multicast signal for retransmission over EchoStar's DBS system.

Moreover, broadcasters may use certain information to manage their multicast signal internally but then strip that information before the signal is broadcast. EchoStar may need that stripped information (and probably additional or different information due to differences in technologies) in order to manage the retransmission of the multicast signal on its system. All of this requires substantial capital expenditures on the part of both EchoStar and the broadcaster to implement.

The Commission has attempted to downplay the burdens faced by satellite carriers. It argued that broadcasters may not transmit many multicast programming streams before the multicast carriage requirement takes effect.³⁵ And it argued that technology may remedy satellite carriers' capacity issues before that point.³⁶ Neither argument comports with reality. First, in designing its satellite system, EchoStar must assume that broadcasters will choose to carry as many programming streams as they can. Satellite operators cannot thereafter simply "borrow" capacity from other spot beams if they find they have underestimated the Alaska/Hawaii broadcasters' output, as the Commission seems to imagine.³⁷ Second, even if satellite operators do improve their technology over the next two years, it is inconceivable that EchoStar will have the capacity to carry all multicast signals in all U.S. markets by that point. In the end, the Commission's expansive reading of section 338(a)(4) would likely lead to a reduction in both the diversity of information sources and the range of programming available on

³⁵ *Order* at ¶ 21 ("The requirement for carriage of multicast and HD signals does not begin until June 2007. We do not know at this time how many programming streams Alaskan and Hawaiian local broadcast stations will be multicasting in 2007. At this point, for example, no station in Alaska or Hawaii is broadcasting more than two streams of programming.").

³⁶ *Order* at ¶ 21 ("Moreover, by the time the multicast and HD carriage requirement would take effect, many of the capacity issues may well be remedied through improvements in satellite technology.").

³⁷ None of EchoStar's current DBS satellites have steerable spot beams.

EchoStar's DBS system. The Commission cannot put its head in the sand and hope that technology will solve the First Amendment problem it has created.

The burdens are not on EchoStar alone. They are on Hawaiian and Alaskan consumers too. These consumers will likely have to forgo more popular regional programming. And the loss of spectrum efficiency on the spot beam may force the use of the lower power general "CONUS" beam to carry some of these channels, leading potentially to larger dishes for households in Alaska and Hawaii.

In sum, the burdens of multicast carriage are substantial, yet no important or substantial government interest has been articulated that would justify imposing such burdens on the First Amendment rights of satellite carriers.

B. Other Constitutional Concerns

The Commission's expansive interpretation of section 338(a)(4) also raises constitutional concerns beyond those implicated by the First Amendment, including non-frivolous Takings Clause³⁸ and Equal Protection arguments.³⁹ In such circumstances, the Commission should be doubly wary of reading too much into the statute.

V. CONCLUSION

By adopting a multicast carriage requirement, the Commission has turned sound statutory construction on its head. The Commission has adopted a strained reading of new section 338(a)(4) that renders it extremely vulnerable to constitutional attack, when the Commission's duty is to adopt a less burdensome alternative reading of the statute.

³⁸ See Cooper & Kirk, P.L.L.C., A Mandatory Multicast Carriage Requirement Would Violate Both the First and Fifth Amendments, http://www.ncta.com/pdf_files/Cooper_Kirk_Analysis_w-bios.pdf

³⁹ For instance, there is arguably no rational basis for imposing a more onerous multicast carriage requirement on satellite while refraining from doing so for cable operators. *Compare Order with Carriage Recon. Order.*

For this reason, EchoStar respectfully urges the Commission to reconsider the *Order* to eliminate the multicast carriage requirement.

Respectfully Submitted,

David K. Moskowitz
Executive Vice President
and General Counsel
ECHOSTAR SATELLITE L.L.C.
9601 South Meridian Boulevard
Englewood, CO 80112
(303) 723-1000

Karen Watson
Ross Lieberman
ECHOSTAR SATELLITE L.L.C.
1233 20th Street, N.W.
Washington, D.C. 20036-2396

/s/ _____
Pantelis Michalopoulos
Chung Hsiang Mah
STEP TOE & JOHNSON LLP
1330 Connecticut Avenue NW
Washington, D.C. 20036-1795
(202) 429-3000

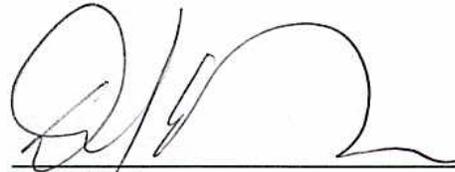
Counsel for EchoStar Satellite L.L.C.

September 30, 2005

DECLARATION OF DAVID BAIR

I, David Bair, declare under penalty of perjury under the laws of the United States of America that I have personal knowledge of the assertions of fact contained in the foregoing "Petition for Reconsideration," filed in MB Docket No. 05-181, and that they are true and correct to the best of my knowledge, information and belief.

Executed on 30 SEP 2005

A handwritten signature in black ink, appearing to read 'David Bair', written over a horizontal line.

David Bair
EchoStar Satellite L.L.C.
9601 South Meridian Boulevard
Englewood, CO 80112