

**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

REPLY

Pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, EchoStar Satellite L.L.C. ("EchoStar") hereby replies to the opposition of the National Association of Broadcasters¹ ("NAB") to EchoStar's petition for partial reconsideration filed in this proceeding.²

In short, the NAB's opposition misses the mark for the following reasons. *First*, the NAB has failed to demonstrate how the language of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA") can bear the meaning ascribed to it by the Commission. The NAB's *Chevron* "deference" argument in support of the Commission's interpretation is inapplicable here. An agency reconsidering its own decision is not in the same position as a reviewing court. Even if *Chevron* were applicable here, "unreasonable" agency interpretations are not owed any deference at all.

¹ See Opposition of the National Association of Broadcasters to Petitions for Reconsideration, filed in MB Docket No. 05-181 (filed Dec. 8, 2005) ("NAB Opposition").

² See Petition for Partial Reconsideration of EchoStar Satellite L.L.C., filed in MB Docket No. 05-181 (filed Sept. 30, 2005) ("EchoStar Petition").

Here, the term “signals” cannot reasonably mean “multicast signals,” particularly in the absence of any reference to such a concept in the statutory language or legislative history and in light of the constitutional infirmities of multicast carriage.

Second, a multicast requirement furthers *no* important or substantial governmental interest. NAB’s focus on refuting the burdens of multicast carriage on satellite carriers means that NAB misses this fundamental threshold point. As EchoStar has submitted, no one has shown that a multicast requirement would further any of the interests recognized as important or substantial by the Supreme Court in the *Turner* cases,³ nor can this reasonably be demonstrated. Moreover, the new “interests” cited by the Commission in the Report and Order to justify multicast carriage are not only *post hoc*, but would not be advanced by a multicast requirement. NAB’s argument that the Commission’s findings in this regard are entitled to deference is unavailing here. *Turner II* makes clear that, if anything, courts will give agencies less deference than Congress when it comes to free speech restrictions and, even then, the Government must present substantial evidence before courts will find that the free speech restrictions are narrowly tailored to advance important or substantial governmental interests.

Finally, the fact that must-carry requirements burden the speech of multichannel video programming distributors (“MVPDs”) is undeniable. In essence, such laws *dictate* that MVPDs “speak” by carrying the messages of local broadcasters. Moreover, NAB’s argument that there is no burden on free speech because “money” is not “speech” is simply wrong. Not only are satellite carriers being compelled by government mandate to

³ See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”).

engage in speech not of their choosing, but they are being forced to incur the substantial costs of engaging in such speech.

For all of these reasons, the Commission should revise its interpretation of Section 210 so as to eliminate the unconstitutional multicast carriage requirement. If the Commission were nevertheless to leave its decision unchanged, the Commission should be careful to do nothing that would detract from its earlier finding that a general multicast carriage requirement throughout the nation presents constitutional problems of the very first order. The Commission should also refrain from deciding here questions, such as what constitutes material degradation of a digital television signal, that have much broader repercussions and do not therefore properly belong in this proceeding.

I. SECTION 210 CANNOT BEAR THE MEANING ASCRIBED TO IT BY THE COMMISSION

The NAB has failed to demonstrate how the language of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”) can bear the meaning ascribed to it by the Commission -- the statute simply does not require multicast carriage, as both EchoStar and DIRECTV have previously submitted.⁴ In a provision that it otherwise found to be full of many ambiguities, the Commission cannot plausibly conclude that Section 210 unambiguously requires multicast carriage simply because the plural “signals” is used in one part of one sentence, especially when (1) the same word in a different part of the sentence cannot have that meaning,⁵ and (2) what is unambiguous is that nothing in the statutory text or legislative history even mentions the concept of

⁴ See EchoStar Petition at 4-6; Petition for Partial Reconsideration, *filed on behalf of DIRECTV, Inc.*, in MB Docket No. 05-181, at 6-9 (filed September 30, 2005) (“DIRECTV Petition”).

⁵ See EchoStar Petition at 4-5.

multicast carriage. Even setting aside the statutory silence, this would not be a reasonable reading of the statutory language, particularly in light of the constitutional infirmities of a multicast carriage requirement. As the Supreme Court has instructed: “a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”⁶ Here, there are at least “grave doubts” about the constitutionality of the Commission’s interpretation, as explained below.

In addition, the NAB’s “deference” argument in support of the Commission’s initial interpretation is inapplicable here. NAB asserts that “if an implementing agency’s construction of a statute is permissible, it is entitled to deference”⁷ (citing *Chevron*).⁸ This makes no sense. While an agency’s interpretation of an ambiguous statute under *Chevron* is entitled to deference *from a reviewing court*, an agency reconsidering its own decision is not in the same position as the court.⁹

⁶ *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (citation omitted). See also *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (it must be assumed that Congress “legislates in light of constitutional limitations”); *Edward J. DeBarolo Corp. v. Florida Coast Bldg. & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Alemendarez-Torres v. U.S.*, 523 U.S. 224, 237-38 (1998).

⁷ Opposition at 3.

⁸ *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”).

⁹ Judicial deference to agency interpretations under *Chevron* is based on the rationale that Congress intended the agency (and not the courts) to “fill in the gaps” in the statute. *Id.* at 844 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”). This rationale is wholly inapplicable when an agency is reconsidering its own decision.

II. A MULTICAST CARRIAGE REQUIREMENT DOES NOT FURTHER ANY IMPORTANT OR SUBSTANTIAL GOVERNMENTAL INTEREST

Contrary to NAB’s contention, EchoStar’s petition for reconsideration does *not* “rely primarily on the alleged burdens that the required carriage of multicast streams imposes on them and their First Amendment Rights.”¹⁰ While the burdens of multicast carriage on satellite carriers’ free speech rights are undeniable (as explained below), the more fundamental point is that NAB seems to have missed the threshold prong of the *O’Brien* test:¹¹ whether the speech restriction furthers an important or substantial governmental interest. A multicast carriage requirement does not, even for the two noncontiguous States.

NAB’s opposition recites the governmental interests identified as important or substantial in the *Turner* decisions,¹² but (a) fails to identify the concrete threat to (i) the benefits of free, over-the-air local broadcast television, (ii) the widespread dissemination of information from a multiplicity of sources, or (iii) fair competition in the market for television programming, as the Supreme Court demanded in those cases; and (b) does not explain how any of these interests are in fact furthered by the Commission’s interpretation of Section 210.¹³ As EchoStar has pointed out,¹⁴ no one has shown that

¹⁰ NAB Opposition at 9.

¹¹ *United States v. O’Brien*, 391 U.S. 367 (1968).

¹² *Turner I*, 512 U.S. at 662 (“Congress declared that the must-carry provisions serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”).

¹³ *Id.* at 664 (“When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited

any broadcaster will become non-viable if its second, third or fourth feeds 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 information from a multiplicity of *sources*. Indeed, the Commission conceded this much when it refrained from imposing a multicast requirement in the contiguous 48 states.¹⁵ 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.

NAB offers no substantive response to this argument. Indeed, the Commission itself eschews reliance on the interests identified by the *Turner* decisions and instead cites two new “interests” to justify a multicast requirement on satellite carriers -- ensuring full access to television programming in Alaska and equitable distribution of satellite service. As EchoStar has shown, however, not only are these new rationales *post hoc*, but a multicast requirement for Alaska and Hawaii would further neither goal.¹⁶

NAB’s response is to argue that the Commission’s articulation of governmental interests in this regard should be accorded deference.¹⁷ While the *Turner* cases instruct

harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”).

¹⁴ EchoStar Petition at 10-11.

¹⁵ *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, at ¶ 37 (2005) (“*Carriage Recon. Order*”) (“we cannot find on the current record that a multicasting requirement is necessary to further either of these goals.”).

¹⁶ EchoStar Petition at 9-10.

¹⁷ NAB Opposition at 13.

that some deference must be accorded the predictive judgments of *Congress* in First Amendment cases, they say little about the deference that should be accorded agencies other than to note that Congress deserves greater deference.¹⁸ And even with respect to the predictive judgments of Congress, the Supreme Court in *Turner I* has stressed that “deference does not mean . . . that they are insulated from meaningful judicial review altogether.”¹⁹ Rather, the court described its role as “to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.”²⁰ The Government “must do more than simply ‘posit the existence o the disease sought to be cured’” and “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”²¹ Indeed, the Supreme Court in *Turner I* remanded the matter for further fact-finding by the District Court precisely because of the “paucity of evidence indicating that broadcast television is in jeopardy.”²² The Commission’s interpretation of Section 210 to require multicast carriage would be subject to no less searching scrutiny; in fact, *Turner II* makes clear that the courts would accord *less* deference to agency findings than Congressional findings.²³

¹⁸ See *Turner II*, 520 U.S. at 195 (“In reviewing the constitutionality of a statute, ‘courts must accord substantial deference to the predictive judgments of Congress.’ As noted in the first appeal, substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency.”).

¹⁹ *Turner I*, 512 U.S. at 666.

²⁰ *Id.*

²¹ *Id.* at 664.

²² *Id.* at 667.

²³ *Turner II* at 195-96.

In light of this, the Commission should proceed as cautiously as it did when it rejected multicast carriage for the lower 48 states, and refrain from adopting an interpretation of Section 210 of SHVERA that would put it in constitutional jeopardy.²⁴ If, however, the Commission were nevertheless to leave its decision unchanged, it should be careful to do nothing that would detract from its earlier finding that a general multicast carriage requirement throughout the nation presents constitutional problems of the very first order. The Commission should also refrain from deciding here questions, such as what constitutes material degradation of a digital television signal,²⁵ that have much broader repercussions and do not therefore properly belong in this proceeding.

III. MANDATORY CARRIAGE REQUIREMENTS NECESSARILY BURDEN THE FREE SPEECH RIGHTS OF SATELLITE CARRIERS

NAB spends the major part of its opposition attempting to show that the burdens of multicast carriage on satellite carriers are insubstantial. However, the fact that must-carry requirements burden the speech of multichannel video programming distributors (“MVPDs”) is undeniable. In essence, such laws *dictate* that MVPDs “speak” by carrying the messages of local broadcasters. Even though must-carry schemes have been characterized by the Supreme Court as a content-neutral form of speech regulation, it is

²⁴ *Carriage Recon. Order*, 20 FCC Rcd at ¶¶ 36-40; *id.* at ¶ 41 (“We thus find it a reasonable construction of the must-carry provisions of the Act, on the record before us and in light of the Supreme Court’s precedent [citing, *inter alia*, *Turner I* and *Turner II*] not to require cable operators to designate capacity or ‘shelf space’ for multicasting programming streams at the expense of other competing interests.”).

²⁵ EchoStar has made ex parte submissions in this regard in other Commission proceedings. *See, e.g.*, Letter from Pantelis Michalopoulos, Counsel for EchoStar to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket Nos. 98-120, 00-96, 00-2, 03-15 (filed Jan. 31, 2005).

still speech regulation. Moreover, *Turner* makes clear that the Government bears the onus of showing that the free speech restrictions in question are justified:

[W]e must ask first whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry. Assuming an affirmative answer to the foregoing question, the Government still bears the burden of showing that the remedy it has adopted does not “burden substantially more than is necessary to further the government’s legitimate interests.”²⁶

Here, the Commission has failed to establish either. As EchoStar has submitted, the burdens of multicast carriage on satellite operators are substantial -- not just in terms of the spectrum inefficiencies it imposes on satellite carriers, but also in terms of the substantial reengineering of EchoStar’s systems that would be necessary to accommodate multicast feeds. Thus, NAB’s argument that multicast carriage imposes no burden on free speech because “money” is not “speech” is simply wrong.²⁷ Not only are satellite carriers being compelled by government mandate to engage in speech not of their choosing, but they are being forced to incur the substantial costs of engaging in such speech.²⁸

²⁶ *Turner I*, 512 U.S. at 664-65.

²⁷ NAB Opposition at 11.

²⁸ As the parties submissions indicate, a multicast carriage requirement also raises other non-frivolous constitutional concerns, including under the Takings Clause and Equal Protection Clause. *See* EchoStar Petition at 14; DIRECTV Petition at 15-16; NAB Opposition at 14-17. For instance, as the NAB itself acknowledges, “regulatory takings” (as well as physical occupations of property) can be unconstitutional. NAB Opposition at 15-17; *see Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Whether multicast carriage is unconstitutional as either kind of taking will no doubt be explored on judicial review. These additional concerns only compound the “grave doubts” about the constitutionality of the Commission’s multicast requirement under the First Amendment. As the Supreme Court has instructed, such interpretations should be avoided. *See supra* note 6.

EchoStar will not fully address the specific objections that NAB raises to DIRECTV's showing of burden, but will make two points. First, the idea that multicast or high definition carriage in Alaska and Hawaii requires only a negligible portion of the spot beam capacity directed to these States appears fantastical in any case and is certainly untrue in the case of EchoStar. Second, NAB takes out of context statements made by DIRECTV in 2002 in connection with the then proposed EchoStar-DIRECTV merger to support the broadcaster's apparent claim that any bandwidth limitations, no matter how severe, can be overcome with the passage of all-healing time. The NAB omits, of course, statements made by the applicants that have been borne out to date -- the key prediction that, without the merger, it would not be feasible for either company standing alone to provide analog local stations to all 210 designated market areas.

IV. CONCLUSION

In sum, for the reasons stated above and in EchoStar's petition for reconsideration, the Commission should reconsider its interpretation of Section 210 of SHVERA to eliminate the multicast 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

/s/ _____
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.

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