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July 19, 2002

BY HAND DELIVERY

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JUL 19 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

REDACTED -- FOR PUBLIC INSPECTION

Re: Consolidated Application of Echostar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation for Authority to Transfer Control, CS Docket No. 01-348

Dear Ms. Dortch:

Echostar Communications Corporation ("EchoStar") hereby submits to the Commission certain additional documents that were collected at the request of the Department of Justice ("DOJ") subsequent to the first "sweep" of document production and that are responsive to portions of the Commission's February 4, 2002 Initial Information and Document Request (the "Request") that call for the production of documents. The documents being produced to the Commission are identified by specification (as set forth in the Request) and custodian (where applicable) on Attachment A.

Attachment A to this cover letter is being provided to the Commission pursuant to the Protective Order issued on January 9, 2002. *See EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation*, DA 02-27 (rel. Jan. 9, 2002). The supplemental documents being provided to the Commission with this cover letter have been classified as being available for public inspection. Pursuant to the Protective Order, EchoStar will also be filing two copies of a redacted public version of this cover letter and Attachment A. In addition, enclosed please find an additional copy of this cover letter to be date-stamped and returned with our messenger.

No. of Copies rec'd 0
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In the event you have questions regarding the foregoing, we are available to discuss it with you at your convenience.

Sincerely,

Pantelis Michalopoulos /MAP

Pantelis Michalopoulos
Counsel for EchoStar Communications Corporation

cc: Marcia Glauberman
Linda Senecal

Attachment A
to July 19, 2002 Submission of
EchoStar Communications Corporation

FCC REQUEST	FCC DOCUMENT NUMBER	CUSTODIAN
I.M.	ES-FCC031235 - ES-FCC031299	
I.M.	ES-FCC031300 - ES-FCC031311	
XV.A.	ES-FCC031557 - ES-FCC031577	

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JUL 19 2002
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION OF AMERICA,

ECHOSTAR COMMUNICATIONS CORPORATION and DISH, LTD., d/b/a "The Dish Network,"

DIRECTV ENTERPRISES, INC., DIRECTV OPERATIONS, INC., and DIRECTV, INC.,

Plaintiffs,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and WILLIAM E. KENNARD, Chairman, and SUSAN NESS, HAROLD FURCHTGOTT-ROTH, MICHAEL K. POWELL and GLORIA TRISTANI, Commissioners in their official capacities, Washington, DC 20554,

COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS, and JAMES H. BILLINGTON, Librarian of Congress, and MARY PETERS, Register of Copyrights, in their official capacities,

and

UNITED STATES OF AMERICA,

Defendants.

CIVIL NUMBER

00-1571-A

MOTIONS HEARING

Friday, February 9, 2001

BEFORE: THE HONORABLE GERALD BRUCE LEE
United States District Judge

ES 039 10451
ES-FCC031235

APPEARANCES:

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(703)549-5322

INDEX

(Taken under advisement)

(Hearing recessed)

PROCEEDINGS

(Court called to order at 11:30 a.m.)

THE COURT: Satellite Broadcasting versus Federal Communications Division, 00-1571-A.

MR. CYNKAR: Good morning, your Honor. Robert Cynkar for the plaintiffs. With me are my partners, Mr. Charles Cooper, Mr. Andrew McBride. Mr. Cooper will be speaking for us today. His admission pro hac vice was completed last time we were here and all the paperwork is completed.

THE COURT: Thank you.

MS. MCCLENDON: Good morning, your Honor. Assistant United States Attorney Leslie McClendon for the defendant, on behalf of the federal defendants in this case.

Joseph Lobue from the Defendant of Justice, who has previously been admitted pro hac vice, will be handling the matter. Also with him is Hannah Stires, also with the Department of Justice. She has also been previously admitted.

And I would like to hand up to the Court for consideration a motion to move Theodore Hurt into the Court for purposes of this case, pro hac vice. The form has previously been provided to the Clerk's Office, and they recommended that we provide it to you today.

THE COURT: All right. Motion is granted.

MS. PODOLSKY: Good morning, your Honor. Susan Podolsky with Jenner and Block. With me are Don Verrilli and Nori Miller. We represent the commercial intervenor defendants. Both Ms. Miller and Mr. Verrilli have been admitted pro hac vice, Mr. Verrilli will be presenting arguments on our behalf this morning.

THE COURT: Good morning.

MR. WASHINGTON: Good morning, your Honor. George Washington of Covington and Burling on behalf of the Public Broadcasters Intervenors. With me today is my colleague, Mark Lynch, who will be arguing on the matter. He has been admitted pro hac vice.

THE COURT: Good morning, everyone.

Let's hear from the federal defendants first. Tell us your name again, please.

ARGUMENT BY THE FEDERAL DEFENDANTS

MR. LOBUE: Good morning, your Honor. Joseph W. Lobue. I'm an attorney with the Department of Justice, and I represent the governmental defendants in this action.

This case involves the Satellite Home Viewer Improvement Act, which creates a new license available to satellite carriers, which allows them to retransmit the local broadcasts of television stations.

The statute is available -- the statutory

license is available only in circumstances where they carry all of the local stations in a given market area. It does not impose any restrictions on satellite carriers. It does not require them to carry any channel. It does not prohibit them from carrying any channel. They can do anything that they can do before the statute was passed.

What it does do, is gives them a new option, which they can choose to avail themselves of, in which they can use a federal license to carry all the television stations in a given market area.

Plaintiffs are dissatisfied with the scope of the benefit that Congress has given them through this statute, and they're here today asking the Court to rewrite that package that Congress has created.

They want to rewrite it in a manner such that they get all of the benefits of that license, but apply it in circumstances where they're not carrying all local channels. By rewriting it in that fashion, they would not only extend the benefits of the license in circumstances where Congress didn't intend to extend it, they would undermine the very purposes of the statute, which were to create a license which did not create a competitive advantage for anyone.

Neither the First Amendment, the Fifth Amendment, or the Copyright Clause permits the type of

relief they're seeking to rewrite this benefit created by Congress.

THE COURT: Let me ask you this. Several weeks ago we were here on a summary judgment motion, and all the defendants and intervenors said you needed time for discovery.

Now I'm here on a motion to dismiss that looks very much like you not only asked on your motion to dismiss, it seems like the same issues are being presented here. And so we don't need discovery; is that right?

MR. LOBUE: Well, the problem is -- that we have here, your Honor, is that the plaintiffs' claims have evolved over the course of this case. The motion for summary judgment that you were presented with two weeks before our answer was due raised not only a set of legal issues, but a set of factual issues --

THE COURT: With technology limitations.

MR. LOBUE: Yes, yes. We were put in a position where we either had to concede those factual issues or come up with proof that they were untrue, which we could not do without the necessary discovery.

We maintained at that time that we intended to file a motion to dismiss. There was a scheduling order entered in this case on November 6th, in which the defendants announced that they were going to file the

motion to dismiss. We reiterated that again in our reply brief on the 56(f) motions.

THE COURT: All right.

MR. LOBUE: We had legal defenses to these claims. We're prepared to assume all of their channel capacity allegations are true for purposes of this motion. What we cannot do is put in affidavits that show that those allegations are incorrect.

THE COURT: All right.

Well, it seems in reading both sides' briefs that they're not making it as an applied challenge here. This is a facial challenge to the constitutionality of the statute. Do you agree with that?

MR. LOBUE: That's the way they currently characterize it, yes, your Honor.

THE COURT: Help me with your view of the, first of all, the copyright law issues. Does Congress have the power to grant a statutory license to categories of broadcasters? Can Congress do that under the Copyright Clause?

MR. LOBUE: Congress, under the Copyright Clause, is under Sony, authorized to define the scope of the limited monopoly they can create. They can create exceptions where it's in the national interest to do so. Sony emphasizes that. They certainly can create

exceptions.

Whereas here, it promotes the broad public availability of information. That is one of the central purposes of the copyright clause.

Let me add that even if Congress did not have that authority under the Copyright Clause, it most certainly does under the Commerce Clause. This is a channel of interstate commerce.

It doesn't matter whether Congress has the authority under the Copyright Clause or it has the authority under the Commerce Clause. Plaintiffs do not even dispute that this is a channel of interstate commerce. The Supreme Court has so held.

THE COURT: Well, I think the part of their argument is that -- I think that they refer to the copyright issue here as an obstacle to their discretion, editorial judgment about which channels to select for broadcast, and is there a right to retransmit the signals of these local stations in the absence of this statutory license.

MR. LOBUE: No, there certainly is not, and certainly not under the First Amendment. The distinction drawn in the case law is that the First Amendment applies to an -- a company or individual who is trying to get their message out, get their ideas across. It does not allow one

to appropriate the expression of another.

It certainly does not give one the right to utilize the expression as opposed to the ideas of another. Plaintiffs are free to communicate in whatever fashion they see fit.

What they don't have a right to do, under the First Amendment, is to appropriate for themselves the copyrighted works of others.

Now, this is not to say that the First Amendment is not applicable in this context. It simply doesn't give them a right which the Copyright Laws violate. That is clear from the case law.

THE COURT: Let's go to the First Amendment question. I think one of the critical questions that has to be answered is what standard of review to apply to the statute. And I guess before we begin that, the question is: Does the statute on its face implicate the First Amendment?

MR. LOBUE: Our view is that it does not. And the reason -- the reason that is, is that this statute is voluntary. Whatever obligations it has are voluntarily assumed by the plaintiffs. They're not required to accept the benefits of this license, and they're not required to carry any channel. They choose to do that as a vehicle for getting the benefit of this license.

The reason we have this carriage obligation, the reason Congress imposed this carriage obligation was because it was trying to level the playing field as far as the Federal Government statutory schemes are concerned. It was trying to establish a copyright license scheme which didn't create an advantage for anyone.

As it has stood for the past 25 years, the cable industry had a license to retransmit broadcasts. The satellite industry did not. Congress wanted to rectify that disparity. But it wanted to do so in a way that did not create a different problem, that is, a problem for a segment of the broadcast industry, if it were to create a new licensing scheme that permitted satellite companies to cherry pick.

And I would refer the Court to the complaint, Paragraph 47 of plaintiff's complaint. They carry right now Channels 4, 5, 7 and 9. They do not carry the rest of the channels.

So, the situation that Congress was faced with, if it had no licensing scheme at all, people would be likely to go out and get an antenna to get all the channels, including Channels 4, 5, 7 and 9.

If it created this partial license, as plaintiff suggests, which allows Four, Five, Seven and Nine to be carried, but not the rest, the licensing scheme

itself would put the remaining channels at a disadvantage. The Federal Government would be intervening in the marketplace to the disadvantage of remaining channels.

THE COURT: What's the value of having all these channels, as it relates to the government's interest here?

What is the value of having multiple local channels broadcasting, available on satellite, anyway?

MR. LOBUE: Well, I think there two different aspects of this. One, the Federal Government clearly has a right, recognizing Turner, of fostering and promoting competition and not creating precisely the type of unfair advantage I just described, advantaging one group of broadcasters over the other through the federal licensing scheme.

Secondly, the government, as recognized in Turner, has an interest in assuring that there is a broad number of diverse voices out there available to the public, that the public has access not just to the three networks, but to a variety of different voices with a variety of different messages.

In Turner, the Supreme Court recognized that that interest is not only an important governmental interest, but it's squarely what the First Amendment is trying to accomplish.

THE COURT: Well, in this case, plaintiffs contend that the First Amendment is implicated because the statute is not content neutral on its face, and it prefers one speaker over another.

And as I understand their argument, they're saying that because it requires the satellite broadcaster to carry local channels it would not prefer to carry, that is, that Congress is controlling the message and preferring, as a speaker, all of the local stations over stations that they might exercise their choice about.

THE COURT: Where -- do you see in the statute where Congress is directing the message? Is Congress directing the message in this statute anywhere?

MR. LOBUE: They're clearly not directing any messages. The requirements come into play when two things happen. First, there is geographic limitation to the license. If the plaintiffs choose to carry a particular channel in a particular geographic area, it does not matter what the content of the character is.

THE COURT: So, they're not forced to carry local stations nationwide. They have to decide on a locality before, and then they have to elect to seek this copyright license?

MR. LOBUE: That's absolutely right. That's a distinction from the "cable must carry" provisions at

issue in Turner, where it was a mandatory requirement that they carry every channel, every local channel everywhere. There is no such similar requirement here. It's a market by market license, with market by market carriage obligations.

It applies only in circumstances where the license itself may create an imbalance among broadcasters, such that the licensing scheme that has Channels 4, 5, 7 and 9 gets the benefit of satellite carriage and the extra advertising revenues from that. The rest of them are left out in the cold.

Why? Because the Federal Government created a licensing scheme. That was what Congress tried to avoid, that very situation.

THE COURT: Well, in terms of the standard of review here, if you say the strict scrutiny would not apply, then how should the Court assess the issue, and under what standards of review?

There is some question about whether or not Red Lion applies. I don't know if we have to reach that, but what is your view about the appropriate standard of review here?

MR. LOBUE: Well, we agree with the Court. You do not need to reach the question of whether Red Lion, which allows content based regulation, applies here,

because this is not a content based regulation. This is a content neutral regulation.

So, even under the standards applied in the Turner case, the intermediate O'Brien standard of review, this statute passes muster, assuming that the First Amendment applies in the first place.

Number one, it is clearly content neutral. Content based statute is one that distinguishes favored speech from disfavored speech, based upon the ideas expressed.

There is nothing in the statute that does that. It doesn't matter what programming a particular channel carries. It just matters where it's located, number one.

And number two, it matters whether the plaintiffs have decided to invoke the benefits of this license. Those are the only criteria which kick the carriage obligations into effect.

Secondly, where you have a content neutral regulation, the question becomes whether the government has identified important governmental interest unrelated to speech, whether this statute furthers those interests, and whether it does not burden substantially more speech than is necessary.

We contend that each of these requirements,

just from looking at the statutory scheme itself, are satisfied. The statute focuses on the statutory scheme. It doesn't try to level the playing field out in the industry. It doesn't try to assure that Channel 20 has the same exact competitive advantage as Channel 4. What it does do is try to make sure that the federal licensing scheme doesn't give somebody an advantage.

To determine whether the statute accomplishes that purpose, you only need look at the federal statutory licensing scheme itself. Looking at this scheme, the license applies on a market by market basis. It applies only when plaintiffs choose to invoke it. And when plaintiffs do choose to invoke it, it assures that either all the broadcasters are affected equally, or none of them are affected.

THE COURT: Well, that's part of their trouble with the statute, is that it is, in their view, a condition that's being applied to this license that is unconstitutional.

They're saying that it impinges upon their editorial judgment about which programming to broadcast, because it forces them to choose from either participating or not.

And the way you describe it from the standpoint of the government's point of view, it is

beneficial to seek this license, because you'll be able to broadcast more programs, which theoretically ought to make it more attractive to your viewer.

But there are some costs associated with that, and that leads to their concern that Congress here is burdening what would otherwise be a very attractive license with an unconstitutional condition.

How about that?

MR. LOBUE: Well, let me say, number one, we're sort of flip-flopping. You can find that our voluntariness argument is wrong and get to the O'Brien standards and still uphold the statute. The unconstitutional conditions argument that they've raised goes to whether the statute even implicates the First Amendment.

Secondly, the cases they rely upon do not apply here. The unconstitutional condition cases are cases where Congress has prevented the recipient from getting their message across outside the scope of the program that they're funding.

In Russ, for example, where the government was funding a specific program which Congress did not want to include counseling on abortion in that program, okay? That restricted their speech, in a sense. During the day, when they were working on this program, when they were

working on this particular funded project, they could not counsel people concerning abortion.

That, however, was not an unconstitutional condition. The reason the Court found was because when they were acting outside the scope of the program, when they were not acting under the auspices of the government's program, they were free to convey what message they wished to about abortion.

The same is true here. Whatever editorial discretion obligations they take on, they take on only when they're acting under the auspices of this license. They are free, outside the scope of this license, to exercise their editorial discretion in a completely unfettered fashion.

Secondly, there is no absolute right to editorial discretion. Turner established that. In Turner, the same arguments were made, the same arguments based upon Miami Herald were made, which is a newspaper.

This is not a newspaper. Newspapers have a situation, anybody can go out and speak. Anybody can go out and publish. We're dealing here with satellite frequencies. There are only 96 of them up there that can transmit high-powered DBS to the entire United States. There are only 96. We've got to regulate them. You can't create a new set of satellite frequencies. That's all we

have.

So, the Supreme Court has held over and over and over again, in Turner, in Red Lion, in Pacifica, they've held over and over and over again, you cannot take principles developed in connection with a newspaper medium and apply it in this totally different forum, this totally different medium.

And that's what the plaintiffs are trying to do here. That's what the Court rejected in Turner. It rejected it for that reason. It rejected it because the requirement in Turner was content neutral, as it is here, and it rejected it because nobody's going to get confused about whose message a TV show is. It's not the satellite carriers. Everybody knows that.

The Supreme Court found the same thing with the cable system. Everybody knows that the programs that they carry off of local television are those of the local television stations. They're not the satellite carriers. So the cable companies, the Turner Court found, are not required to alter their speech to respond, as they were in Miami Herald.

The same is true here. The satellite carriers are not required to alter their own speech to respond. So, those principles, that sort of absolute notion of editorial discretion, has no application

whatsoever to this case.

THE COURT: All right. I think that their argument about editorial judgment is, at best, an argument that they have the right to determine which channels they will select, and at issue, they have a right to decide what content they would put on their own individual channels, and that Congress, by granting statutory license, favors these local broadcasters, that they would not otherwise carry, more than others.

Let me ask you this: What is your view on the so-called taking?

Is there a taking here under the Fifth Amendment?

What property is being taken from the plaintiffs here?

MR. LOBUE: I -- the property that is being taken from the plaintiffs here is somebody else's copyrighted material. We're taking away their right to use somebody else's property. That's it.

There is no -- they can use their property today, their satellites, their equipment, for the same thing they could use it for two years ago. They can do whatever they want with it, subject to not intruding on somebody else's right. This statute does not take anything away from these satellite carriers.

THE COURT: Well, the statute is not in effect yet, as it relates to this statutory license; is that right?

MR. LOBUE: Even when it becomes effective, they can voluntarily choose to accept the benefits of that license, or they can ignore it.

THE COURT: So, what do they do now with respect to local stations? Do they have to negotiate --

MR. LOBUE: Right now they have an interim license which permits them to cherry pick Channels 4, 7 and 9, and they have no carriage obligation. The carriage obligation kicks in January 1st, 2002.

THE COURT: All right. Both sides have briefed this fairly extensively. I think I have covered the questions that I had.

If you would concede the podium to the intervenors, I'll do this all at one time. I'll give Mr. Cooper ample time to respond. Let me hear from the other side first, and then I'll give you ample time to respond.

MR. VERRILLI: Good morning, your Honor.

On behalf of the commercial broadcasters, what I will try to do this morning --

THE COURT: Tell me your name again.

MR. VERRILLI: Don Verrilli. I'm sorry, your

Honor.

THE COURT: My court reporter has to have it, too. Okay.

MR. VERRILLI: On behalf of the commercial broadcasters, I will try simply to provide further focused responses to the specific questions that your Honor has addressed to our side.

With respect to the need for discovery, we did say on the very first page of our Rule 56(f) motion that the problem that we faced was twofold: first, that the plaintiffs's summary judgment motion had preceded the date on which we would have filed the motion to dismiss and, therefore, basically cut off our right to do so. And we thought that was wrong.

And then we made a second argument, which was that in any event -- and additionally, the plaintiffs' claim could not proceed unless we had a discovery opportunity to test their claims.

But that -- we tried to be very clear about that in our papers, anticipating that we might face an argument such as the one that the plaintiffs made here today, and we said very clearly on the very first page of our papers that we believe this case ought to be dismissed on the pleadings, because their construction of the statute was not a fair one, and that this -- and that the SHVIA

statute did not impose any obligation that triggered First Amendment review of all.

I hope that clarifies that point for your Honor.

THE COURT: But I think we agree that this is not an applied challenge, this is a facial challenge to the statute.

MR. VERRILLI: We are in complete agreement with your Honor's assessment about that.

I would like now to focus on your Honor's question about what the appropriate standard of review is.

THE COURT: Please.

MR. VERRILLI: The appropriate standard of review is rational basis. The Supreme Court decisions that make that clear are Russ against Sullivan, and Finley. We have cited both of those in our papers.

I would like, if I could, to direct the Court's attention to the specific principle in Finley and Russ that we believe controls that question of standard of review, and it is -- here is what the Supreme Court said:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consummate with legislative policy.

In Finley, that's 524 U.S. at 588; and Russ, that's 500 U.S. at 193.

That's what the case is all about. The basic difference, the SHVIA statute does not interfere with any constitutionally protected activity. It is a choice that is there for the plaintiffs to accept or reject.

They have exactly the same ability now as they did before this statute was passed, to decide what to carry and to decide what not to carry, under the normal rules of the marketplace. They are no worse off with the SHVIA statute than they were without it.

And there is, I think, a very straightforward way to prove that, your Honor. In our motion to dismiss we made an argument, which I do not believe the plaintiffs responded to in their paper, and it's this: If the plaintiffs were to succeed on their constitutional argument and the SHVIA statute were invalidated, that would wipe out the license that gives them the ability to carry any local broadcaster for free.

So, there, the -- if they win, they lose. If they win, they have no right to carry anyone for free. So, there is no sense in which they can be better off by invalidating the statute.

And the flip side of that coin is there is no sense in which they are worse off by the existence of the

statute. It's as simple as that. That proves why the First Amendment isn't even implicated here, because there is no interference with their activity.

The only --

THE COURT: What is your view of their argument concerning editorial judgment?

Is the selection of channels an act of exercise of editorial judgment?

They're saying, like a newspaper editor decides which articles to run, that clearly is activity that cannot be regulated by the government. The government can't tell the newspaper what to put on the front page.

And what's being done here is the government is telling these satellite broadcasters what to put on their array of channels, on their menu, that they're privileged to decide to include or not include, and that the advantage being granted here is burdened by this obligation to carry the Bowling Channel or the Golf Channel, and they may not want to carry it.

MR. VERRILLI: That's the nub of the case at the motion to dismiss stage, and here is our answer: that that is simply a mischaracterization of this statute.

If the plaintiffs -- if a satellite operator goes out into the marketplace and negotiates a deal with Channel 7 and pays Channel 7 for the right to carry it on

the satellite, if they do that, there is no obligation to carry any other channel that comes with it. They're free to do that.

There is no interference with their editorial discretion. They can choose whatever they want. They can choose to not carry whatever they want.

What -- the trigger here is when they decide that they want to carry Channel 7 for free, and without getting permission, it's only when they want Channel 7 for free, that there are any other carriage requirements. It's the difference between taking it for free and getting it in the marketplace.

THE COURT: Is the Copyright Act an obstacle to their exercise of judgment, or is it the law which grants -- which affords writers and others the right to protect their work and to require that individuals who want to exploit it, pay for it?

MR. VERRILLI: Your Honor has said it perfectly. It is the latter. It is a right that is both a property right, protecting the interest of those who engage in creative expression, and it's an incentive to create more expression, because one can get paid for it, and it can't just be taken by somebody else for free.

Now, what Congress has done here is make an exception to that general rule that benefits the

plaintiffs. It benefits them. Congress said, "Yes, you can take something for free that under any other circumstance you would have to pay for, and that there is no conceivable First Amendment right to take for free."

That's what Congress has said here to them. But it has said, "You've got to take it on the package terms, because otherwise you're going to inflict a very serious harm to a policy that is very important to the structure of the national telecommunications, national communications policy. If you can cherry pick, then you will harm the stations not carried, and that will principally hurt those citizens."

And if I could actually, rather than put it in my own words, if I could just put it in the Congress' words, from the conference report -- and this is at page 101:

> Providing the proposed license on a market by market basis meets both goals, competition and communications policy, by preventing satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas.

Now, in the Senate bill that went to

conference and became this law, there was a Section 3 which explained the same exact policy. And here is what Section 3 says:

> The purpose of this Act is to promote competition in the provision of multichannel video services, while protecting the availability of free local over-the-air broadcasting, particularly for the 22 percent of American television households that do not subscribe to any multichannel video programming service.

THE COURT: Is that similar to what was said in Turner about the reason for the "must carry" requirement?

MR. VERRILLI: Yes, your Honor. But in fact, what this statute seeks to do is to make sure that the objective of that "must carry" statute in Turner is not eroded as the satellite industry encroaches on the cable industry's customers and takes more of them away.

THE COURT: How is this case different from Turner, then?

MR. VERRILLI: It's easier than Turner. It's way easier than Turner, because that's the Alice in Wonderland quality of the plaintiffs' case, your Honor. In Turner it was a mandatory obligation on cable operators: "You must carry all these broadcast stations. You must."

The Supreme Court rejected every argument the plaintiff made there, says Tornillo doesn't apply. The speaker preference argument that your Honor identified earlier doesn't apply. None of those arguments apply. But because this is a mandatory obligation, we give it intermediate First Amendment scrutiny and uphold it.

Here, what the Congress has done is said, "Well, we are not going to make it mandatory. We are going to structure this so it's an option. We are going to encourage you to do it. Sure, we hope you do, but it's your call."

It's the plaintiff's call whether they do this. It is something that is -- it was -- Turner was mandatory and triggered First Amendment review. This is optional, and it does not.

The idea that this would be subject to stricter scrutiny than the statute in Turner turns the world upside down. That's our basic point with respect to that.

Then, if I might make one point on the Unconstitutional Condition Doctrine which your Honor raised, which is important here?

THE COURT: Yes.

MR. VERRILLI: The law, we think, is clear. Again, it's Russ, it's the Regan case, it's a number of

other cases, that government can offer a benefit and can impose conditions on the benefit, so long as the conditions are defining the scope of the benefit, to make sure that it furthers the policy Congress wants to further.

THE COURT: Well, can Congress punish a group of individuals by a statute it creates in conditioning a grant of government privileges?

MR. VERRILLI: No, your Honor.

THE COURT: Is that what's being done here?

MR. VERRILLI: It's not even close. And the idea here, your Honor, if I might draw on something that may -- I'm sure is familiar to your Honor, the Canons of Judicial Ethics prevent federal judges from holding positions in political parties. They prevent federal judges from engaging in public political activities.

THE COURT: Thankfully.

MR. VERRILLI: Well, Congress couldn't pass a statute depriving citizens of those rights. But it can, there can be laws that say if you're going to participate in a particular federal function of great importance, these restrictions are necessary for that function to be carried out properly.

This is the exact analogy here. What Congress has said is:

We want to create a license situation

here, a license opportunity, but we don't want to do it in a way that destroys an important federal policy and harms the 22 percent of households that don't have any cable or satellite paid programming. So, we are going to structure the benefit with conditions that define its scope, and insure that it is only used to serve the policy we want it to serve.

THE COURT: All right.

MR. VERRILLI: That means it's not an unconstitutional condition.

THE COURT: I don't think I need you to address the taking argument.

MR. VERRILLI: Thank you, your Honor.

THE COURT: Thank you.

ARGUMENT BY INTERVENOR PUBLIC BROADCASTERS

MR. LYNCH: Good morning, your Honor. My name is Mark Lynch. I'm here for the public broadcasters.

For the reasons that my colleagues have set forth, this is not a First Amendment case, because the satellite carriers never had a First Amendment right to carry for free anybody's broadcast programming.

And this statute gives a benefit, and for the reasons Mr. Verrilli explained, the condition that's imposed on that benefit is not an unconstitutional

condition. So, I agree completely with the people that appeared before me, that this is not a First Amendment case.

But if, if you decide that some First Amendment scrutiny is applicable here, we would submit that it's rational basis under Red Lion.

Now, the reason for that is as set forth in the complaint, there are only a limited number of orbital positions available for satellite broadcasters. Under these circumstances, both the Federal Communications Commission and the D.C. Circuit have recognized that the demand for orbital positions exceeds the capacity.

Now, when you've got a situation where there are more people that want to speak than can speak, when there are more people that want to use a scarce resource than can -- than the resource is available, as the Supreme Court held in Red Lion, you have to adjust the First Amendment analysis.

Where there is scarcity, where there is a limited availability to speak, it's idle to posit that everyone has an unabridgeable right to speak. Now, consequently, Red Lion and cases following it have established that in broadcasting, a relaxed standard of First Amendment scrutiny applies.

Now, my colleagues on the other side of the

aisle here will cite concurrence and dissent and law review articles and all manner of materials to suggest to you that Red Lion has been heavily criticized. But the fact of matter for the trial court is, Red Lion is still good law. The Supreme Court affirmed it as recently as the Turner 1 case.

THE COURT: In Turner 1, they discussed --

MR. LYNCH: They discussed Red Lion and they said, specifically:

> We understand that our scarcity rationale has been criticized, but we see no reason to depart from it at this time as the basis for our broadcasting jurisprudence.

So, it is the law of the land today.

Now, the D.C. Circuit recognized that in the Time-Warner case, which involves satellite broadcasting. The issue there was whether the four to seven percent set-aside violated the First Amendment. And in that case, the D.C. Circuit held that the Red Lion rationale applies to satellite broadcasting, and that a relaxed level of scrutiny under the First Amendment is appropriate.

Now, you may ask yourself, what does "relaxed level of scrutiny" mean?

That question is directly answered in National Citizens Committee for Broadcasting, the

Supreme Court case. And that case makes clear that under this relaxed standard of Red Lion, regulations of broadcasting will be upheld if they are a reasonable means of promoting the public interest in diversified mass communication.

Now, clearly, the SHVIA statute satisfies that, that standard. The reason for the carriage requirements under SHVIA is the same as the reason for the carriage requirements under the "must carry" regime that was upheld in Turner, and that is to preserve the viability of our system of free over-the-air broadcasting that -- and making sure that that system is available to everyone, not just the people who subscribe to cable, not just the people who subscribe to satellite, but also people like me, who still rely on a plain old television antenna to get the channels into their homes.

And the fear is that if you -- if, as cable and satellite become more dominant, they will attract advertising in the case of commerce stations, they will attract contributors in the case of noncommercial stations, and those stations that are stuck on the over-the-air mode will -- their sources of revenue will dry up and they will die.

And that goal, that policy goal of maintaining over-the-air broadcasting, free over-the-air

broadcasting, was found sufficient in Turner and should be easily sufficient in this case.

THE COURT: All right.

MR. LYNCH: The final point I would like to make, they complain that this is an intrusion on their editorial discretion.

Well, as Mr. Verrilli and Mr. Lobue pointed out, they have a choice. They can walk right away from this program. They don't have to come into this in the first place.

But even when they come into it, the imposition on their editorial discretion is much, much less intrusive than what was upheld in Red Lion, where you had the reply time to someone who is attacked. You had to provide equal time to a political candidate who was endorsed.

In the CBS case which followed Red Lion, networks had to make way for federal candidates. And then in Turner itself you had to carry all of the stations, and you had no choice in the matter.

Here, you have a choice, and the impositions -- if they can be construed as impositions at all -- are much less intrusive than in these other cases that have been sustained under the Red Lion standard.

MR. LYNCH: Thank you.

THE COURT: Thank you.

Well, Mr. Cooper, it's been three against one. I'm ready to hear from you now.

MR. COOPER: Thank you, Judge Lee. And may it please the Court.

ARGUMENT BY THE PLAINTIFFS

MR. COOPER: Your Honor, I do have quite a bit of ground to cover, and I will start, however, your Honor, where you started, with the issue of the power under the Copyright Clause to authorize the provisions at issue here.

Put aside for a moment the First Amendment, and let's focus on the copyright power. Your Honor, this is not a legitimate exercise of the Copyright Clause power that Congress has.

That was the only power that Congress relied upon to exercise this. This is a copyright license, after all, your Honor, that is at issue, a statutory copyright license, burdened, fettered, with the "must carry" condition.

But your Honor, the defendants cannot cite to a single precedent for Congress conditioning the use of a copyrighted work on the forced display of another copyrighted work. And that is what is at issue here.

If we select any station, Channel 4,