ORAL ARGUMENT SCHEDULED FOR MARCH 10, 2003

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

02-1039

UNITED CHURCH OF CHRIST, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISISON

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JURISDICTION

This Court has jurisdiction over the order of the Federal Communications Commission ("FCC") under 47 U.S.C. § 402(a) and 28 U.S.C. § 2344.

STATEMENT OF ISSUES PRESENTED

Under 47 U.S.C. § 399B, a public broadcast station may not broadcast advertisements. As part of the transition to Digital Television ("DTV"), the Commission issued an Order requiring public broadcast stations to use their entire digital capacity primarily for nonprofit, noncommercial, educational broadcast services, but allowing those stations to advertise on their

ancillary or supplementary services of their DTV channels. The questions raised by petitioners' appeal are:

1. Did the Commission reasonably interpret the advertising prohibition in section 399B when it concluded that the prohibition does not apply to non-broadcast ancillary or supplementary services?

2. Is the *Order* consistent with the Commission's policy of not allowing advertising on public broadcast stations?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

I. Public Broadcasting Background

The history of public broadcasting, and its regulation, is characterized by two themes. All of the relevant parties – Congress, the FCC, the public broadcasting community, and public interest groups – recognize that what makes public television special is that it does not face the same economic and corporate pressures as commercial television. *See, e.g.*, The Carnegie Commission on Educational Television, Public Television: A Program for Action (1967), at 2, 3. At the same time, they are aware of the need for public broadcasting to be vigilant in raising revenues in order to keep programming. *See, e.g.*, John W. Macy, Jr., To Irrigate a Wasteland: The Struggle to Shape a Public Television System in the United States (1974), at ix.

In 1952, the FCC first set aside 242 channels in the table of television station allotments for noncommercial educational ("NCE") broadcast stations.[1] 41 FCC at 158-167. As early as 1962, Congress decided to provide public monies for noncommercial educational television. In 1967, Congress passed the Public Broadcasting Act, *see* Pub. L. No. 90-129, 81 Stat. 365 (1967) (codified at 47 U.S.C. §§ 390-399), which states "that it is in the public interest to encourage the growth and development of noncommercial educational radio and television broadcasting, including the use of such media for instructional purposes." 47 U.S.C. § 396(a)(1).[2]

In 1981, Congress enacted legislation to enable public television to raise funds through new sources. See *Order* at para. 7 ("In 1981, Congress amended the Communications Act to give public broadcasters more flexibility to generate funds for their operations") (JA ____). In particular, Congress authorized "public broadcast station[s] . . . to engage in the offering of services, facilities, or products in exchange for remuneration," although it also provided that they could not "make [their] facilities available to any person for the broadcasting of any advertisement." 47 U.S.C. §§ 399B(b)(1), (b)(2); *see also Order* at para. 7 ("As amended, section 399B of the Act permits stations to provide facilities and services in exchange for remuneration as long as those uses do not interfere with the stations' provision of public

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[1] "The Communications Act defines a 'noncommercial educational broadcast station' and 'public broadcast station' as a television or radio broadcast station that is eligible under the FCC's rules to be licensed as 'a noncommercial educational radio or television broadcast station which is owned and operated by a public agency or nonprofit private foundation, cooperation or association' or 'is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.'" *Order* at para. 7 (JA _____). This brief will use the terms "noncommercial educational broadcast station" and "public broadcast station" interchangeably.

[2] Among other things, the Public Broadcasting Act created the Corporation for Public Broadcasting, which was responsible for raising funds from private and public entities. *See* 47 U.S.C. §§ 396(b), 396(g)(2)(A)-(I).

telecommunications services.") (JA ____). In implementing this legislation, the Commission established that "public television stations are required to furnish primarily an educational as well as a nonprofit and noncommercial broadcast service." *Order* at para. 7 (JA _____); *see also* 47 C.F.R. § 73.621.

Subsequently, the Commission issued a number of orders consistent with Congress' authorization to raise funds through new methods. In 1983, for example, the FCC issued an order allowing the transmission of data through "teletext" technology as part of a television broadcast; the agency recognized that public television stations could raise funds by providing teletext services. *See Teletext Transmission*, 53 R.R.2d 1309 (1983). [Amendment, 48 Fed. Reg. 27054]; *see also* Comments of National Datacast, Inc., MM Docket No. 98-203, filed Feb. 16, 1999 (JA _____-__). A year later, the FCC adopted a policy that would permit public television stations to offer subscription television services as long as they first obtained a waiver. 97 FCC.2d 411 (1984).

[Any subsequent orders [?].

II. The Pending Proceedings.

Digital television is an emerging technology that allows broadcasters, among other possibilities, to offer high definition television programs with better picture resolution and higher quality sound than the current analog technology. As the Commission explained in its Fifth Report and Order, digital television "permits broadcasters to offer a variety of services," allowing them to: "to offer free television of higher resolution than analog technology"; broadcast "at least one, and under some circumstances two, high definition television programs"; and to "multicast[]," that is simultaneously transmit "three, four, five, or more digital programs." 12 FCC Rcd 12809, _____ (para. 20). Digital broadcasting also "permits the rapid delivery of

large amounts of data," such as "an entire edition of the local newspaper in less than two seconds." *Id.*

Section 336, which was enacted as part of the Telecommunications Act of 1996, sets out the Digital Television ("DTV") licensing provisions of the 1996 Act. In the Fifth Report and Order, the Commission implemented a transition to digital technology for existing television broadcasters. "Among other things," the FCC "established standards for license eligibility, a transition and construction schedule and a requirement that broadcasters continue to provide one free over-the-air television service in accordance with section 336," *see* 14 FCC Rcd at 537 (para. 1) (JA ____).[3]

More recently, the Commission has set a deadline of the end of 2004 for noncommercial broadcast stations to complete their transition to the agency's digital television requirements. Review of the Commission's Rules and Policies Affecting the Conversion to Television, ___ FCC Rcd ___, ___ (2001) (para. 4). Intervenor AAPTS in its comments below estimated that the initial infrastructure investment necessary for the transition by public broadcasters is $1.7 billion. *See* Comments of the Association of America's Public Television Stations, MM Docket No. 98-203, filed February 16, 1999, Attachment 1 at 1; *see also Order* at para. 33 (noting that "costs of converting to digital service will be considerable") (JA ____).

In the Fifth Report and Order, the Commission "also adopted rules permitting DTV licensees, without distinguishing between commercial and noncommercial licensees, to use their DTV capacity to provide ancillary or supplementary services provided these services do not

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[3] Under 47 C.F.R. § 73.624, which implements section 336, "DTV broadcast station permittees or licensees must transmit at least one over-the-air video program signal at no direct charge to viewers on the DTV channel." *Id.* at 73.624(b); *see also Order* at para. 8 (JA ____).

derogate the free digital television service." *Id.* at 537 (para. 1) (JA ____).[4] After the release of the Fifth Report and Order, the Association of America's Public Television Stations and the Public Broadcasting Service ("AAPTS/PBS"), filed a petition for reconsideration seeking clarification of the extent to which public television stations may "use excess capacity on DTV channels for commercial purposes." *Order* at para. 3 and n. 5 (citing Petition for Reconsideration and Clarification of Association of America's Public Television Stations and the Public Broadcasting Service in MM Docket No. 87-268, filed June 13, 1997) (JA ____, ____).

AAPTS/PBS asserted that section 336 of the Act and the FCC's DTV rules "are intended to allow public stations to offer ancillary or supplementary services for revenue-generating purposes." *Order* at para. 3 (JA ____). The reconsideration petition was opposed in part by the Media Access Project ("MAP") and other public interest groups, and prompted the Commission to seek further comment on "issues regarding the service and funding opportunities made available to NCE [noncommercial educational] stations as a result of the transition to digital transmission" in a Notice of Proposed Rulemaking ("NPRM") in MM Docket No. 98-203.[5] *Order* at para. 4 (JA ____).

In the NPRM, the FCC sought comment on whether 47 C.F.R. § 73.621, "which requires public stations to provide a primarily nonprofit, noncommercial educational broadcast service," applies to ancillary or supplementary services provided on DTV capacity, given the requirement

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[4] Section 73.624 which, as noted, n.3, *supra*, requires DTV stations to provide one free over-the-air television service, also provides that so long as DTV broadcast stations comply with this requirement, "DTV broadcast stations are permitted to offer services of any nature, consistent with the public interest, convenience, and necessity, on an ancillary or supplementary basis." *Id.* at § 73.624(b).

[5] *See Notice of Proposed Rulemaking*, In the Matter of Ancillary or Supplementary Use of Digital Television Capacity By Noncommercial Licensees, 14 FCC Rcd 537 (1998) ("*NPRM*").

in Section 399B that public station's renumerative offerings can not derogate their traditional public television services. *Order* at para. 8 (JA ____).[6] The Commission also sought comment "on how the advertising ban set forth in Section 399B . . . implicates the provision of remunerative services by public DTV stations," in particular whether the ban applies to subscription services provided on public broadcasters' DTV channels, and whether it applies to "advertising carried on any other non-subscription ancillary or supplementary services carried by a public TV station." *Order* at para. 20, 21 (JA ____, ____). Finally, the FCC sought comment on the request of AAPTS/PBS that the agency "exempt public television licensees from any fee assessed in connection with revenue-generating use of the ancillary or supplementary services on their DTV spectrum 'to the extent that revenues from those service are used to support the licensee's mission-related activities.'" *Order* at para. 36 (JA ____) (citation omitted). In response to the NPRM, five parties, including petitioners and intervenor, submitted comments.

III. The *Order* Under Review

On October 17, 2001, the Commission released the *Order* under review. (JA ____). The Commission addressed three issues in its *Order*. First, it addressed whether 47 C.F.R. § 73.621 applies to the entire digital bitstream of NCE licensees. The Commission concluded that the requirements of section 73.621 "apply to the entire digital bitstream of NCE licensees," and that NCE licensees thus must "use their *entire* digital capacity *primarily* for a nonprofit,

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[6] *See also Order* at para. 9 ("we sought comment on whether we should extend the requirement to provide an educational nonprofit service to ancillary or supplementary services provided by noncommercial licensees on their DTV capacity"), at para. 10 ("we asked whether NCE DTV stations will have the capacity to provide ancillary or supplementary services without interfering with their ability to provide a primarily educational NCE broadcast service, and whether such ancillary or supplementary services can provide an important funding source that could facilitate the transition to DTV for NCE stations").

noncommercial, educational broadcast service." *Order* at para. 15 (JA ____) (emphases added). The Commission did not provide specific criteria on what constitutes "primarily" but stated that it refers to "a 'substantial majority'" of an NCE licensee's digital capacity. *Id.*

Second, the Commission addressed how the advertising ban in 47 U.S.C. § 399B(b)(2) applies to the use of the digital bitstream by NCE licensees to provide ancillary and supplementary services. On this question, the Commission decided that the ban applies to any programming provided by NCE licensees which constitutes broadcasting "but does not apply to ancillary or supplementary services on their DTV channels, such as subscription services or data transmission services, to the extent that such services do not constitute 'broadcasting.'" *Order* at para. 27 (JA ____).[7] In reaching this conclusion, the Commission referred to the plain language of section 399B, explaining that the prohibition on advertising in section 399B(b)(2) "only forbids the 'broadcasting' of any advertisement." *Order* at para. 28 (quoting statute) (JA ____).

The Commission relied upon a definition of broadcasting as "'only those signals which the sender intends to be received by the indeterminate public.'" *Order* at para. 29 (JA) (quoting *Subscription Video*, 2 FCC Rcd 1001, 1004 (1987), *aff'd sub. nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988)); *see also id.* at para 29 ("a necessary condition for the classification of a service as broadcasting is that the licensee's programming is available to all members of the public, without any special arrangements or equipment"). In *Subscription Video*, the Commission applied this definition in concluding that

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[7] In the *NPRM*, the Commission also sought comment on intervenor's argument "that even if Section 399B's advertising restrictions apply to some ancillary or supplementary services, [the Commission has] discretion under Section 336(a)(2) of the Act to allow public TV licensees to include advertiser-supported services" if those services are in the public interest. *Order* at para. 32 (JA ____). The Commission concluded that the plain language of section 336(a)(2) did not support this argument.

"subscription television does not constitute broadcasting"; applying the same definition in the Order under review, the Commission held that "subscription television provided by NCE licensees on their excess digital spectrum does not constitute 'broadcasting.'" *Order* at para. 29 (JA). [ADD RE: PARAS. 30, 31?].

Finally, the Commission determined whether, under 47 U.S.C. § 336, NCE licensees "should be exempt from DTV fees when they offer remunerative ancillary or supplementary services as source of funding for their mission-related activities," see *Order* at para. 36 (JA ____). The Commission decided NCE licensees "are not exempt from the requirement to pay fees on revenues generated by the remunerative use of their excess digital capacity, even when those revenues are used to support their mission-related activities." *Order* at para. 40 (JA _____).[8]

Although Commissioner Copps supported portions of the *Order*, he nevertheless dissented. Dissenting Statement of Commissioner Michael J. Copps (JA ____-____); *see, e.g., id.* at 2 ("It's advertising that has me upset.") (JA ____). No party sought reconsideration of the Commission's *Order*, and the *Order* was published in the Federal Register on November 26, 2001. Petitioners filed their petition for review on January 25, 2002.

SUMMARY OF ARGUMENT

This case is not about advertising in over the air broadcasts, and the *Order* under review poses no threat to the traditional mission of public television. This proceeding concerned only whether noncommercial educational broadcasters could be authorized to take advantage of some of the new opportunities made technologically possible by the advent of Digital TV without

[8] This part of the Commission's Order is not the subject of petitioners' appeal.

interfering with that traditional mission. The Commission concluded that this was possible provided that a PTV licensee must use its entire capacity on a weekly basis "primarily" for a noncommercial, nonprofit educational broadcast service with **no** advertising permitted on over the air broadcasts.

Petitioners do not challenge the decision to allow on an ancillary or supplementary basis some nonbroadcast services to be offered. Nor do they challenge the decision to allow ancillary or supplementary services to be offered on a subscription basis. The principal dispute raised by petitioners' appeal is whether advertising can be included within the transmission of these ancillary or supplementary services. Relying on their interpretation of section 399B, petitioners say no. Section 399B, however, is capable of more than one interpretation, and Congress did not provide clear evidence of how far it intended the advertising prohibition in the statute to apply. The FCC reasonably arrived at a different interpretation, based upon the plain language of the prohibition. The *Order* therefore must be affirmed under step two of Chevron.

Petitioners' arbitrary and capricious argument is misguided because the *Order* under review makes no change in the Commission's long-standing policy of prohibiting advertisements on public television broadcasts.

ARGUMENT

I. Standard of Review

The petitioners have a heavy burden to show that the *Order* is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the court presumes the validity of agency action and must affirm unless the agency failed to consider relevant factors or made a clear error in judgment. *Davis v.*

Latschar, 202 F.3d 359, 365 (D.C. Cir. 2000). *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

As this Court stated in *Davis v. Latschar*, "[f]or challenges to an agency's construction of the statutes or regulations that it administers, . . . the Court's review must be particularly deferential." *Davis*, 202 F.3d at 365. The Court must review the agency's construction of the Communications Act under the standard of review articulated in *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, *reh. denied*, 468 U.S. 1227 (1984). Under *Chevron*, the Court must first consider "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If so, "that intention is the law and must be given effect." 467 U.S. at 843 n.9.

Where the statute is silent or ambiguous with respect to the specific issue and Congress has delegated the agency authority "to implement a particular provision or fill a particular gap,"[9] the question for the court is whether the agency's construction is based on a permissible construction of the statute.[10] The court must uphold a reasonable construction by the agency even if it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron USA, Inc.*, 467 U.S. at 843 n.11.

The Court reviews an agency's construction of its own rules under a standard even "more deferential . . . than that afforded under *Chevron.*" *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996), quoting National Medical Enterprises v. Shalala, 43 F.3d 691, 697 (D.C. Cir. 1995). "[T]he agency's interpretation of its own rule is given 'controlling weight unless it is

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[9] *United States v. Mead Corporation*, 533 U.S. 218 (2001).

[10] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 397 (1999).

plainly erroneous or inconsistent with the regulation.'" *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 606 (D.C. Cir. 2002), *quoting Capital Network Systems, Inc. v. FCC*, 28 F.3d 201, 205 (D.C. Cir. 1994). Deference to the expert agency's interpretation "is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotations omitted.).

II. The *Order* Provides A Reasonable Interpretation Of Section 399B

Petitioners raise three arguments in an attempt to establish that the Commission's decision runs afoul of section 399B. First, they assert that the interpretation of section 399B in the *Order* violates the plain language of the statutory prohibition against advertising. Pet. Br. at 28-29. Second, petitioners contend the Commission erred in relying upon the definition of broadcasting from a 1987 FCC Order on the grounds that Congress could not have been aware of that definition when it enacted section 399B in 1981. Finally, petitioners argue that the legislative history of the 1981 Amendments confirms their interpretation of section 399B.

None of petitioners' arguments is availing. As we show below, the better interpretation – and certainly a reasonable one – of section 399B is that the ban on advertising in section 399B does not apply to ancillary or supplementary services provided by NCE licensees on their DTV channels except when the ancillary or supplementary service constitutes broadcasting. Furthermore, the Commission's reliance upon the definition of broadcasting from the agency's Subscription Video Order in 1987 was reasonable. And, contrary to petitioners' assertions, the

legislative history of the 1981 Amendments does not support their interpretation of section 399B and does not provide a basis for setting aside the *Order*.

A. The Commission's Interpretation Is Reasonable, Satisfying Step Two of Chevron

Section 399B, in relevant part, defines "advertisement" as "any message or other programming material which is broadcast *or otherwise transmitted* in exchange for any remuneration."[11] 47 U.S.C. § 399B(a) (emphasis added). As noted above, section 399B(b)(2) provides that "[n]o public broadcast station may make its facilities available to any person for the broadcasting of any advertisement." *Id.* at 399B(b)(2). Petitioners argue that the advertising prohibition in section 399B(b)(2) extends to the transmission of any material in exchange for renumeration. Pet. Br. at 28-29.

Contrary to petitioners' suggestion, however, this reading of section 399B is neither clear nor compelled. It is not enough under 399B(b)(2) that an advertisement is present. The advertisement must be broadcast in order for the statute to be violated. Congress did not explain why it did not extend the prohibition in 399B(b)(2) to a situation where the advertisement was merely transmitted, but not broadcast. In interpreting this specific provision, one must decide whether to follow the plain language of the prohibition, or to incorporate the broader definition of advertisement in section 399B(a) when applying the prohibition. See *Order* at para. 28 (JA) (noting that petitioners' argument based upon the definition of advertisement is "one way to

[11] The entire text of section 399B(a) provides: "For purposes of this section, the term 'advertisement' means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended – (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office." 47 U.S.C. § 399B(a).

read the statute"). In the *Order*, the Commission arrived at a different interpretation than the one put forward by petitioners based upon the specific language of the prohibition.

Petitioners argue that their appeal may be decided under step one of Chevron based upon the plain language of, apparently, the definition of advertisement in section 399B(a). Pet. Br. at 28 ("This is a *Chevron I* case"). Their argument is misplaced, however, because the *Order* interprets a different section of the statute which contains the prohibition against advertising, *i.e.*, 399B(b)(2), and which confines the prohibition to the "broadcasting" of any advertisement. See 47 U.S.C. § 399B(b)(2). Therefore, petitioners may not prevail under their theory based upon *Chevron* step one. Indeed, although the FCC's *Order* did not purport to resolve this case under *Chevron I,* if a step one analysis is dispositive here, it is the FCC's interpretation and not petitioners' that must prevail.

In the *Order* below, the Commission concluded that section 399B is ambiguous. In view of petitioners' failure to establish that their interpretation must prevail under a *Chevron* step one analysis, the Commission's interpretation must be upheld because it is both reasonable and accompanied by a reasonable explanation. Not only is the Commission's reading of the statute supported by the plain language of the prohibition, it also is consistent with Congress' dual objectives in the 1981 legislation. At the same time that Congress sought to preserve the noncommercial nature of public television's broadcast programming, it also sought to give public broadcast stations greater flexibility in raising funds.

In the *Order* below, the Commission noted that public broadcast stations "were technologically capable of transmitting advertisements on a broadcast or nonbroadcast basis" in 1981. *Order* at para 28 and n. 57 (citing Ex parte letter of AAPTS, October 8, 1999 ("Ex parte")) (JA _____, _____). Among other things, teletext technology – a "form of radio

communication that involves the transmission of textual and graphic data on the vertical blanking interval (VBI) of the video portion of the television signal," see Ex parte at 4 – existed in 1981, as did other VBI technology. Ex Parte at 4-5. The definition of advertising in section 399B suggests that Congress was aware that public broadcast stations could send advertisements in a number of ways, while the prohibition on advertising in the statute indicates that it sought only to prevent the broadcasting of advertisements. *Order* at para. 28 (JA) ("the better reading is the literal one"). This interpretation of the section 399B(b)(2) – and accompanying explanation – certainly is reasonable enough to survive scrutiny under Chevron step two.

B. The Commission's Reliance Upon The 1987 Subscription Video Order's Definition Of "Broadcasting" Was Reasonable

In the *Order* below, the Commission relied upon a definition of broadcasting adopted by the agency in 1987 and upheld by this Court in *National Association for Better Broadcasting* in 1988. *Order* at para. 29 (JA). The 1987 classification decision held that programming offered on a subscription basis did not constitute broadcasting. This was a departure from the Commission's previous policy under which the broadcasting definition did encompass subscription programming. The Commission acknowledged that its definition of broadcasting was revised after the enactment of section 399B but nevertheless concluded that the current definition of broadcasting should govern the situation addressed in the *Order*. *Id.* at n.60. On appeal, petitioners insist that Congress clearly intended to freeze (at least until congressional revision) the agency's definition of broadcasting applicable when section 399B was enacted in 1981. *See, e.g.*, Pet. Br. at 32. Petitioners' argument – which they indicate is based upon a "*Chevron I*" approach to section 399B, see Pet Br. at 31 – is unavailing because the Commission

reasonably applied the current definition of broadcasting, and gave a satisfactory explanation for its decision to do so.

Petitioners do not dispute that the Commission adopted a new definition of "broadcasting" in 1987, replacing a "content-based intent determination" with one based upon whether "the programmer intends the signal to be received" by "the general public." *National Association for Better Broadcasting*, 740 F.2d at 668. Nor do they dispute that "Congress did not intend, in 1927, to foreclose the FCC from defining 'broadcast' for purposes of section 153(o)." Pet. Br. at 31.[12] The issue raised by petitioners' appeal, therefore, is whether Congress clearly intended to apply the FCC's definition of broadcasting in 1981 in perpetuity even assuming the agency subsequently revised its definition of this term.

Congress gave no such clear indication, however, so this issue is resolved under step two of Chevron. Once again, the Commission has provided a reasonable explanation for its decision. Citing *Lukhard v. Reed*, 481 U.S. 368 (1987), the Commission explained that "Congress gave no indication in section 399B . . . that it intended to lock in the Commission's prior interpretation of the statutory definition of the term 'broadcasting.'" In *Lukhard*, which involved the definition of "income" under the Aid to Families With Dependent Children statute, the plurality opinion stated that "[i]t is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place." *Id.* at 379 (citing *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-101 (1939)).

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[12] The current definition of broadcasting is found at 47 U.S.C. § 153(6). That definition is the same as the definition that previously was found in section 153(o), and defines broadcasting as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." See 47 U.S.C. § 153(6).

Petitioners do not discuss these authorities which support the Commission's approach in this case. Instead they cite *Brown v. Gardner*, 513 U.S. 115 (1994). They do not, however, explain what the Court held in *Gardner*, nor why it is controlling in this situation. *Gardner* does not address the situation presented here and in *Lukard*, which is whether Congress intended to confine the FCC to the definition of broadcasting that applied when section 399B was enacted, even after the agency changed this definition and had to decide which definition to apply in a current regulatory situation.

Moreover, petitioners' acknowledgment that petitioners have discretion under step two of Chevron to define broadcasting "for purposes of" the Communications Act, see 47 U.S.C. § 153, undermines their claim that – in the absence of any supporting evidence – Congress "clearly" intended for "broadcasting" to have the meaning that the FCC had given it at the time of the adoption of this statute in 1981. Nowhere in the Communications Act – certainly not in section 153 or section 399B – did Congress indicate that the application of the contemporaneous definitions in section 153 "for purposes of this Act" does not apply to the advertising prohibition in section 399B(b)(2).

C. The Legislative History Of The 1981 Amendments Supports The Commission's Order

Petitioners attempt to bolster their interpretation of section 399B with reference to other provisions of the 1981 amendments and the legislative history. Pet. Br. at 32. In particular, they cite the failure of Congress to reauthorize "the extremely limited advertising experiment" permitted by the 1981 legislation, and the restrictions on corporate logograms set out in 47 USC

399a.[13] Although petitioners' description of the legislation is not incorrect, it is irrelevant to the argument they advance because the *Order* does not change the Commission's policy with respect to advertising on over-the-air broadcasts. The fact that Congress has not attempted to revive advertising on public broadcasts, or regulates logograms to ensure that they are not advertisements does not demonstrate a "clear intent" by Congress to prevent public broadcasters from raising revenues through advertising on non-broadcast services.

To the contrary, Congress enacted the 1981 legislation "[t]o facilitate and encourage the efforts of public broadcasting licensees to seek and develop new sources of non-Federal revenue, which will be necessary for the long term support of the system as Federal funding is reduced." Public Broadcasting Amendments Act of 1981, Report, H.R. Rep. No. 97-82, 97th Cong., 1st Sess. 7 (1981) ("House Report"). The relevant legislative history demonstrates that public broadcast stations were "not allowed to broadcast advertisements" but were "explicitly authorized to provide services . . . in exchange for remuneration, provided that no Federal funds may be used to subsidize such activities, and that such activities do not interfere with the provision of public telecommuications services." *Id.* at 8. The *Order* reflects and implements both of Congress' goals set out in the legislative history: it does not allow advertising on broadcasts, but does permit funds to be raised through advertising on ancillary and supplementary services, such as subscription services provided on DTV channels.

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[13] A logogram is "any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, and which is not used for the purpose of promoting the products, services, or facilities of such corporation, company, or other organization." 47 U.S.C. § 399A(a).

III. The *Order* Is Not Arbitrary Or Capricious, And Does Not Deviate From Prior Commission Policies Without Explanation

Petitioners recast their arguments about Congress' prohibition of advertising on public television in attempt to mount an arbitrary and capricious claim. Petitioners recount in great detail the origins of noncommercial educational broadcasters, explaining that in 1951 the FCC "drew the line at permitting advertising by NCEs" even though "such arrangements would provide much needed funds for construction of stations and development of programming." Pet. Br. at 35. Now, according to petitioners, the FCC has ignored its policy of prohibiting advertising in the *Order* under review, and failed to provide an adequate explanation for this decision.

Petitioners' arbitrary and capricious claim is unavailing, however, because the relevant change in FCC policy occurred in 1987, when the agency revised its definition of broadcasting, and this Court found that "the FCC in a properly noticed rulemaking has . . . supplied . . . [a] reasoned explanation" for the departure "from its prior conclusions that subscription services were broadcasting." National Association for Better Broadcasting, 849 F.2d at 669.

Petitioners also contend, in a single paragraph that almost qualifies as cursory, that the FCC failed to explain in the *Order* "why it reversed its 1984 determination that a general grant of authority to NCEs to offer subscription services would interfere with the ability of NCEs to offer educational programming." *Id.* at 38. This assertion is unpersuasive for at least three reasons. First, to the best of our knowledge, it was not raised by petitioners below. Therefore, it may not now be presented to this Court. See 47 U.S.C. § 405; Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279-80 (D.C. Cir. 1997).

Second, petitioners' characterization of the Commission's 1984 decision is not correct. The FCC did not hold that the provision of subscription video services would interfere with the

ability of NCE broadcasters to offer educational programming. Instead, the Commission stated that:

> [T]he legislative history associated with Section 399B states that ". . . this 'non-interference' test is broad, and is to be judged as the circumstances in each particular instance dictate. . . ." The Commission clearly has the authority in particular instances and under certain circumstances to permit STV operation by public television. However, there is no clear guidance in the record of this proceeding or in the legislative history of Section 399B regarding how general authority for public broadcasters to engage in STV operations can be promulgated consistent with our statutory responsibilities under Section 399B. For this reason, we conclude that a case-by-case waiver approach is more consistent with Section 399B than a general rule change at this time.

97 F.C.C.2d 411, ___ (para. 6) (1984).

Finally, as noted earlier, the pertinent change in Commission policy came after 1984, when the agency changed its definition of broadcasting to no longer include subscription services.

CONCLUSION

For the foregoing reasons, the Court should affirm the *Order*.

Respectfully submitted,

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November 20, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED CHURCH of Christ, et al.,	)	
	)	
PETITIONERS,	)	
	)	
V.	)	02-1039
	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	
	)	
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 5715 words.

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