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FCC Should Reprogram Its Program Carriage Regulation: Giving the First Amendment Its Due Respect

by

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The Federal Communications Commission is considering initiating a program carriage rulemaking that will propose certain updates to its program carriage regulation. The Commission's program carriage rules allow the agency to compel cable operators or DBS providers to carry the video programming of unaffiliated video programmers. The Commission hinted in a recent order that its rulemaking will seek comment on a variety of changes to its program carriage complaint process. Concerns have already been raised that the Commission is seeking to bolster its program carriage complaint rules, giving unaffiliated video programmers better opportunities for filing complaints against their competitors and giving the Commission itself greater power to act on those complaints.

Central to concerns raised over the Commission's program carriage regulation should be the First Amendment's free speech guarantees. The program carriage rules amount to a compelled speech mandate that on its face runs contrary to basic First Amendment principles that protect against government restricting or forcing the speech of private parties. Such regulation calls upon the Commission to second-guess the decisions of private market actors, in this instance speakers for First Amendment purposes,

regarding prices, terms and conditions of their agreements. Existing program carriage regulation is therefore already suspect in light of free speech principles.

Continuing competition in the dynamic video marketplace has also supplanted the cable "bottleneck" rationale that provided both the primary policy justification and legal excuse for other cable regulation in the early 1990s. Today, cable companies do not enjoy a bottleneck but experience intense competition from DBS providers, telco multichannel video programming distributors (MVPDs), and a new threat from online video delivery services. Such competition in the video market cuts against the protectionist aims of program carriage regulation that undermines editorial judgments of MVPDs to provide their own choice of video programming to consumers.

Given that cable operators and other MVPDs possess First Amendment rights regarding their editorial judgments about video content carriage and channel lineup selection, existing program carriage regulation is already problematic in light of free speech principles. Any future attempts to bolster the restrictions on cable operators, DBS providers or other MVPDs would be even more suspect. The Commission should not seek to increase its power and opportunities for compelling speech. If anything, in its forthcoming rulemaking the Commission should take steps to dismantle outdated regulation that burdens free speech protections and look instead to further unleash market forces that have led to the abundance of video programming choices that consumers are now enjoying.

The Cable Act of 1992 and the FCC's Program Carriage Complaint Rules

The 1992 Cable Act was premised on the perception of a cable bottleneck that would be addressed through a slate of regulatory controls on cable services, including program access, leased access, must-carry, and – in this case – program carriage regulation. Section 616 of the 1992 Act requires the Commission to adopt regulations regarding the conduct of vertically integrated video programmers — that is, cable operators providing retail service to customers that also have an attributable interest in the video content they make available.[1]

Rules adopted by the FCC pursuant to Section 616 govern program carriage agreements between vertically integrated cable operators or other multichannel video programming distributors such as DBS providers and independent or unaffiliated video programmers. The rules prohibit program carriage agreements that either require the independent video programmer to have a financial interest in a network as a condition of carriage or that coerce the unaffiliated programmer into providing the cable company exclusive rights to programming.[2] The rules also prohibit program carriage agreements that contain provisions that "unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage."[3]

The Commission's complaint process allows unaffiliated video programmers that believe violations of the rules have occurred to file a complaint with the Commission and seek relief.[4] The Commission's complaint rules provide that an unaffiliated video programmer bears the burden of proof in establishing a *prima facie* case of unreasonable discrimination. Upon receipt of the complaint, the answer by the cable operator or other MVPD, and the reply by the independent video programmer, the Commission's staff makes a determination of whether a *prima facie* case has been established. If so, the staff can grant the requested relief — which might include compelled carriage. Or, the staff can refer the dispute to an alternative dispute resolution forum (if both parties so consent). Also, if the staff believes that additional factual determinations need to be made to make a final decision on the complaint, it can designate the dispute for a hearing before an administrative law judge (ALJ). Upon resolving the remaining factual issues, the ALJ can make a ruling on the complaint, which is appealable to the staff and then to the full Commission.

FCC's Wealth TV Complaint Order and Anticipated Program Carriage Rulemaking

On June 13, the Commission released an order upholding a Recommended Decision by the ALJ dismissing the Wealth TV's program carriage complaint against Time Warner Cable and other cable operators.[5] The Commission adopted the ALJ's conclusions that "the preponderance of the evidence, viewed in its entirety, demonstrates that the defendants never violated section 616 of the Act" or the program carriage complaint rules."[6]

The significance of the Commission's order for program carriage regulation had less to do with the result of its decision and more to do with the reasoning and discussion it provided. The Commission declined to decide whether the ALJ was correct in ruling that burdens of production or persuasion should have been placed on Wealth TV rather than the cable operators.[7] However, the Commission noted: "it would be helpful for us to provide guidance on the proper allocation of the burdens of proceeding and proof in program carriage cases that are designated for hearing. To that end, we anticipate initiating a rulemaking proceeding that will seek comment on this and other issues regarding the program carriage rules, which will afford all interested parties an opportunity to present their views."[8]

The Commission's anticipated rulemaking has been the subject of recent *ex parte* filings. Media reports suggest that the rulemaking asks whether the complainant or defendant should bear the burdens of persuasion and producing evidence. Also, some *ex parte* filings address the First Amendment implications of such burden shifting or other possible changes to the Commission's carriage complaint rules.

Assignment of burdens and other possible revisions to the program carriage rules raise significant legal and constitutional questions. The Administrative Procedures Act, for instance, states in 5 U.S.C. § 556(d) that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Revising its program carriage rules to shift the burdens onto cable operators or DBS providers, for instance, would

further institutionalize government second-guessing of editorial speech judgments by MVPDs, raising First Amendment questions as well. Also, procedural safeguards for free speech rights comprising a branch of constitutional jurisprudence sometimes called "First Amendment 'Due Process'" likely place limits on the types of revisions that the Commission can make to its program carriage complaint process.[9] For example, any temporary remedy that involves compelling program carriage prior to any determination that rule violations occurred would result in a type of prior restraint forced speech mandate that lacks grounding in any proven wrongdoing.

But however important those more detailed, procedure-based legal questions may be, the Commission's program carriage rules and its forthcoming rulemaking present broader questions of policy and constitutional principle that should first be confronted. Here it is important to take a step back and consider the First Amendment as a first principle that restrains government and not private speakers.

The First Amendment as First Principle of Regulatory Policy

Taking the First Amendment seriously in policymaking means adopting only those policies that are proven necessary and limiting their application wherever possible to avoid restricting or burdening free speech rights. It also means revisiting those policies frequently to ensure they are still necessary and still protect free speech from government interference. In practice, treating First Amendment protections as a first-order concern and objective of policymaking generally involves an anti-regulatory approach, or at least a limited and light-touch regulatory approach.

This contrasts with a pro-regulatory approach that treats the First Amendment as a lower-order or last-order concern. The pro-regulatory approach is prone to treat the First Amendment more like an obstacle to government policy goals — an obstacle to be avoided or left for the courts to address through detailed judicial rulings that provide merely the floor of constitutional free speech protections.

Of course, the Supreme Court has declared that "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."[10] Courts have recognized First Amendment protections against compelled speech in the context of modern media communications.[11] And a long line of Supreme Court cases establish that cable operators and DBS providers receive First Amendment protection.[12]

But courts are often prone to follow the lead of regulatory agencies in matters of marketplace economics and give significant deference to agency decisionmaking. Respect for the First Amendment as a guiding light for policymaking means that legislators and regulators should, in the first instance, take responsibility for avoiding regulation that abridges free speech and for removing outdated regulatory burdens on speech in light of changed marketplace conditions. Policymakers should not simply wait for the judicial branch to step in when the weight of regulatory burdens on free speech falls through the floor of First Amendment protections.

First Amendment Free Speech vs. FCC's Program Carriage Regulation Compelling Speech

Because the Commission's program carriage complaint rules implicate speech and editorial decisions expressed through video programming selection, the First Amendment should guide policymaking considerations regarding those rules. Program carriage regulation constitutes a form of government-compelled speech. But cable operators and DBS providers have a First Amendment interest in being protected from statutes and regulations requiring them to deliver video programming that they would otherwise choose not to deliver or to deliver in a different manner.

Under the Commission's program carriage complaint rules, government substitutes its own judgment about what video programming cable companies and other MVPDs such as DBS providers should carry, how they should provide carriage, and what price they should charge for carriage. By compelling the carriage of market rivals' video programming, the rules empower government regulators to undermine MVPDs own business plans for producing and investing in their own video content to appeal to certain kinds of audiences and develop their own branded channel lineup. The rules permit government to second-guess the prices, terms, and other conditions of contractual agreements between MVPDs and their unaffiliated video programmers that are otherwise bargained-for in the market.

While program carriage regulation was initially adopted in light of a supposed cable bottleneck, whatever justification that premise once provided for regulation involving compelled speech mandates has significantly eroded in light of dramatic changes in the video marketplace since the early 1990s. Whereas customers in the early 1990s were typically served by only one incumbent cable operator, today two nationwide DBS providers together have over 30 million subscribers, and telco companies that have recently entered the video services market provide services to approximately 6.5 million subscribers.[13] Although as late as 1994 cable companies served about 91% of all subscribers, today that percentage has declined to about 60% of all video subscribers.[14] Meanwhile, online video delivery via broadband connections is providing an explosive new delivery platform for consumers to enjoy video programming. Market evidence also indicates that the number of unaffiliated video programming available to consumers has also grown in recent years.[15] And the number of vertically integrated video programming has declined from more than 50% of all cable programming to less than 20% today.[16]

New outlets for video services that have emerged in the dynamic video market of recent years also provide additional options to unaffiliated video programmers for gaining carriage of their video content and reaching consumers. But while innovation and competition in the marketplace are benefiting consumers with better service and price options, the program carriage rules stick out as a relic of competitor welfare policy. As the ALJ deciding the Wealth TV complaint observed, the program carriage rules are based on competitor-welfare considerations, not consumer-welfare considerations that are the hallmark of antitrust.[17] The protectionist underpinnings of the rules renders even

less tenable program carriage regulation that compels MVPDs to provide carriage of video content that they might otherwise chose not to carry or to carry on significantly different terms and conditions.

Conclusion

Because program carriage regulation on its face constitutes a kind of compelled speech, the regulation is at odds with the First Amendment's protections from government restrictions on free speech. Cable operators and other MVPDs such as DBS providers have First Amendment rights in their editorial judgments about video content carriage and channel lineup selection.

A pro-First Amendment perspective calls into question the continuing existence of program carriage regulation. Such regulation inevitably calls upon government to second-guess the decisions of private speakers regarding prices, terms and conditions of bargained-for agreements.

Moreover, competition in the dynamic video marketplace has supplanted the primary policy justification of such regulation. Increasing competition in the video market only highlights the protectionist nature of program carriage regulation that effectively overrides the First Amendment editorial discretion of MVPDs to provide carriage of the video programming of their own choosing.

First Amendment principles lean strongly against program carriage regulation as it exists today. Even more strongly do those principles lean against any future attempts to strengthen and expand government-compelled speech mandates and government second-guessing of marketplace actors through revisions to its program carriage rules. The Commission should carefully consider First Amendment constraints if it proceeds to issue a new program carriage rulemaking, and it should act with caution before considering new rules that would burden the free speech rights those constraints were designed to protect. Guided by First Amendment principles, the Commission should instead begin to reduce outdated and problematic restrictions and burdens on MVPDs free speech rights, including program carriage regulation.

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[1] Codified in 47 U.S.C. § 536.
[2] *See* 47 C.F.R. § 76.1301(a) and -(b).
[3] 47 C.F.R. § 76.1301(c).
[4] *See* 47 C.F.R. § 76.1302.

[5] Memorandum Order and Opinion ("Order"), In the Matter of *Wealth TV v. Time Warner Cable*, Inc., MB Docket No. 08-214 (released June 13, 2011), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0613/FCC-11-94A1.pdf.
[6] Order, at 6, para. 15; *id.* at 7-8, para. 18.
[7] *See* Order, at 7-8, para. 18.
[8] Order, at 8, para. 15, fn. 50.
[9] *See, e.g.*, *Freedman v. Maryland*, 380 U.S. 51, 61 (1965); *cf*. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 162 (Harlan, J., concurring) (describing Freedman as establishing the principle that "prohibits the States from requiring persons to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of expression"). In *HBO v. FCC*, a case involving cable regulation, the D.C. Circuit has held that *Freedman*'s "central concern – that judicial proceedings be available for rapid removal of unwarranted prior restraints" is applicable. 567 F.2d 9, 50 (D.C.Cir. 1977). *See also, e.g.*, *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (stating that for First Amendment purposes "the propriety of a proposed procedure must turn on the particular context in which the question arises – on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase"); *Citizens United v. FEC*, 130 S.Ct. 876, 895-896 (2010) (reasoning that even where a "regulatory scheme may not be a prior restraint in the strict sense of that term," "the complexity of the regulations and the deference courts show to administrative determinations" may "function as the equivalent of a prior restraint" that the First Amendment prohibits").
[10] *Rumsfeld v. CAIR*, 547 U.S. 47, at 61 (2006). Two seminal compelled speech cases in the context of mass media communications are *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974) and *Pacific Gas & Electric Company v. Public Utility Commission*, 475 U.S. 1, 9 (1975).
[11] *See, e.g.*, *Turner Broadcast Systems, Inc v. FCC* ("*Turner I*"), 512 U.S. 622, 636 (1994); *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994); *Illinois Bell Telephone Co. v. Village of Itasca*, 503 F. Supp. 2d 928 (N.D. Ill. 2007); *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000).
[12] *See, e.g., Turner I*, at 636 ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment"); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).
[13] *See* Further Notice of Inquiry, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming ("FNOI"), MB Docket No. 07-269 (released April 21, 2011), at 2-3, para. 2, available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0421/FCC-11-65A1.pdf.
[14] *See* Second Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, 11 FCC Rcd 2060, 2063 (1995); FOI at 2-3, para. 2.
[15] For a cable industry analysis of FCC data regarding video competition and vertical integration, *see* Comments of NCTA, MB Docket No. 07-269 (June 8, 2011), available at: http://www.ncta.com/DocumentBinary.aspx?id=980.
[16] *See* Comments of NCTA, at 14.
[17] *See* Order, at 6, para. 16 (observing that "[t]he ALJ rejected defendants' arguments that an antitrust approach should be used in applying the statute and rule because the antitrust laws are designed to protect competition, not competitors, whereas sections 616 and 76.1301(c) are intended to protect a specific group of competitors").