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Short of Statutory Right, Contrary to Constitutional Right

by

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The *Chevron* test[1] for determining when and the extent to which a reviewing court should give deference to a decision of an administrative agency is familiar to all administrative lawyers. Not so familiar, I suspect, is some of the actual language of the Administrative Procedure Act concerning the scope of review of an agency's action. The APA states that a reviewing court shall set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or *short of statutory right*"[2] or "*contrary to constitutional right*, power, privilege, or immunity."[3]

Short of statutory right. Contrary to constitutional right. These APA phrases have stuck in my mind recently as I have been thinking about FCC Chairman Kevin Martin's most recent action directed towards cable operators. This one led to at least thirteen cable operators receiving "letters of investigation" or "LOIs" from the FCC's Enforcement Bureau seeking voluminous information in fourteen days relating to the migration of certain cable television channels from analog tiers to a digital tier. Some of the questions asked in the LOIs relate to the adequacy or not of the notice provided to consumers concerning the analog-to-digital switches. But others relate centrally to the pricing of the channels moved from or to the digital tier. For example, the Enforcement Bureau inquires whether the cable operator "implemented a rate increase to customers receiving the

digital tier to which the formerly analog programming was moved." Or whether the operator "implemented a rate reduction for analog subscribers to reflect the reduction in the number of channels they are able to receive without a digital set-top box and/or subscribing to Company's digital programming tier."

On November 12, the National Cable & Telecommunications Association sent a letter to Chairman Martin and the other commissioners asking that the LOIs be rescinded.[4] The letter asserts that the LOIs constitute an abuse by the Enforcement Bureau of the Commission's processes, improperly seek highly confidential business information, and violate the Paperwork Reduction Act. The letter concludes that "the appropriate way for the Commission to conduct what is in fact an industry-wide inquiry about cable's digital migration is to proceed in the regular order, by issuing an NOI."

There is much that is persuasive in the letter to support the process points raised by NCTA, not the least of which is that the sections cited by the Enforcement Bureau as possible rule violations have little or nothing to do with the inquiries directed to the companies. In terms of the industry-wide nature of the information being sought and the broad scope of the inquiries, some form of procedure other than investigatory letters, hastily-conceived without input and collaboration from all commissioners, appears more appropriate. There is a sense, as NCTA puts it, that the Commission's staff has deviated from "regular order."[5]

For whatever reason, NCTA's response, at least initially, was confined to what the association conceived as the process irregularities pervading the agency's action. I want to call attention here to two non-procedural grounds for objection that come to my mind in connection with APA's review language. For just as the phrase "regular order" has a connotation of matters done properly, matters done in accordance with established legal norms, so too, I think, do the APA phrases "short of statutory right" or "contrary to constitutional right." Whether or not the APA's framers intended as much, for me these phrases connote a certain conception of "rightness" and "propriety" that goes beyond strict notions of "jurisdiction," "authority," "power," or "privilege" of which the APA also speaks. In any event, as noted at the outset, those phrases have stuck in my mind as a way of thinking about the rightness of the LOIs, perhaps just because the LOIs seem to depart from "regular order."

Short of Statutory Right

A fundamental problem with the LOI inquiries concerning the rates charged for the cable television channels that are the subject of the Enforcement Bureau's letter is that the FCC and local franchising authorities lack the authority under the Communications Act to regulate the rates for tiers of service above the basic tier. Typically, migrated channels are not part of the basic tier containing, for example, local television stations and public, educational, and governmental ("PEG") channels required to be carried by law.

The FCC does not have authority to regulate the pricing of the channels which are the subject of the Enforcement Bureau's LOIs because the Commission lacks jurisdiction

with respect to pricing of either the basic tier or expanded basic tiers, whether analog or digital. Except in the rarest of cases, a cable system's "basic" tier (whether analog or digital) is subject only to local franchise authority rate regulation and then only if the system is not subject to effective competition. And, as Congress mandated in the 1996 Telecommunications Act, the expanded basic tiers (including digital tiers) have been deregulated since 1999 and are no longer subject to FCC regulation. Therefore, cable companies may modify their rates and channel line-ups at their own discretion without FCC oversight, subject only to any applicable notice requirements.[6] It is in the sense that the FCC lacks authority to use the information it is seeking for the purpose of regulating the rates on the tiers inquired about that the agency's action appears "short of statutory right."

This is not to say that the Commission lacks any authority as part of its fact-finding or general oversight mission to collect information in appropriate proceedings on the rates charged for channels placed on the digital tier, or possibly even information concerning programming costs that may be relevant as inputs for the rates charged for channels. Such authority conceivably might be exercised in conjunction with the agency's responsibility to inform Congress concerning its view of any legislative changes that ought to be considered or to report to Congress on the status of the marketplace. But in light of the Commission's present lack of authority to regulate the rates for the channels which are the subject of the analog-to-digital switches at issue here, any such information-gathering regarding rates should occur in the context of proceedings other than enforcement proceedings that look towards the imposition of fines.

There is a good reason, of course, why the Commission no longer possesses any rate regulatory authority over cable channels other than with respect to limited situations involving the most "basic" tier. The multichannel video marketplace is competitive, and increasingly so all the time. Cable operators, satellite television operators, and telephone companies all compete vigorously for subscribers. More and more video programming is delivered every day over the Internet and over portable wireless devices, including the most popular broadcast television programming. Google paid $1.65 billion for YouTube back in October 2006 because people increasingly download video programming from the Internet. Indeed, in June 2006, YouTube reportedly already had registered over 100 million hits per day. In October of this year, Chad Hurley, the founder and CEO of YouTube said that the equivalent of 57,000 full length movies is uploaded to the video site each week.[7] That is a lot of video programming available to the public on essentially an *a la carte* basis that was not readily accessible only a few years ago.

Contrary to Constitutional Right

The constitutional wrong I have in mind is the inevitable chilling effect on cable operators' free speech rights that occurs when the FCC initiates enforcement proceedings arising out of decisions relating to the placement of programming. After all, put plain and simply, deciding whether to carry a program channel at all, or, if so, on which tier to place it, and how much to charge for it are matters that go to the heart of the cable operators' editorial discretion.[8] Generally, the First Amendment requires that the exercise of editorial discretion be left to private speakers, not government regulators.

To be sure, under existing Supreme Court jurisprudence, the First Amendment's protection of the editorial discretion of cable operators is not yet on a par with the strict protection accorded the print media, although I have recently argued in a piece entitled, "*Charting a New Constitutional Jurisprudence for the Digital Age,*"[9] that it should be. Thus, in 1994, in *Turner Broadcasting System v. FCC*,[10] the Supreme Court held in a narrow five-to-four decision that a law requiring cable operators to carry the signals of local broadcast stations was not a *prima facie* violation of the First Amendment. The *Turner* Court readily acknowledged that the "must carry" mandate, by requiring the carriage of certain programming, implicated the cable operators' free speech rights. But the Court relied heavily on Congress' judgment that local broadcast stations deserve special economic protection. And it assumed that cable operators possessed a bottleneck that allowed them to play a "gatekeeper" role regarding the programming that could enter a subscriber's home.

The channels in the analog to digital migrations at issue in the LOIs are not local broadcast stations subject to a "must carry" mandate, so *Turner* is inapposite in that key respect. And *Turner* is inapposite in another fundamental respect as well. Today's competitive multichannel video marketplace is markedly different from the considerably less competitive environment which prevailed in the mid-1990s. Now, with competitive video program offerings from satellite television operators and telephone company fiber optic and IPTV systems, and with programming available on the Internet and mobile devices as well, it no longer is sustainable to contend that cable operators effectively operate as "gatekeepers" with respect to programming entering the home. Whether or not *Turner* remains good law in today's changed circumstances with respect to a local broadcast station "must carry" mandate, it provides little jurisprudential comfort to anyone who might suggest that cable operators' First Amendment rights are not compromised by government actions that have the effect of dictating carriage decisions (other than for channels required by law to be carried).[11]

The point here, though, is really about more than whether ultimately a court would uphold or reject a First Amendment claim from cable operators concerning the LOI's. It is, rather, about whether the Commission is proceeding in a way in this instance, especially in light of its lack of direct rate regulatory authority over the programming in question, that is appropriately sensitive to First Amendment values that ought always to guide its actions.

Conclusion

I am not unmindful of the significance of the "process" concerns raised by NCTA in its letter. As Alexander Bickel, one of the most acclaimed constitutional law scholars of the twentieth century, wrote: "And the highest morality almost always is the morality of process."[12] Indeed, often deficiencies in process lead to, or are intertwined with, deficiencies of substance. What I have tried to do in this short piece is at least highlight

the ways in which the Commission's issuance of the LOIs is in some substantive sense "short of statutory right" and "contrary to constitutional right."

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[1] Chevron U. S. A. Inc. v. Natural Resources Defense Council, 467 U.S. 116 (1985).
[2] 5 U. S. C. §706(2)(C).
[3] 5 U. S. C. §706(2)(B).
[4] Letter from Kyle McSlarrow, President and CEO, NCTA to the FCC, File Nos. EB-08-SE-1067-1075, 1077-1078, dated November 12, 2008.
[5] Id., at 8.
[6] See generally 47 U.S.C. § 623. For an explication of this regulatory regime on the Commission's own website, see: http://www.fcc.gov/cgb/consumerfacts/cablerates.html
[7] Inform*itv*, "Satellite to Mobile," October 15, 2008, available at: http://informitv.com/articles/2008/10/15/youtubecomparesonline/
[8] Although the movement to digital networks increases the system capacity available to cable operators, capacity constraints still exist, of course. Nevertheless, it should be noted that cable operators' ongoing process of migrating channels from analog to digital programming services benefits consumers because digital is much less-bandwidth intensive. Digital service provides cable operators with the ability to offer more channels in the same amount of bandwidth, a result consistent with the goal of the First Amendment to offer more content rather than less.
[9] Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, Engage, Vol. 9, Issue 3, October 2008, available at: http://www.freestatefoundation.org/images/Charting_a_New_Constitutional_Jurisprudence_for_the_Digital_Age-Engage.pdf
[10] 512 U.S. 622 (1994).
[11] Other FCC actions that involve program carriage decisions, such as review of a cable operators' decision to carry a particular sports network, seriously implicate First Amendment values because they interfere with the operators' editorial discretion.
[12] Alexander M. Bickel, THE MORALITY OF CONSENT 123 (1975).