RECENT DEVELOPMENTS—TELECOMMUNICATIONS

CITY OF AUBURN V. QWEST CORP.

260 F.3d 1160 (9th Cir. 2001)

The United States Court of Appeals for the Ninth Circuit examined whether the federal Telecommunications Act of 1996 preempted local ordinances regulating telecommunications companies.

Section 253(a) of the federal Telecommunications Act of 1996 bars all state and local regulations that prohibit or have the effect of prohibiting any company's ability to provide telecommunications services unless the regulation falls within one of the statute's safe harbor provisions. In relation to the present case, section 253(c) permits local ordinances that regulate public rights-of-way. Multiple cities passed such local regulatory ordinances. Under these ordinances, telecommunications service providers wishing to operate in a city had to apply to that city for a franchise. Only franchised telecommunications companies could install facilities in public rights-of-way. In order to obtain a franchise, telecommunications companies had to submit lengthy and detailed application forms, including maps, corporate policies, documentation of licenses, and "such other and further information as may be requested by the city." The ordinances also regulated transferability of ownership and charged fees unrelated to maintenance of the public rights-of-way. Further, each city reserved discretion to grant, deny, or revoke franchises for unnamed reasons. Faced with these requirements, Qwest sought a declaratory judgment that the federal Telecommunications Act of 1996 preempted such ordinances as unreasonable prohibitions on the ability to provide telecommunications services. The district court dismissed Qwest's claim as unripe on the grounds that the analysis would be better-conducted following specific attempts by the cities to enforce their telecommunications ordinances.

However, the Ninth Circuit found the case ripe for judicial resolution. It found that the cities' requirements to obtain a franchise, taken together, had the effect of prohibiting Qwest and other companies from providing telecommunications services and, therefore, created a substantial and unlawful barrier to entry into the telecommunication market. The court held that the ordinances attempted to regulate the telecommunication companies themselves rather than the public rights-of-way. In reaching this decision, the court considered the cities' (1) requirement that the applicant submit proof of its financial, technical, and legal qualifications to provide services, (2) regulation of the transferability of ownership, (3) requirement that the companies provide participating cities with best available rates, and (4) reservation of the right to grant, deny, or revoke franchises based on unnamed factors. Thus, the court held the ordinance's requirements overly burdensome and preempted it as outside the realm of section 253(c).

FEDERAL COMMUNICATIONS COMMISSION FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING IN THE MATTER OF: CARRIAGE OF DIGITAL TELEVISION BROADCAST SIGNALS

Congress requires cable broadcasters to provide channels for local television stations. Thus, under sections 614 and 615 of the Communications Act of 1934 ("the Act"), and FCC rules, commercial and noncommercial educational (NCE) television broadcast stations are entitled to request carriage on cable systems located within the station's market. The cable operators must carry the local stations on certain channels and must not degrade the local stations' signals. Cable operators must only carry primary video, and are not required to carry duplicative local stations. Additionally, sections 325 and 336 of the Act relate to retransmission consent and broadcast spectrum flexibility and ancillary and supplementary services.

The television industry is currently undergoing a transition from analog to digital television broadcasting. On January 23, 2001, the FCC released its First Report and Order and Further Notice of Proposed Rulemaking, regarding the impact of the transition from analog to digital television on various regulations on cable television broadcasters.

The first issue was whether cable operators must immediately (during the transition) provide both digital and analog signals of local stations' broadcasts. Such duplicative broadcasting might force cable operators to drop other programming services if channel capacity is limited. The FCC decided not to resolve this dual carriage issue in this order, and requested more comment. However, the Commission did clarify (by amending sections 76.5 and 73.622) that digital-only local commercial and NCE television stations were entitled to mandatory carriage by cable operators.

The FCC then turned to retransmission consent issues. Section 325 of the Act prohibits cable operators from broadcasting the signals of local *commercial* television stations unless the local stations consent or choose mandatory carriage. The Commission held as follows. First, stations that simultaneously broadcast analog and digital signals are permitted to treat the signals differently for carriage purposes. Thus, a station can carry out separate negotiations regarding the two signals with cable operators. Stations that broadcast only digital signals are treated just as analog-only stations. Second, stations that commence digital operations will be treated as new stations for purposes of electing either retransmission consent or mandatory carriage, and thus do not need to wait until the end of the three-year election cycle. Third, at least during the transition phase, when a digital-only or digital-and-analog television station consents to retransmission, it may negotiate with the cable operator for partial carriage of the local digital television signal. Fourth, superstations' digital signals are treated the same as their analog signals for retransmission consent purposes. Thus, cable operators are exempt under section 325(b)(2)(D) of the Act from the obligation to obtain retransmission consent from superstations' analog and digital signals if those signals are available by a satellite or common carrier on May 1, 1991. Fifth, exclusive retransmission consent agreements between digital or analog television broadcast stations and cable operators are prohibited until January 1, 2006. Sixth, "tying" arrangements, in which a television broadcaster requires the cable operator to carry its digital signal as a condition of carrying its analog signal, are not prohibited at this time. The Commission requested more information regarding this issue. Seventh, as NCE stations are not covered by section 325 of the Act, an NCE station can-not withhold its signal from being carried by any multi-video programming distributor or cable operator. However, an NCE station can negotiate for voluntary carriage, and thus for exclusive digital carriage arrangements for any signals not subject to mandatory carriage under section 615 of the Act.

The FCC then addressed ten issues regarding digital signal carriage requirements. First, the Commission asked whether the new digital technology has changed how channels should be defined for the purposes of section 614(b)(1)(B) of the Act, which provides that a cable operator with more than twelve usable activate channels is not required to devote more than one-third of the aggregate number of usable activated channels for the carriage of commercial television stations. Traditionally, analog channels were defined in 6 MHz blocks. However, the new digital technology allows signals to be compressed so that several signals can fit within a 6 MHz block. The Commission held that channel capacity should not be determined by counting the number of 6 MHz blocks. Instead it should be calculated by taking the total usable activated channel capacity of the system in MHz and dividing it by three. This number is the limit on the amount of system spectrum that a cable operator must make available for commercial broadcast signal carriage purposes. Usable activated channels are defined as previously set out in section 76.5(nn) (section 602(1) of the Act) and section 76.5(oo) (section 602(19) of the Act), and may include the cable spectrum used for internet service, pay-per-view, video-on-demand, and telephony. Once the one-third quota has been met, the cable operator has discretion to choose which signals it will carry. NCE stations are not included in the calculation.

Second, section 614(h) of the Act requires stations to deliver a good quality signal to the principal headend of the cable system, in order to qualify for carriage. As degradation presents unique problems in the digital signal context, the Commission established a new standard for digital signals. Specifically, stations must maintain a minimum signal level of—61 dBm at the principal (cable system) headend.

Third, section 614(b)(3) of the Act requires the cable operator to carry "primary" video in its entirety, along with accompanying audio, closed caption, and, to the extent feasible, program-related material carried in the vertical blanking interval. Section 615(g)(1) of the Act provides similar rules for NCE stations. Digital broadcasts may carry many concurrent signals including multiple high or standard definition digital television programs, making it difficult to determine what is "primary" video. The Commission held that only one video stream (along with program-related content) of multiple simultaneous streams can be considered primary. The broadcaster chooses which stream is primary. Cable operators must provide mandatory carriage for primary video program-related content, but not for separate, independent and unrelated programming streams, or for ancillary or supplementary services under section 336 of the Act. The FCC noted that section 73.624(c) of the Commission's Rules provides examples of such ancillary or supplementary services. An example of unrelated programming might be e-commerce applications. The FCC revised its Rule in section 76.56(e) to modify its three-part test for determining what is program-related to take into account technological differences between analog and digital programming. The Commission also held that program guide data is not program-related, and thus is not subject to mandatory carriage. Finally, the FCC held that section 336 of the Act precludes a digital television station offering video services for a fee from asserting multichannel video programming distributor status under the FCC's rules and claiming program access right pursuant to section 628 of the Act.

Fourth, the Commission found that it did not have enough information to revise its rules implementing section 614(b)(5) of the Act. This section permits a cable operator to decline to carry a station's signal if it substantially duplicates another local television station's signal. The applicable rule states that two commercial television stations are considered to substantially duplicate each other if they simultaneously broadcast identical programming for more than fifty percent of the broadcast week. An NCE station does not duplicate another NCE station if at least fifty percent of its typical weekly programming is distinct from the other station.

Fifth, the Commission asked how the Act's sections 614(b)(4)(A) and 615(g)(2) material degradation requirements apply to digital signals. First, the FCC believes that material degradation should be measured by consumer perception, not by the amount of digitized information. In order to determine whether the signal has degraded, it should be tested at the input terminal of either the television set or set-top box if the subscriber owns that piece of equipment, or at the output point of the set-top box if the subscriber rents that equipment from the cable operator. Second, because section 614(b)(4)(A) of the Act requires that cable operators provide the same quality of signal processing and carriage for broadcasters' signals as they provide for any other type of signal, mandatory carriage of digital broadcast signals must be provided at the same perceptible quality as other digital programs. Third, the Commission held that a television station may demand that one of its HDTV or SDTV signals be carried on the cable system for delivery in analog format, without violating the nondegradation requirement, at least during the early stages of the transition period. Fourth, the FCC will allow cable operators to remodulate digital broadcast signals.

Sixth, the Commission will not require cable operators to provide subscribers with a set-top box that would allow the viewing of digital broadcast signals by a non-digital cable ready television receiver. Owners of analog television receivers will be able to view analog simulcasts.

Seventh, sections 614(b)(6) and 615(g)(5) of the Act generally provide that television stations carried pursuant to the mandatory carriage provision are entitled to be carried on the same channel number. Nevertheless, the FCC held that in view of the channel display menus made possible by digital signal technology, channel positioning requirements will not be implemented. Accordingly, cable operators are required to pass through program-related channel mapping data.

Eighth, the FCC did not alter its method for assessing a television's market area under section 614(h)(1)(C) of the Act. For both analog and digital signals, Nielsen Media Research determines the relevant market reached by stations' programming. However, the FCC recognized that the technical coverage area of digital and analog signals might not be exactly the same. The FCC will consider changes in signal strength and Grade B contour coverage. All other matters will be decided on a case-by-case basis.

Ninth, the Commission will allow cable operators to place required qualified NEC and low power television stations on unused public, educational, or governmental channels not in use for their designated purposes.

Tenth, the process for filing complaints under section 614(d)(3) of the Act by television stations will be left unchanged.

Next, the FCC turned its attention to possible changes to other Part 76 requirements. First, under sections 653(c)(1) and (c)(2)(A) of the Act, any provision applied to cable operators must apply no greater or lesser to open video systems. Thus, the FCC clarified that open video systems must adhere to the rules adopted for the cable industry, including carrying digital-only television stations.

Second, cable operators must notify their subscribers whenever a digital television signal is added to the cable channel line-up or whenever such a signal is moved to another channel location. However, a cable operator is not required to notify subscribers of the programming available on each possible SCTV digital stream.

Third, the rules regarding cable television relay service microwave stations will remain unchanged in light of the absence of comment.

Fourth, program exclusivity rules implemented in sections 76.92 and 76.101 of the FCC's rules will remain unchanged because there is an inadequate record. Exclusive distribution rights afforded to network and syndicated programming through private agreements will be protected.

Fifth, the Commission interpreted section 623(b)(7) of the Act to require that digital signals be provided to all cable subscribers on the same basic, lowest priced tier as analog signals. However, because the Commission believes that section 623(b)(7) does not apply once competition is present in the franchise area, if a cable system faces effective competition, and is deregulated pursuant to an FCC order, the cable operator can place a broadcaster's digital signal on upper tiers of service or on a separate digital service tier.

Sixth, the rate regulation processes in place should generally be applied to the addition of digital programming. Thus, a cable operator may raise rates to cover the costs of upgrading equipment to supply digital broadcasting to subscribers. However, only subscribers of digital programming should pay the increased rates.

Finally, the FCC issued a further notice of proposed rulemaking. The FCC sought comment on a number of issues including the following: First, is dual carriage needed for a successful transition to digital television and return of the analog spectrum? Specifically, the Commission would like to establish a record of possible harm to television stations in the absence of dual carriage, in anticipation of a First Amendment challenge before the U.S. Supreme Court. Second, as we are in the midst of the transition from analog to digital, the FCC requests comments on how the affected parties expect to complete the transition, how the law applies, the current state of digital technology and availability of programming, the quantity of digital programming, and issues relating to small operators, in order to better formulate future rules and policy. Third, what exactly does "program-related" mean in the digital context? Fourth, what is the available usable channel capacity, and what are the implications of techniques that conserve or recapture cable channel capacity? What are the feasibility and implications (e.g., copyright, advertising rate structure) of a proposal to adopt digital carriage rules that allow cable operators to deliver services from video servers through the internet's channel addressing methodology? Fifth, what is the extent of the prevalence and scope of voluntary carriage agreements in the digital signal context? Sixth, what is the effect of new ownership rules affecting the number of television stations in any given market that can be owned or controlled by a single broadcaster? Seventh, should digital channels be placed on different pricing tiers than analog channels? Eighth, what effect will the addition of digital broadcast services to cable operators' channel line-ups have on the FCC's per channel rate adjustment methodology? Ninth, should the FCC adopt different rules regarding implementation of the Satellite Home Viewer Improvement Act of 1999, for digital broadcasts, than it did for analog broadcasts?

MEDIAONE GROUP INC. V. COUNTY OF HENRICO, VIRGINIA

257 F.3d 356 (4th Cir. 2001)

The United States Court of Appeals for the Fourth Circuit determined whether Henrico County could condition its approval of the transfer of control on an open access provision or whether the federal Communications Act preempted such a conditioned approval.

MediaOne provided bundled services, combining their broadband pipeline with Internet services offered by other Internet Service Providers ("ISPs"). AT&T acquired MediaOne and applied to Henrico County for formal approval of AT&T's control of MediaOne. Henrico County conditioned its approval on MediaOne providing open access to its cable modem platform to all ISPs. AT&T and MediaOne sued the county in federal court arguing that the federal Communications Act preempted this condition on approval. Verizon intervened as a defendant. The district court granted summary judgment to AT&T and MediaOne, finding that the open access conditioned approval violated the Communications Act.

Henrico County and Verizon appealed. The appellate court affirmed the district court's granting of summary judgment. The court found that forcing MediaOne to provide its cable modem platform to an ISP, as a condition for transfer of control, violated 47 U.S.C. § 541(b)(3)(d) of the federal Communications Act. Section 541(b)(3)(d) states that a "franchising authority may not require cable operators to provide any telecommunications . . . facilities . . . as a condition of the . . . transfer of a franchise." The court rejected the County's argument that MediaOne was not required to provide access to "telecommunications facilities" because MediaOne was primarily a "cable system." Instead, the court relied on Section 153(43)'s definition of "telecommunications," as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." The court also found that MediaOne's services could be classified as telecommunications services (rather than mere cable system services) because the Communications Act contemplates multi-use facilities receiving different regulatory classifications depending on the services they provide at a given time. Therefore, although MediaOne maintains a cable system, its facilities are properly classified as telecommunications facilities when they provide transmission paths to the Internet. As such, Henrico County violated section 541(b)(3)(d) when it conditioned the transfer of control of MediaOne on open access to its telecommunication facilities.

TIME WARNER ENTERTAINMENT CO., L.P. V. FEDERAL COMMUNICATIONS COMMISSION

240 F.3d 1126 (D.C. Cir. 2001)

In this case, owners of cable television systems petitioned the United States Court of Appeals for the District of Columbia Circuit for review of FCC regulations promulgated pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"). The regulations at issue generally dealt with attempts by the FCC to prevent anticompetitive behavior in the cable industry. The court's opinion dealt with five distinct issues.

Section 11(c) of the Cable Act sets two types of limits on Cable operators: horizontal and vertical. The horizontal requirement limits "the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. § 553(f)(1)(A). The goal of this limit is to "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer." 47 U.S.C. § 553(f)(2)(A).

The FCC implemented the horizontal requirement by setting a thirty percent limit on the number of subscribers that may be served by a multiple cable system operator. The FCC argued that this number satisfied its statutory obligation under the Cable Act to prevent anticompetitive behavior and promote diversity. The court held that the FCC's regulation failed to pass intermediate scrutiny. First, although the court agreed that the FCC has authority to prevent companies from engaging in anticompetitive behavior, it found that neither Congress nor the FCC presented substantial evidence that companies, either independently or in collusion with other firms, had behaved, or were likely to behave, anticompetitively. Second, the court held that Congress did not give the FCC authority to impose a limit that does more than guarantee a programmer two possible outlets, based solely on the goal of promoting diversity. Under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the court found that Congress's primary concern was not promoting diversity but fair competition. The court reversed and remanded with respect to the thirty percent horizontal requirement.

The vertical requirement limits "the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." 47 U.S.C. § 533(f)(1)(B). The FCC's rule implementing the vertical limit required that sixty percent of channel capacity (up to 75 channels) be set aside for nonaffiliated firms' programming. Again, the FCC argued that this number satisfied its statutory obligation under the Cable Act to prevent anticompetitive behavior and promote diversity. The court found that the vertical rule failed to pass intermediate scrutiny because the FCC did not justify the rule as not burdening substantially more speech than necessary: "the FCC seems to have plucked the 40% limit out of thin air." The court reversed and remanded with respect to the forty percent rule. Additionally, the court found that there was no basis for the FCC's decision not to exempt cable companies that are subject to effective competition.

The FCC also promulgated rules for attributing ownership for purposes of applying the horizontal and vertical limits. First, under the FCC's rules, ownership of five percent of the voting shares of a company signifies attribution. The court upheld this rule on the grounds that there was adequate evidence that the rule would address situations of influence over companies. Second, the FCC also defines attribution by an investor who holds an interest in a company exceeding thirty-three percent of equity and debt. Finding that the thirty-three percent debt and equity limit had support in the record, the court upheld the rule.

The FCC eliminated an exemption in the broadcast attribution rules for a minority shareholder in a company with a single majority shareholder. The court found standing, and reversed the FCC's decision on the ground that the FCC offered no affirmative justification for eliminating the exemption.

Finally, the court reversed an FCC interpretation regarding sale of programming to the partnership by a limited partner. In general, a limited partner is exempt from attribution if that partner ensures that it is not materially involved in management, day-to-day control, or controlling programming choices. The FCC interpretation eliminated this exemption when the limited partner is a vertically integrated multiple cable system operator that sells programming to the partnership. Thus, such partners could not sell programming to the partnership. The court reversed this exemption elimination on the grounds that it was not rationally related to the goal of restricting the limited partner from controlling the partnership's programming choices, particularly in light of other means for restricting that control.