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Telecommunications Alert: D.C. Circuit Sidesteps Merits of Cable Programmers' Challenge to Duplicative Must-Carry Rules in C-SPAN v. FCC

11/21/2008

Late last month, the U.S. Court of Appeals for the D.C. Circuit denied several cable programmers' petition for review of an FCC order that regulated cable operators' carriage of broadcast signals, finding that the cable programmers did not have standing to challenge the FCC's order. Due to the unique factual circumstances of the case, the court's standing analysis required more concrete evidence of harm to the programmers than would have been required otherwise.[1]

Background of the *C-SPAN* Case

Congress, by passing the Digital Television Transition and Public Safety Act of 2005 (the "Act"), required full-power over-the-air TV stations to switch their broadcast transmissions from an analog format to a digital format by February 18, 2009 (the "DTV Transition" date). Cable systems are not required by the Act to go all-digital. However, in 2001 the FCC held that cable operators cannot allow "material degradation" of the signals of must-carry stations after the DTV Transition. This could include the options of all-digital carriage or downconverting high definition (HD) signals to standard definition (SD) format.

Late last November, the FCC issued the 2007 Duplicative Carriage Order[2] (the "2007 Order"), which formed the basis for the *C-SPAN* challenge. The order required any cable system that offered an analog-only tier of program service to either:

- transmit both an analog *and* a digital version of each must-carry broadcast station, *plus* an additional HD version for any must-carry station broadcasting in HD, for three years after the DTV Transition; or
- to switch to an all-digital system and provide every subscriber desiring to attach an analog television to the system with a digital box.

Nearly a year after issuing the 2007 Order, and after briefing in the D.C. Circuit case had been completed, the FCC issued a new order[3] in September 2008 narrowing the scope of the 2007 Order in two ways. First, the FCC exempted small and low-bandwidth cable systems from its requirements. Second, it retracted a requirement in the 2007 Order that cable operators carry both an SD digital and an analog version of all must-carry stations. This significantly limited the scope of duplicative carriage, narrowing its application to only those must-carry stations broadcasting in HD.

Well before the FCC issued its 2007 Order, the cable industry had announced that it would voluntarily continue to provide must-carry stations in both analog and digital format for *three years* after the DTV Transition *regardless of the FCC's action on the subject*. The FCC recognized this commitment in its 2007 Order. Later, the FCC would argue to the D.C. Circuit that the 2007 Order simply repeated this commitment and therefore caused no harm to the programmer plaintiffs beyond what the cable industry had already pledged to do.

After the *C-SPAN* case had been filed, the cable industry reiterated its three-year promise to the FCC and made the further promise to adopt duplicative carriage regardless of the outcome of the case. As discussed below, these statements by the cable industry would play a key role in the D.C. Circuit's ruling on standing.

C-SPAN and Other Cable Programmers' Challenge to the FCC's Rule

Several cable programmers, including C-SPAN—but no cable operators—petitioned for appellate court review of the FCC's 2007 Order. The cable programmers argued that the 2007 Order's requirements violated their First Amendment rights, were contrary to the Communications Act's plain meaning, and were arbitrary and capricious. Specifically, C-SPAN argued that requiring cable systems to devote additional scarce bandwidth to carrying multiple and duplicative versions of must-carry television broadcast stations would decrease the opportunities for other television programmers to reach their intended audiences—causing a "crowding out" effect. C-SPAN and the other cable programmers argued that this government-mandated reduction in the number of opportunities for *non-must-carry* broadcast TV programmers to speak, which was intended to ensure additional opportunities for *must-carry broadcast TV programmers* to speak, violated the cable programmers' own protected First Amendment interests.

C-SPAN and the other cable programmers relied in part upon the 1994 Supreme Court case, *Turner Broadcasting System, Inc. v. FCC*.[4] The *Turner* Court held that cable programmers are fully protected First Amendment speakers and that mandatory carriage requirements such as those in the 2007 Order directly interfere with the free-speech rights of cable programmers by "render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining" after the must-carry broadcast TV stations are given their channel quota. The *Turner* Court recognized that this "crowding out" effect has significant First Amendment implications for cable programmers' speech interests, although in that case it found that the government's interest in protecting the system of free, over-the-air television broadcasting justified the speech infringement.

C-SPAN and the other cable networks challenging the FCC rules also relied on *Quincy Cable TV, Inc. v. FCC*.[5] *Quincy Cable* recognized the First Amendment harms that must-carry rules can inflict upon cable programmers due to this very "crowding out" effect. While the Supreme Court in *Turner* assumed without discussion that cable programmers enjoy standing to challenge a must-carry rule that directly regulates only cable *operators* (not cable *programmers)*, the D.C. Circuit in *Quincy Cable* expressly held as much. Furthermore, the *Quincy* court held that cable programmers may enjoy standing *even if cable operators*, in the absence of the regulation, *might still elect not to purchase programming from the cable programmers*. Petitioners in *C-SPAN* argued that the November 2007 Order would cause direct injury to their speech interests via "crowding out," as in both *Turner* and *Quincy Cable*, and that they enjoyed standing to challenge the rules adopted in that order as a result.

The D.C. Circuit Avoids Constitutional and Statutory Arguments by Focusing on Standing Alone

The *C-SPAN* opinion never addressed the merits of the cable programmers' First Amendment, statutory, or Administrative Procedure Act arguments. It focused instead solely upon the issue of standing. The court stated that, although it had previously found that cable programmers had standing to challenge the FCC's must-carry rules, *Quincy Cable* did not stand for the proposition that cable programmers *always* have standing to challenge those rules.

The court drew a distinction between *Quincy Cable* and *C-SPAN* based on what level of evidence existed in the record. In *Quincy Cable*, the record contained evidence (in the form of petitions for waiver to the FCC) that the must-carry rules there at issue would in fact force cable systems to drop the programmer that had brought that case. No such statement had been made by a cable operator concerning the petitioning cable program networks in *C-SPAN*. To the contrary, the cable industry had gone out of its way to assure the FCC and the public that cable operators would make the same programming decisions whether or not the 2007 Order was vacated by the D.C. Circuit.

The court thus found that "the causal connection between the [2007 Order] and the claimed injury is tenuous at best." Specifically, the D.C. Circuit wanted to see "facts showing that at least one petitioner competes for carriage on a cable system that is a hybrid system bound by the [2007 Order], that will not opt to switch to all-digital operations, that receives HD (as opposed to SD) signals from must-carry stations, and that will not voluntarily follow the [2007 Order] anyway but is operating at 'full' capacity."

Even had the cable program networks been able to provide such evidence, the court would have further required them to show that the First Amendment speech burden resulting from decreased channel capacity for a particular cable operator would not be alleviated by increases in capacity across cable systems generally resulting from other operators going all digital. Finally, the court found the FCC's subsequent narrowing of the 2007 Order to be relevant to its standing analysis, although it is unclear how much weight the court gave to this fact.

A Positive Practical Outcome for Cable Programmers

Because the D.C. Circuit never reached the merits of the 2007 Order, its *C-SPAN* holding will have no practical effect on cable programmers' ability to gain carriage on cable systems

saddled with duplicative-carriage obligations. The *C-SPAN* decision will have, moreover, little or no relevance in any challenge to future must-carry regulations beyond imposing a somewhat higher burden on a petitioner to demonstrate First Amendment injury sufficient to confer standing.

Many in the cable industry believe, however, that the cable program networks' decision to challenge the 2007 Order, and the arguments that these networks made to the D.C. Circuit, resulted in, or at least encouraged, the FCC's decision, after the case was filed and briefed, to significantly narrow the requirements of the 2007 Order. In that respect, C-SPAN and the other cable program networks that brought the petition for review realized a partial victory before the case was even argued.

Endnotes

[1] *C-SPAN et al. v. FCC*, No. 08-1045 (D.C. Cir. Oct. 31, 2008).

[2] Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, Third Report and Order and Third Further Notice of Proposed Rulemaking, FCC 07-170, CS Docket No. 98-120 (rel. Nov. 30, 2007).

[3] Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, Fourth Report and Order, FCC 08-193, CS Docket No. 98-120 (rel. Sept. 4, 2008).

[4] 512 U.S. 622 (1994).

[5] 768 F.2d 1434 (D.C. Cir. 1985).

If you would like more information on this or any other telecommunications matter, please contact your telecommunications attorney at Mintz Levin or visit www.mintz.com.

Bruce Sokler
(202) 434-7303
BDSokler@mintz.com

Christopher Harvie
(202) 434-7377
CJHarvie@mintz.com

Howard Symons
(202) 434-7305
HJSymons@mintz.com

Frank Lloyd
(202) 434-7309
FWLloyd@mintz.com

Robert Kidwell
(202) 661-8752
RGKidwell@mintz.com

Jennifer Ellis
(202) 585-3595
JCEllis@mintz.com