In re Carriage of Digital Television Broadcast Signals et. al.

Statement of Commissioner Harold W. Furchtgott-Roth,
Approving in Part and Dissenting in Part

I agree in part and dissent in part with the Commission's actions in this proceeding. Were all issues finally resolved, and the next step were for aggrieved parties to challenge the rules in court, I would feel compelled to delineate precisely where the Order is faithful to the statute, and where it is not. No finality is reached here; all issues can and will be revisited; the line drawn in the sand by this item today will doubtlessly have been washed away tomorrow.

This is not the Report and Order that I would have written. Were I the scribe, I would have stated the statutory language in Sections 325, 614, and 615; reviewed the comments; and reached conclusions on a proper interpretation of those sections consistent both with current rules and with any conceivable technology. Where possible, I would have written simple, unambiguous, easily enforced rules that apply with equal simplicity to any technology. There would be finality and closure; after reconsideration, disappointed parties could have gone to court. Rather than a line-by-line accounting of my views, let me note my three greatest disappointments: (1) the failure to reach a final resolution long after the pleading cycle had closed; (2) constitutional ruminations to limit First Amendment protections; and (3) the interpretation of the relevant statutory language as requiring special rules for digital broadcasting.

Final rules

Decisiveness rather than indecisiveness, action rather than inaction, are usually thought to be virtues. There are exceptions. It is difficult, however, to find anything laudatory in the delay by this Commission to resolve matters regarding digital television carriage obligations under the current regulatory regime. The issues were initially framed three years ago. While I have doubts about whether the issues have ever been properly framed, I have even more doubts that additional time alone will lead these issues to be properly framed, much less resolved.

I see no need for a Further Notice, with the possible exception of creating a record for the Satellite Home Viewer Improvement Act. We have a substantial record for the must carry issues, and delay only perpetuates uncertainty. Businesses do not reinvent themselves every day; they have plans that stretch over years. Capital investments are not children's toys that can be built in one moment on a whim, torn apart the next moment on another whim, and reconstructed in a different place tomorrow. In the business world, investments are made after careful balancing of expectations of uncertain futures. The more uncertain those futures are, the less likely investments are made. Uncertainty about future government rules for Sections 325, 614, and 615 of the Communications Act doubtlessly dampens investment in both the broadcast and cable industries.

The item today does little to limit uncertainty. Indeed, at times it seems to send conflicting signals. For example, the Report and Order can be read to limit the likelihood that the Commission will adopt dual carriage requirements; the Further Notice can be read as a signal of likely future adoption of dual carriage. These mixed signals only aggravate uncertainty.

Constitutional ruminations

As I have noted in many proceedings, the Commission should interpret the Act so as to avoid conflicts with the Constitution. The Further Notice seeks additional information so that the Commission can weigh whether a dual carriage requirement is constitutional, without first resolving whether such a requirement is mandated by the Act. Neither the Report and Order nor the Further Notice squarely addresses the central issue of precisely what form of must-carry obligations is mandated by the Act. If the clearest reading of the Act leads to rules that do not raise constitutional concerns, the Commission need not collect information to evaluate hypothetical constitutional concerns.

After many years and the receipt of substantial information, we still claim to be insufficiently informed. Yet we have no institutional, much less personal, embarrassment in seeking yet more information. Moreover, we seek comment on a variety of issues, few of which have a direct bearing on whether dual carriage is or is not constitutional. The Further Notice, whatever merit it may have, does not necessarily lead to a final decision by the Commission. It simply promises to delay a decision for another day, or another year, or another century.

Even if the Commission were to find that a dual carriage requirement is permitted but not required by the Act, few if any parties can be comforted by the prospect of the FCC engaging in a constitutional balancing act. It is one matter, and even a troubling matter, for Congress to balance competing interests and to write a law limiting First Amendment protections. That is perhaps one of the lessons of *Turner II*. It is, in my opinion, an even more troubling matter for the FCC, without specific delegation of authority under specific law, to ruminate about how to limit First Amendment interests of some parties and balance them against other policy objectives. What possible information can the FCC receive that would compel us to limit protected speech? What are the rules, bases, and parameters of the balancing act we undertake other than an implicit understanding that we will make them up as we go along and that we will recognize the balance of conditions under which we should limit First Amendment protections only when we see it. Congress cannot delegate the discretion to the FCC to limit First Amendment rights where the law can easily be interpreted in such a manner as not to require any limitation of First Amendment protections. Only if the Commission were to find that the statute inescapably mandates a dual carriage requirement, and only if that dual carriage requirement inescapably raised First Amendment concerns would the Further Notice be necessitated. The Commission has yet to make either finding.

Technical neutrality

Sections 325, 614, and 615 of the Communications Act are not the most transparent portions of the statute. Nonetheless, regardless of what Congress meant at the time of drafting these sections, these sections are not technology-specific; moreover, they were written at a time when digital broadcasting was in its nascent stages of development from both a technical and regulatory point of view. These sections have not been relevantly amended since the advent of new digital technologies. Consequently, the Commission must interpret Sections 325, 614, and 615 in a manner that applies with equal force whether broadcast transmission is in analog, digital, Morse Code, or any other conceivable technology.

Simply stated, because Sections 325, 614, and 615 are technology neutral, our rules interpreting those sections should be technology neutral as well. Yet the proceeding before us has been framed in a different manner. Throughout the document is the explicit and implicit message that Sections 614 and 615 apply to an analog technology, and the FCC must develop corresponding but different rules to apply to a digital environment. Our job should not be to write *different* rules for digital technologies, but to write rules that apply with *equal* force to any technology.

Conclusion

Many businesses, large and small, some broadcast and some cable, are affected by the Commission's interpretation of Sections 325, 614, and 615. They have business plans that may depend on the final regulatory interpretation of Sections 325, 614, and 615. Absent final rules, no plans can be executed. Absent final rules, aggrieved parties cannot take their complaints about our rules to court for resolution of disputes. For businesses that depend on the FCC to provide regulatory certainty, their worst nightmare is a Commission that refuses to make decisions, good or bad. In this instance, those nightmares have come true.