



September 2009

Court Kiboshes Cable Cap

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The subscriber cap which the Commission adopted in 2007 to keep cable companies from acquiring too much control of program delivery mechanisms is officially toast. The U.S. Court of Appeals for the D.C. Circuit declared the cap arbitrary and capricious and vacated it on August 28. Since the same Court had sent the same cap back to the agency for further consideration in 2001, this should be no big surprise – especially since the Commission’s 2007 attempt to explain and justify the cap failed to address questions which the Court had told the Commission to consider.

Way back in 1992, Congress directed the Commission to fashion rules that would prevent any cable operator (or group of cable operators) from unfairly impeding the flow of programming to the consumer. In response, the Commission reached into its magic hat, intoned a couple of cryptic mathematic incantations, and – *presto* – announced that it had concluded that no single cable operator should be permitted to serve more than 30% of all subscribers. That was in 1993.

Since then, the Commission has twice changed the mystical mathematic formula supposedly used to calculate the subscriber cap, but both times the new formulae have miraculously led back to the same 30% cap. What a coincidence!

The Court had occasion to review the FCC’s first revised approach back in 2001, at which point the Court expressed concern that the Commission hadn’t adequately addressed all relevant considerations – including, in particular, the increase in direct satellite broadcast (DBS) subscribership. (The Court at that point also questioned the constitutionality of the cap, but since the matter was being shipped back to the FCC for further deliberation, no final determination was made on that score.) In 1992, DBS had accounted for a minuscule share of video subscribers (in the Court’s words, DBS providers were “bit players” then). In the intervening years DBS has expanded considerably – today, it accounts for one-third of all subscribers. Unsatisfied with the FCC’s initial revised approach, in 2001 the Court shipped the matter back to the Commission for further consideration. The Court specifically directed the agency to consider the effect of DBS on the ability of cable operators to “determine the economic fate” of programming networks.

The Commission dutifully took the case back. In 2008, after several years of proceedings, the Commission again reached into its magic hat, again intoned some mathematical incantations, and, lo and behold, again came up with a 30% cap!

Representatives of the cable industry again brought the matter back to the Court. And again the Court wasn't satisfied with the Commission's analysis. So much so, in fact, that in its August 28 opinion, the Court vacated the 30% cap, declaring it to be arbitrary and capricious. As a result, for all practical purposes, the cap no longer exists.

The Commission tried to justify its failure to figure in the competitive impact of DBS by observing that it would be difficult to do so. That argument went nowhere with the Court. Referring to the Commission's "dereliction" as "particularly egregious", the Court concluded that the FCC "either cannot or will not fully incorporate the competitive impact of DBS and fiber optic companies" into its calculations. Since the Court had specifically instructed the Commission, back in 2001, to consider DBS impact, the agency's failure to do so appears to have been especially galling to the Court.

The FCC 2007 decision to cling, rigor mortis-like, to the 30% cap was reached on a 3-2 vote, with the two then-Republican Commissioners (McDowell and Tate) dissenting. It will be very interesting to see how the new Democratic Commission reacts to the Court's stinging rebuke.