Telecommunications & Electronic Media

The FCC's Stalled Attempt to Breathe Life into Commercial Leased Access of Cable Television

*By Henry Weissmann & Eric Tuttle**

Back in the 1980s and 1990s, when the only way to get television programming was through cable or over-the-air broadcast, Congress decided that the cable industry had too much market power. In response, Congress enacted several restrictions on cable operators' ability to decide what programs to carry, including: (1) "must-carry" rules, requiring cable operators to dedicate some channels to carrying local broadcast stations, (2) "PEG" rules, requiring cable operators to dedicate other channels to public, educational, and governmental programming, and (3) "leased access" rules, requiring cable operators to dedicate yet other channels for unaffiliated commercial programmers who were unable to convince operators to carry their programs voluntarily.

These restrictions, and the FCC's implementation of them, were problematic from the start. Most obviously, the whole purpose of this regime is to deprive cable operators of the right to exercise editorial control—a right that lies at the core of the First Amendment. Nevertheless, in the mid-1990s, the Supreme Court rejected First Amendment challenges to the must-carry rules by a slim 5-4 vote.[1]

These restrictions have not gotten better with age. The premise of this regulatory regime—that there are insufficient outlets for independent voices—has come under increasing attack. For example, in many areas, consumers can now obtain programming over rival cable systems built by telephone companies and from direct broadcast satellite systems. In this context, it should hardly come as a surprise that leased access is not being used much. If a programmer has a good product, there are plenty of ways of getting it to the public.

What should come as a surprise is the FCC's response. Rather than view the absence of demand for leased access as a sign that the regulation is unnecessary, the FCC regarded it as a sign of market failure requiring further regulation. In February 2008, the FCC adopted rules that slashed the regulated price of leased access, even to the point of making it free in some instances. The FCC applied these rules even to areas in which cable operators face competition from wireline entrants; indeed, the FCC even applied the rules to wireline entrants themselves. The Sixth Circuit quickly stayed the FCC's rules, and the Office of Management and Budget (OMB) disapproved them as well.

This article describes the background of the leased access regime, the FCC's rules, and the pending legal challenges.

I. Origins and Development of the Leased Access Statute

Congress created the leased access scheme in the Cable Communications Policy Act of 1984 (the "1984 Act").[2] The 1984 Act required cable operators to set aside 10–15% of their channels for lease to programmers unaffiliated with the operator.[3] Operators were free to set the rates, terms, and conditions for leased access consistent with the purposes of the statute;[4] programmers could challenge these rates and terms as unreasonable by seeking relief in court or from the FCC, but reasonableness would be presumed.[5] Cable operators were denied any editorial control over leased access programming, but were permitted to use the designated channels for programming of their choice if they were not being used for leased access.[6]

In the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"), Congress amended the leased access provisions of the 1984 Act by giving the FCC authority to regulate the maximum price and other terms and conditions of leased access channel use—subject to a continuing requirement that leased access use not adversely affect a cable system's financial condition, operation, or development.[7]

The legislative history of the 1984 and 1992 Acts reveals two rationales for requiring cable operators to provide access channels. The first, particularly evident in the 1984 Act, is a hostility to cable operator editorial discretion—a form of speech practiced by cable operators in selecting the programming they wish to carry. For example, the reporting House Committee for the 1984 Act explicitly stated that its "overriding goal in adopting [the leased access provisions was] divorcing cable operator editorial control over a limited number of channels," and expressed a desire to ensure carriage of "programming which represents a social or political viewpoint that a cable operator does not wish to disseminate."[8]

The second rationale, particularly evident in the 1992 Act, was a desire to remedy what Congress regarded as anticompetitive trends in the cable industry due to excessive market power. The reporting Senate Committee for the 1992 Act found that the vast majority of communities at the time had only one cable system, and that cable operators were using their local monopoly status, vertical integration with cable programmers, and "bottleneck" control of programming to the detriment of independent programmers; in this environment, market forces, absent government regulation, would be "unable to cure cable's bottleneck problems."[9] Leased access was seen as an "important safety valve" for these conditions.[10]

II. The FCC's Initial Implementation of Leased Access

Through a series of rulemakings from 1993 to 1997, the FCC implemented its authority to set caps on leased access rates and to regulate other terms and conditions.[11] As to rates,[12] the FCC settled on an approach based on the "implicit fee" that cable programmers effectively pay to operators, as middlemen, for carriage. The implicit fee for a given channel is supposed to represent the cable operator's markup for that channel—the difference between what subscribers pay the operator to receive the channel and what the operator pays the programmer to carry it.[13]

* *Henry Weissmann and Eric Tuttle practice at Munger Tolles & Olson LLP. The views expressed are solely the authors' and do not necessarily reflect positions of the firm or its clients.*

In adopting this approach, the FCC determined that the leased access statute requires it to balance the interests of leased access programmers and cable operators. Diversity through leased access is to be encouraged, but only in ways that fully compensate cable operators, because Congress did not intend cable operators to subsidize leased access programming.[14] Accordingly, the FCC's obligation was to set a reasonable rate cap, regardless of whether that cap would in fact increase use of leased access.[15] The FCC also found that leased access programming results in significant costs and decreased advertising revenue for operators, and causes subscribers to devalue entire packages (known as "tiers") of channels because leased access programming is generally less desirable to subscribers and disrupts channel lineups.[16]

The FCC set the maximum leased access rate at the operator's *average* implicit fee.[17] Some leased access programmers argued that the FCC should set the maximum rate at the *lowest* implicit fee, on the theory that operators forced to carry leased access programming will necessarily displace the existing channels with the lowest implicit fees. The FCC did not adopt this approach, which it viewed as unrealistic. First, the value placed on a particular channel by subscribers is unknown because subscribers purchase most channels in tiers, so the implicit fee for a given channel can only be estimated. Second, the implicit fee for a channel does not in fact correspond to the overall value of the channel to the operator, and thus to the likelihood that the operator would bump that channel. For example, channels that are very popular with subscribers are likely to have low implicit fees because they tend to cost the operator the most to carry.[18]

The FCC's rules were upheld by the D.C. Circuit in 1998.[19] The court affirmed the FCC's reading of the statute to require full compensation to operators for leased access use. It noted in particular that the legislative history behind the 1992 Act showed that "Congress never intended to ensure financial success for leased access programmers," and that the Senate Committee had "frankly acknowledged that leased access might not be economically viable."[20] The court also upheld the FCC's specific rate methodology as reasonable.[21]

III. The FCC's Recent Attempt to Stimulate Use of Leased Access

Leased access remained relatively little-used even following the 1992 amendments and the FCC's implementing regulations. A 2006 survey by the FCC revealed that the average cable system carried 0.7 leased access channels.[22] Users of leased access tended to fall into two categories: part-time programmers capable of generating revenue directly from viewers (such as home shopping programs, infomercials, adult content, and certain kinds of religious programming), and low-power broadcast stations that do not qualify for the "must-carry" rules.[23]

On February 1, 2008, several months after seeking comments on "the current status of leased access programming,"[24] the FCC announced new regulations for leased access that reversed course from the approach it had taken in 1997. Rather than viewing its task under the statute as setting a fair rate regardless of the effect on leased access use, this time the FCC's goal was to address the "underutilization of leased access" and to "make the leased access channels a more viable outlet" by "mak[ing] adjustments to the rate calculations that should lower prices."[25] Further, while the FCC purported to still view the statute as requiring a balancing of interests between leased access programmers and cable operators, it concluded that leased access rates could result in net lost revenue for cable operators, so long as they did not "materially affect the financial health of a cable system"; the FCC "should set the leased access rates as low as possible" consistent with that requirement.[26]

In an about-face from the 1997 regulations, the FCC adopted a "marginal implicit fee" approach,[27] concluding that the average implicit fee rate methodology overcompensates cable operators because it represents more than the value of the channel that actually gets displaced to make room for leased access.[28] The FCC "assume[d]" that the channel to get bumped would be the one with the lowest implicit fee, or at least decided to set its rules to "encourage such a result."[29] The FCC made no attempt to explain away its prior conclusion that a channel's implicit fee is an abstract estimate that bears no relationship to the actual value of a channel to the cable operator.

Under the FCC's new approach, the maximum rate for leased access on a particular tier of channels is determined by the lowest implicit fees calculated for channels voluntarily carried by the operator on that tier.[30] Where cable operators purchase channels from programmers in bundles, the FCC mandated without explanation that all of the fees paid for the bundle be allocated to the top-rated channel in the bundle, with all other channels in the bundle receiving an implicit fee of zero.[31] Out of a concern that cable operators might somehow game their programming tiers to make leased access unaffordable, the FCC further imposed a "maximum allowable rate" of ten cents per subscriber per month, which applies whenever any particular cable system's marginal implicit fee would otherwise exceed that amount.[32] The FCC authorized cable operators to petition the FCC to exceed this maximum allowable rate on a showing of equity, public interest, and facts justifying the system's particular rate, but the FCC would presume that its formula provides the best rate.[33]

Beyond the changes to the rate formula, the FCC imposed a number of other terms and conditions designed to encourage use of leased access. For example, cable operators would be required to designate a leased access liaison and make available within three days of any request a host of detailed information concerning the system's technical information and costs, as well as a sample contract and documentation justifying all policies, terms, and fees.[34] The FCC also amended its dispute resolution procedures to expand discovery of information relating to the operator's calculation of leased access rates.[35] Finally, the FCC required cable operators to file annual reports with the FCC concerning leased access rates, usage, and complaints.[36] As a number of these and other regulations required approval from the OMB under the Paperwork Reduction Act,[37] the FCC delayed the effective date of many of its new rules—including the rate rules—pending OMB approval.[38]

Three of the FCC's five Commissioners observed in their separate statements that there had been inadequate public comment and review on the new rate methodology. This was grounds for two of those Commissioners to dissent

from the Order,[39] but Commissioner Adelstein—while frankly acknowledging that "the methodology was invented by staff out of whole cloth without sufficient public input, independent review or any transparency"—nevertheless supported the Order because interested parties could seek reconsideration.[40]

IV. The Judicial Challenge and Aftermath

The National Cable & Telecommunications Association (NCTA), a national trade association of cable operators, and several individual cable operators and leased access programmers filed petitions seeking judicial review of the FCC's Order that were consolidated into a single proceeding before the Sixth Circuit. The NCTA also sought an emergency stay of the Order from the Sixth Circuit.

The NCTA argued that the FCC's Order was unlikely to withstand judicial scrutiny because it failed to comply with the leased access statute or the Administrative Procedures Act (APA). In the NCTA's view, the Order ignored the statutory requirement that leased access rates not "adversely affect" a cable system's financial condition or development, which means fully compensating operators for the cost of leased access, even if that results in limited leased access use. Evidence submitted by the NCTA indicated that the FCC's new rules would result in a leased access rate of *zero* or near-zero in many cases (thanks largely to the rule allocating all value in a bundle of channels to the top-rated channel), which falls far short of full compensation. Moreover, the FCC's failure to explain its departure from its previous views of the statute and of the usefulness of a channel's implicit fee as a measure of its value to the operator, and its failure to develop record evidence in support of its assumptions, violated the APA. Finally, the NCTA attacked the FCC's failure to seek proper notice and comment on its new rules as required by the APA.[41]

The NCTA further argued that it would be irreparably harmed by the flood of leased access demand that was likely to follow the FCC's lowering of leased access rates to zero. This would impose serious disruption on cable operators' channel lineups, angering and confusing subscribers who would turn to services not subject to leased access rules. Moreover, the FCC's burdensome new disclosure requirements would impose unrecoupable implementation costs and expose sensitive competitive data to public dissemination.[42]

The FCC argued that the NCTA's claims were barred for failure to exhaust them before the agency. In the FCC's view, comments during the rulemaking proceeding that generally opposed decreases in leased access rates were insufficient to exhaust the NCTA's specific challenges to the adopted rate formula; as the NCTA could not have known the particular methodology until after the Order was released, the NCTA had to first raise its claims with the FCC by way of a petition for reconsideration.[43] The FCC further insisted that "basic economic principles" supported its assumption that leased access programming would displace the lowest-performing channels, and that the marginal implicit fee would offset any lost revenue from this displacement; it was the NCTA's obligation to bring any contrary evidence to the agency's attention during the rulemaking procedure. Moreover, the "safety valve" procedure permitting operators to exceed maximum allowable rates could correct for any problems in the FCC's assumptions.[44] The FCC dismissed the NCTA's claims of irreparable injury as speculative.[45]

Verizon, represented by the authors (among others), filed a brief in support of the NCTA's stay request focusing mostly on the First Amendment problems with the FCC's Order.[46] As Verizon argued, these problems independently justified a stay because First Amendment harms are by nature irreparable.[47]

The Supreme Court has held that by exercising editorial discretion, cable operators engage in speech protected by the First Amendment.[48] The FCC's Order burdens these First Amendment rights, Verizon argued, by forcing cable operators to carry more leased access programming and reducing cable operators' editorial discretion to select the programs that they wish to transmit. Although the D.C. Circuit had previously rejected a facial challenge to the leased access statute, it did so on the assumption that the statute would not in fact burden operator speech because "programmers have not and will not lease time on the channels set aside for them."[49] The FCC's Order, on the other hand, is expressly designed to stimulate leased access use.

Verizon argued that, even assuming that the FCC's Order furthers important governmental interests in general, there is no basis for applying it in geographic areas where there is effective cable competition, or to new entrants attempting to challenge a cable incumbent. Incumbents' bottleneck control over programming has always supplied the essential justification for cable regulations in the face of First Amendment scrutiny,[50] and such control cannot exist in the hands of a new entrant or where there is effective competition.[51] Indeed, the D.C. Circuit previously struck down the FCC's similar refusal to exempt from another speech-burdening regulation those cable operators subject to competition; as here, the FCC could not show that competitive operators would produce a mix of programming "inferior" to that produced by the regulation.[52]

The FCC challenged Verizon's argument on the theory that Verizon had failed to exhaust its claims with the agency by filing a petition for reconsideration. The FCC further argued that the leased access statute draws no distinction between competitive and monopolistic cable operators, and that the FCC is therefore under no obligation (and perhaps lacks authority) to create an exception to its rate regulations for competitive operators or new entrants.[53]

On May 22, 2008, the Sixth Circuit granted the FTCA's request for a stay.[54] The court concluded that the "NCTA has raised some substantial appellate issues."[55] It also cast doubt on the FCC's exhaustion arguments, noting that a petition for reconsideration is a prerequisite for review only where the appellant relies on legal or factual questions upon which the FCC had "no opportunity to pass," and that an agency necessarily has an opportunity to pass on the validity of the rationale it actually put forth and the adequacy of its justifications.[56] The court further found that the NCTA "demonstrated some likelihood of irreparable harm" flowing the large increase in requests for leased access expected to result from the rate reduction.[57]

Before merits briefing could begin on petitioners' challenges to the Order, the OMB issued a decision disapproving of the Order's information collection requirements. Among other things, the OMB concluded that the FCC's rate regulation would result in increased requests for leased access

and corresponding burdens on cable operators, and that the FCC failed to justify these burdens.[58] As a result, according to the terms of the FCC's Order[59] and the Paperwork Reduction Act,[60] most of the new leased access rules (including the rate formula) could not go into effect without further action by the OMB or the FCC. The Sixth Circuit accordingly agreed to hold the challenges to the Order in abeyance.[61]

One of the petitioners who opposed the NCTA's stay motion subsequently filed a request with the FCC to override the OMB action and to modify the new rate methodology to allow cable operators reasonably to allocate the fees paid for a bundle of channels rather than allocating all value to the highest-rated channel.[62] The request noted the cable operators' argument that, as a result of the bundling rule, many cable systems would have a maximum leased access rate of zero, and urged the FCC to "address this potential flaw in its new rate calculation."[63] On September 10, 2008, the FCC sought public comment on this request.[64] A number of comments have been submitted, but as of the date of writing the FCC has taken no further action.

Conclusion

With new entrants in the video services industry, not to mention higher capacity cable systems and new forms of media like the Internet, programmers have a variety of outlets to distribute content that viewers want to see. In its zeal to "prop[] up a regulatory regime that is past its prime," as dissenting Commissioner McDowell charitably observed,[65] the FCC chose to simply ignore this state of affairs and even its own prior conclusions about the economics of leased access. As the Sixth Circuit and the OMB have now suggested, agencies will not always get away with doing that, particularly when important speech rights are at stake.

Endnotes

1 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

2 Cable Communications Policy Act of 1984 ("1984 Act"), Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. §§ 521-611 (2006)); *see also* H.R. Rep. No. 98-934, at 30-31 (1984), as reprinted in 1984 U.S.C.C.A.N. 4655.

3 1984 Act, *supra,* note 2, sec. 2, § 612 (codified as amended at 47 U.S.C. § 532(b)(1) (2006)).

4 *Id.* (codified as amended at 47 U.S.C. § 532(c)(1) (2006)).

5 *Id.* (codified as amended at 47 U.S.C. § 532(d),(e),(f) (2006)).

6 *Id.* (codified as amended at 47 U.S.C. § 532(b)(4),(c)(2) (2006)).

7 *See* Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), Pub. L. No. 102-385, sec. 9(b), 106 Stat. 1460, 1484 (1992) (amending 47 U.S.C. §§ 532 (c)(1), (c)(4)).

8 H.R. Rep. No. 98-934, at 48, 50; *see also id.* at 30.

9 S. Rep. No. 102-92, at 23-26, 50-53 (1991), as reprinted in 1992 U.S.C.C.A.N. 1133. *See also id.* at 18 (stating a "policy to rely, to the maximum feasible extent, upon greater competition to cure market power problems," and noting that while some governmental oversight was necessary "where no competition exists," such oversight "should end as soon as cable is subject to effective competition"); 1992 Act, *supra,* note 7, sec. 2(b)(2) (codified at 47 U.S.C. § 521 hist. n. 2(b)(2) (2006)) (stating "the policy of the Congress in this Act to . . . rely on the marketplace, to the maximum extent feasible, to achieve [the] availability" of a diversity of information sources).

10 S. Rep. No. 102-92, at 32. As the reporting Senate Committee summarized: "The legislation reported by the Committee is largely designed to remedy market power in the cable industry. In this context, the leased access provision takes on added importance—in addition to First Amendment concerns. It can act as a safety valve for programmers who may be subject to a cable operator's market power and who may be denied access [or] be given access on unfavorable terms." *Id.* at 30.

11 *See* Value Vision Int'l, Inc. v. FCC, 149 F.3d 1204, 1205-08 (D.C. Cir. 1998) (discussing and citing FCC orders and proposed rulemaking).

12 The FCC also set various terms and conditions for leased access, including a leased access programmer's right to: (1) demand carriage on a tier with at least 50% subscriber penetration; (2) lease time in half-hour increments at pro-rated rates for part-time use; and (3) resell their leased access slots. *Id.* at 1208.

13 *Id.* at 1207.

14 *Id.* at 1209.

15 *Id.* at 1210.

16 *Id.* at 1208, 1210-11.

17 *Id.* at 1208, 1211. *See also id.* at 1207 n.3, 1208 (describing FCC's methodology in detail).

18 *Id.* at 1211.

19 *Id.* at 1209-13.

20 *Id.* at 1209.

21 *Id.* at 1210-12.

22 Report on Cable Industry Prices, Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service Cable Programming Service, and Equipment, MM Docket No. 92-266, 21 F.C.C. R. 15087, 15089-90 at ¶ 9, 2006 WL 3797869 (F.C.C. Dec. 27, 2006).

23 Report and Order on Leased Access ("2008 Order"), MB Docket No. 07-42, 23 F.C.C.R. 2909, 2992, 2008 WL 294648 (F.C.C. Feb. 1, 2008) (Dissenting Statement of Commissioner Robert M. McDowell).

24 In re Leased Commercial Access, Notice of Proposed Rule Making, MB Docket No. 07-42, 22 F.C.C.R. 11222, 11224-25, 2007 WL 1744321 (F.C.C. June 15, 2007).

25 2008 Order, *supra*, note 23, at ¶¶ 39, 41; *see also id*. at 2987 (Statement of Chairman Kevin J. Martin) ("Our order, therefore, is designed to increase the use of leased access channels.").

26 *Id.* ¶¶ 38 & n.122, 42.

27 The FCC decided that it would not apply its new rate methodology to home shopping programs or infomercials, for now, out of concern that such programmers would simply migrate to leased access from the voluntary commercial arrangements they had with cable operators. *Id.* ¶¶ 37, 74-75; *see also id.* at 2992 (Dissenting Statement of Commissioner Robert M. McDowell) (questioning the constitutionality of this content-based distinction).

28 *Id.* ¶¶ 41-42.

29 *Id.* ¶¶ 38, 42.

30 *Id.* ¶¶ 43-45.

31 *Id.* ¶ 43 n.137.

32 *Id.* ¶¶ 47-48. The FCC arrived at this number by computing the marginal implicit fee for a hypothetical cable network based on average national data and a host of assumptions, and similar alternative approaches, and noting that in none of its hypothetical calculations did the per-subscriber fee exceed 10 cents per month. *Id.* at 2957 (Appendix D)..

33 *Id.* ¶ 49.

34 *Id.* ¶¶ 12-32.

35 *Id.* ¶¶ 51-65.

36 *Id.* ¶¶ 66-69.

37 Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified at as amended at 44 U.S.C. §§ 3501-3520 (2006)).

38 2008 Order, *supra*, note 23, at ¶¶ 50, 84, 86, 89.

39 *Id*. at 2991 (Statement of Commissioner Deborah Taylor Tate); *id.* at 2992 (Dissenting Statement of Commissioner Robert M. McDowell) ("[T]he Commission developed the current 'average implicit fee' methodology in 1997 after extensive review of the economic studies and policy discussions at that time. The record in this proceeding, and our consideration of it, do not come close to reaching that level of careful analysis. The least we could have done was to seek comment on any changes to the current rate formula.").

40 *Id.* at 2989 (Statement of Commissioner Jonathan S. Adelstein).

41 Emergency Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (April 22, 2008); *see also* Petitioner's Reply to Oppositions to Emergency Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 8, 2008); Brief of Intervenors TV One Group in Support of Emergency Motion for Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 5, 2008).

42 Emergency Motion for a Stay, *supra.*

43 As the NCTA argued in reply, such a rule would create a catch-22 and permit agencies to insulate their regulations from judicial review for years after they take effect. If the agency is carefully vague in its request for comment, it will be able to argue that it gave sufficient notice of the rule under the APA, but that any specific challenges to the rule are unexhausted and must be raised with the agency by a petition for reconsideration. A petition for reconsideration deprives courts of jurisdiction to review the order until the petition is resolved, *see, e.g.*, Tennessee Gas Pipeline Co. v. FERC, 9 F.3d 980 (D.C. Cir. 1993), and in the meantime the agency is under no obligation to stay its order or to deal with the petition in an expeditious manner. *See* Petitioner's Reply to Oppositions to Emergency Motion for a Stay, *supra*, note 41.

44 Opposition of FCC to Emergency Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 2, 2008); *see also* United Church of Christ's Opposition to Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (April 29, 2008).

45 Opposition of FCC to Emergency Motion for a Stay, *supra*.

46 *See* Response Of Verizon in Support of the NCTA's Emergency Motion For A Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 5, 2008)

47 *See, e.g.*, United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 363 (6th Cir. 1998).

48 *See* Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 638 (1994) ("[C]able operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable... operators seek to communicate messages on a wide variety of topics and in a wide variety of formats." (internal citations and quotation marks omitted)); *see also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC (Denver), 518 U.S. 727, 737-38 (1996) (plurality opinion) (recognizing that "this Court has held [that] the editorial function itself is an aspect of 'speech,'" protecting a cable operator's "freedom to speak as an editor"); *id.* at 822 (Thomas, J., concurring in part and dissenting in part) (noting that cable "operators' editorial discretion" is something "all recognize as fundamentally protected").

49 Time Warner Entm't Co., L.P. v. FCC (Time Warner I), 93 F.3d 957, 971 (D.C. Cir. 1996).

50 *See, e.g.*, Turner I, 512 U.S. at 633-34, 656, 661 (noting Congress's observations of anti-competitive trends in the cable industry, such that a cable operator enjoyed "bottleneck monopoly power" over television programming and could "silence the voice of competing speakers with a mere flick of the switch"); Denver, 518 U.S. at 738 (plurality opinion) (observing that "communities typically have only one cable system," and that "concern about system operators' exercise of this considerable power originally led government—local and federal—to insist that operators provide leased and public access channels free of operator editorial control"); Turner Broad. Sys., Inc. v. FCC (Turner II), 520 U.S. 180, 208-13 (1997) (noting evidence of cable operators' incentive and ability to favor affiliated cable programming networks over independent programming); *id.* at 197-98, 206 (plurality opinion) (noting that "cable operators possess a local monopoly over cable households," and that increasing horizontal and vertical concentration exacerbated these problems); *id.* at 227-28 (Breyer, J., concurring) (agreeing that a cable system "at present (perhaps less in the future) typically faces little competition, [and] that it therefore constitutes a kind of bottleneck that controls the range of viewer choice"); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 577 (1995) (noting that cable is "a franchised channel giving monopolistic opportunity to shut out some speakers"; "[t]his power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed"); Time Warner Entm't Co., L.P. v. United States, 211 F.3d 1313, 1317, 1319-20, 1321-22 (D.C. Cir. 2000) (relying on cable operators' "bottleneck monopoly power" in rejecting a facial attack on statutory restrictions on cable operators' speech); *see also supra*, notes 9-10.

51 Competitive cable operators and new entrants lack "bottleneck monopoly power" because they must attract and hold subscribers who are free to switch to a competing service with more desirable programming. These providers have every incentive to carry programming from diverse sources in order to differentiate their service and to appeal to a broad range of subscribers. As the D.C. Circuit has said, competition "spurs a firm's search for the best price-quality trade-off" in acquiring programming and limits a cable operator's "*ability* to indulge in favoritism" at the expense of programmers that its subscribers prefer. Time Warner Entm't Co., L.P. v. FCC (Time Warner II), 240 F.3d 1126, 1138-39 (D.C. Cir. 2001). The FCC itself has recognized, in an analogous context, that "[w]here systems face effective competition, their incentive to favor an affiliated programmer will be replaced by the incentive to provide programming that is most valued by subscribers," and that "effective competition will preclude cable operators from exercising the market power which originally justified channel occupancy limits." *Id.* at 1138 (quoting Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 6828, 6862 at ¶ 231, 1993 WL 479493 (1993)).

52 Time Warner II, 240 F.3d at 1137-39 (considering challenge to FCC regulation requiring 60% of a cable operator's channel capacity to be set aside for non-affiliated programmers).

53 *See* Reply of FCC to Reponses of Verizon and TV One Group in Support of Emergency Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 14, 2008).

54 Order, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 22, 2008).

55 *Id.* at 4.

56 *Id.* at 3-4 (quoting and citing 47 U.S.C. § 405(a) (2006)); Qwest Corp. v. FCC, 482 F.3d 471, 474-77 (D.C. Cir. 2007); Cellnet Commc'n, Inc. v. FCC, 149 F.3d 429, 442 (6th Cir. 1998); Comsat Corp. v. FCC, 250 F.3d 931, 937 (5th Cir. 2001); MCI Telecomm. Corp. v. FCC, 10 F.3d 842, 845 (D.C. Cir. 1993); AT&T Corp. v. FCC, 394 F.3d 933, 938 n.1 (D.C. Cir. 2005)).

57 *Id.* at 4-5.

58 Notice of Office of Management and Budget Action, OMB Control No. 3060-0568 (July 7, 2008).

59 2008 Order, *supra*, note 23, at ¶¶ 50, 84, 86, 89.

60 *See* Paperwork Reduction Act of 1995, *supra*, note 37, 44 U.S.C. § 3507(f) (2006); 5 C.F.R. §§ 1320.5(f), 1320.15 (2008).

61 *See* Order, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (July 25, 2008).

62 Request of United Church of Christ to Override the Action of the OMB and to Modify the Commission's Report and Order, MB Docket No. 07-42 (Aug. 26, 2008), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520050519.

63 *Id.* at 6.

64 Public Notice, Media Bureau Seeks Comment on Request of United Church of Christ, Office of Communication, Inc., Media Access Project Regarding Leased Access Order, MB Docket No. 07-42 (rel. Sept. 10,

2008), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-08-2080A1.pdf.

65 2008 Order, *supra*, note 23, at 2992 (Dissenting Statement of Robert M. McDowell).