



# **The “Either-Or” Proposal: Lack of Sufficient Notice Under the APA**

# 2001 Report and Order



- Original NPRM “sought comment on a variety of issues related to the carriage of digital television broadcast signals by cable television operators” (¶ 1)
  - Options during transition include “either-or” (¶ 9)
- R&O “resolve[d] matters relating to retransmission consent, content-to-be-carried, channel capacity, channel placement, and a host of other operational issues” (¶ 2)
- But declined to act on transitional carriage issue, tentatively concluding that dual carriage is unconstitutional (¶¶ 3, 12)

# 2001 FNPRM



- Only three paragraphs on satellite issues
- “Herein we have adopted policies governing the cable carriage of digital television signals. Given the SHVIA’s general thrust that the Commission issue satellite carriage rules comparable to the cable carriage rules, we seek comment on how we should apply the digital carriage rules to satellite carriers.” (§ 136)
- Clearly seeks comment on application to satellite of rules *adopted in this proceeding for cable*
- “Either-or” was not among those rules

# APA Notice Requirements



- APA “requires the Commission to provide notice of a proposed rulemaking ‘adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.’” (*MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140 (D.C. Cir. 1995))
  - “[T]his court has made it clear that an agency may not turn the provision of notice into a bureaucratic game of hide and seek.” (*Id.* at 1142)
- Adequacy is determined by how well notice serves the purposes of the rule: testing the proposal by exposure to public comment, providing fair treatment for affected parties, and giving affected parties an opportunity to develop evidence for their position (*Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983))
- ***Notice clearly inadequate here on “either-or”***

# “Logical Outgrowth”



- Additional notice is not required where changes from original proposals are a “logical outgrowth” of those proposals (*National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986))
- 2001 FNPRM did not make *any* proposal or request *any* comment with respect to transitional carriage issues for satellite
  - Only issue raised for cable was authority to impose dual carriage requirement – now resolved
- Where there is no proposal, there can be no “logical outgrowth”