

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Reconsideration Regarding Home)	MM Docket No. 93-8
Shopping Stations)	

COMMENTS OF TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.

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EXECUTIVE SUMMARY

Trinity Christian Center of Santa Ana, Inc. (d/b/a Trinity Broadcasting Network) (“TBN” or “Trinity”) submits these comments in opposition to a re-evaluation of the Commission’s previous determination that licensees broadcasting home shopping programming serve the public interest, and thus constitute local commercial broadcasts for purposes of the must-carry obligations of cable service providers.

Of particular concern to Trinity is the methodology or approach that the Commission might undertake in making such an evaluation. Like other licensees, Trinity depends on the First Amendment’s close circumscription of Commission authority to protect it from inappropriate content- and viewpoint-based evaluations of its religious programming in making determinations about whether Trinity serves the public interest. The Constitution closely limits the power of the Commission to regulate with an eye toward content of expression. Yet, by evaluating home shopping services, the ugly specter of just such prohibited considerations threatens to rear its head.

Of course, in its previous determination that licensees broadcasting home shopping programming served the public interest, the Commission principally relied upon appropriate factors that left aside evaluations of the relative “worthiness” of the content of such channels. Here, if the Commission concludes that further proceedings leading to new or additional regulations are warranted, Trinity argues in this Comment that the Commission must operate within the severely drawn boundaries of the First Amendment.

I. INTRODUCTION

The Commission solicited comment on the following matters:

- how many television stations still program substantial amounts of shop at home programming;
- whether the programming is in the public interest;
- whether these stations preclude other more worthy uses of the television spectrum;
- whether these stations meet their public interest obligations including their obligations under the FCC's Children's Television rules, and
- whether they are entitled to must-carry status on cable systems.

See Notice, 72 Fed. Reg. 27811 (May 17, 2007).

Trinity does not provide any home shopping segments nor operate any stations with home shopping formats. For that reason, it might seem that the Commission's inquiry is beyond the scope of Trinity's interests. Such a view is misplaced for the reason that any justification for closer scrutiny of home shopping channels that is explained and justified by reference to the content of programming will set the stage for further sorties into constitutionally impermissible content regulation of expression.

As the Commission explained in its Notice, id. at ¶ 3, it has already previously determined that home shopping channels served the public interest ("Addressing the first of the three factors enumerated in Section 4(g), the Commission found that home shopping stations have significant viewership. With respect to the second factor, the Commission found that it must consider the demands only of other television broadcasters and not the demands of services other than broadcast television. The Commission further found that the licensing process

adequately took into account the competing demands of television broadcasters for the television broadcast spectrum. Finally, turning to the third factor, the Commission found that the existence and carriage of home shopping broadcast stations play a role in providing competition for nonbroadcast services supplying similar programming. Thus, the Commission found that each of the three statutory factors supported a conclusion that home shopping stations are serving the public interest”). Moreover:

the Commission found that other factors, including the following, supported its conclusion: (1) Home shopping stations provide a needed and valuable service to people without the time or ability to obtain goods outside the home, including the disabled, elderly, and homebound; (2) home shopping stations fulfill public interest programming obligations; (3) the role played by the Home Shopping Network in assisting minority-controlled and other small and marginal stations to attain financial viability; and (4) lack of evidence that the marketplace had failed to serve television viewers based on the then-present number and variety of home shopping services. Accordingly, the Commission concluded that home shopping stations serve the public interest, and it therefore qualified them as local commercial television stations for the purposes of mandatory cable carriage.

Id. at ¶ 4 (emphasis added).

Trinity’s interest in and relation to this matter arises solely on the possibility that, in a future proceeding, the Commission might arrogate to itself a duty to evaluate whether other kinds of programming, such as Trinity’s decidedly religious core programming, serve the public interest. Rather than wait for that later date, Trinity submits these comments opposing any content-based evaluation of home shopping channels.

The Commission’s inquiry raises the risk that, subsequently, the Commission will conclude that new regulations trenching on sensitive First Amendment areas are required in response to home shopping channels. That judgment, aimed at home shopping channels, threatens the possibility that the Commission would judge program worth, content value and

viewpoint. Such judgments are withdrawn by the First Amendment from the sphere of the Commission's authority. Nonetheless, Trinity fears that the Commission may be drawn into an effort to make judgments which would establish different rules for broadcasters based on government programming evaluations of worth. This, however, the Commission cannot (and should not) do. See, e.g., 47 USC 326 (prohibiting censorial activity by the Commission directed at programming).

While Trinity neither programs a home shopping format nor finds such a format to be of value to it and its viewing public, and while Trinity's programming has many times been reviewed and credited as providing a worthy and meritorious service to the public, Trinity is, nevertheless, concerned that any change in the current regulatory framework regarding station public service or must carry status based on content, etc., could be religious, foreign language, or whatever variety of specialty programming, tomorrow.

Because the possibility that content-driven determinations is presented in the circumstances sought by the Petition for Reconsideration prompting the Notice, Trinity submits these Comments in opposition with a particular focus on the strictures that prevent the Commission from adopting content-based regulations.

II. CONTENT BASED REGULATION OF PROGRAMMING BY THE COMMISSION IS CONSTITUTIONALLY IMPERMISSIBLE.

The Supreme Court has recognized that the programming selection decisions of broadcasters, which are editorial in nature, are not only a privilege but a duty of both the private and the public broadcaster. See Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998). Here, the programming selection decisions of licensees is to carry a home

shopping service. Whether Trinity, or any licensee, would offer such a service, whether Petitioners find value in such a service, whether individual Commissioners would avail themselves of such a service, none of these issues governs the outcome. What governs the outcome are the constitutional principles, set out in the First Amendment, and explained in the decisions of the Supreme Court. Of particular moment here, the Supreme Court's teaching on the issue of content-based restrictions on speech provides clear direction for the Commission to decline the invitation to reconsider its prior determination.

Through content-based laws, the government attempts to control speech it considers undesirable. Content-based schemes generally are unconstitutional. As the Supreme Court has taught, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). In Texas, a divided Court struck down a Texas law prohibiting acts that desecrated the American flag. The Court reasoned that the flag protection statute was content-based. That conclusion resulted from the Court's determination that Texas regulated flag desecration precisely because Texas looked with disfavor on viewpoints expressed by flag burning.

In other cases, the Court has said laws may be unconstitutionally content-based even if they do not reflect invidious government motives and merely subject either speakers or messages to differential treatment. See, e.g., Simon & Schuster, Inc. v. NY Crime Victims Bd., 502 U.S. 105 (1991) (striking New York statute as content-based restriction that compelled authors of descriptions of crimes to turn resulting income over to the state to compensate crime victims). In accord with its decision in NY Crime Victims Board, the Court requires the government to

justify content-regulation by showing that the law is essential to achieve a government interest of the highest order.

To survive constitutional scrutiny, a law reviewed under strict scrutiny must employ the least intrusive means to achieve a compelling government interest. A law employs the least-intrusive means if it limits no more speech than necessary to attain its goal. To determine whether a law meets this standard, the Court often examines alternative methods available to the government. A law is least intrusive if none of the available alternatives would be less harmful to free expression rights. In 1992 in NY State Crime Victims Board, the State of New York claimed that its law, known as the "Son of Sam" law, effectively barred criminals from benefitting from the fruits of their crimes. The Supreme Court, however, found the law unconstitutionally overbroad because its penalties fell too widely on a range of protected speech and because the scheme failed to employ the least intrusive means to achieve the state's goal.

The Supreme Court has repeatedly held that the First Amendment disfavors government actions that target speech based on content,¹ but has proceeded more cautiously regarding

1. The Court's jurisprudence regarding content regulation is extensive. See Legal Services Corp. v. Velazquez, 531 U. S. 533 (2001) (striking federal ban on client representation in specific types of cases); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997) (floating buffer zones at abortion facilities unconstitutional); Turner Broadcasting System, Inc. v. FCC, 512 U. S. 622 (1994) (cable "must-carry" provisions found to be content neutral); City of Ladue v. Gilleo, (1994) (striking ordinance governing residential signs that offered various exceptions based on sign content); United States v. Eichman, 496 U. S. 310 (1990) (invalidating anti-flag desecration law); City of Lakewood v. Plain Dealer Publishing Co., 486 U. S. 750 (1988) (discretionary law governing placement and design of news racks violates the First Amendment); Boos v. Barry, 485 U. S. 312 (1988) (striking ban on critical picket signs in front of foreign embassies); Clark v. Community for Creative Nonviolence, 468 v. 288 (1984) (camping ban on the National Mall does not violate the First Amendment); Heffron v. ISKCON, 452 U. S. 640 (1981) (booth rule for literature distribution and fund solicitations on fair grounds does not violate the First Amendment); Carey v. Brown, (1980) (labor picketing exemption from a picketing ban outside schools renders statute unconstitutional); Smith v. Goguen, 415 U. S. 566 (1974) (finding criminal law that prohibits contemptuous treatment of the flag unconstitutional); Police Department v. Mosley, 408 U.S. 92 (1972) (exemption for labor picketing renders picketing ban unconstitutional).

content-neutral laws. The Court has explained that content-neutral laws are acceptable under the First Amendment when they apply equally to all communications regardless of the message they contain and if they target non-speech elements, such as the time, the place or the manner in which the speech occurs. Such laws are called time/place/manner restrictions.

To accomplish the task of imposing special restrictions or limitations on the operation and broadcast activities of home shopping television stations, or of licensees that offer such segments of programming, ineluctably draws the Commission toward constitutionally forbidden approaches, most significantly, content-based regulatory approaches. “Congress shall make no law . . . abridging the freedom of speech” U.S. Const. amend. I. This prime directive, while not absolute, is clear and governs any Commission exercise in licensee regulation based on the content of programming.

The freedom of speech and of the press that distinguishes this free republic from tyrannical regimes around the world admits of no ready basis for government controls over the contents of speech. The long train of decisional law of the Supreme Court, see n.1 supra, sheds light on the role of the First Amendment in insuring that our constitutional system rejects efforts at “official clearinghouse” approaches to regulating speech. Instead, under the First Amendment, each American retains the power, with certain narrowly circumscribed exceptions, such as obscenity and so-called “fighting words,” to choose for themselves what they will read, what they will watch, what they will listen to, and what they will say.

In fact, for expression that enjoys constitutional protection, it appears that the single exception to individual autonomy that can be sustained against First Amendment scrutiny is the instance of the “captive audience.” Of course, unless the hallmarks of captivity and unwanted

message are joined in circumstances that prevent, literally, one from shielding oneself from an unwanted message, our First Amendment so steers away from speech regulation that it leaves to each individual the responsibility to shield themselves from unwanted, objectionable communications. See, e.g., Cohen v. California, 403 U.S. 15, 21 (1971).

Against that backdrop, in Trinity's view, the issue to be decided is whether the Commission should override the individual choices of viewers served by broadcast licensees. Trinity does not broadcast home shopping segments. In fact, Trinity does not particularly view such programming as significant or useful. But the question for the Commission and the risk for broadcasters such as Trinity is, if the Commission concludes that it should impose new regulations on broadcasting licensees based on their home shopping programming, how can it proceed without risking violence to the First Amendment and its limiting principles?

To regulate speech within constitutional norms, the government must proceed without consideration of content or viewpoint:

But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.

Police Department of Chicago v. Mosley, 408 U.S. 92, 93 (1972). In Mosley, the Court confronted a Chicago ordinance allowing some picketing on a public way near schools but not other kinds of picketing. The Court concluded that the restriction failed scrutiny under the First and Fourteenth Amendments. The ordinance was unconstitutional, the Court decided, because of its drawing of an impermissible distinction between labor picketing and other peaceful picketing. Mosley, 408 U.S. at 94.

The Mosley Court's analysis of the Chicago ordinance led it to conclude: government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.

408 U.S. at 96. Where the government regulates speech, it must approach the task through either reasonable time, place or manner regulations, or through a limited category of permissible subject-matter restrictions, or, finally, through a narrowly tailored means of serving a compelling state interest. Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 535 (1980).

Here, the Commission has raised the spectre of restrictions/regulations directed at licensees making the editorial decision to broadcast home shopping services. Such a venture could not be accomplished unless broadcasters could be evaluated and the content of their programming determined to consist of such home shopping content. In carrying out such an evaluation, the Commission would, undoubtedly for what it would see as entirely benign reasons, fall into the trap of acting as a censor.

Of course, the inclination is to recoil from being accused of being a censor. But it is precisely when it attempts to shield members of the public from some kinds of speech that the government's forbidden, censorial character appears. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975). Censorial restrictions have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. Erznoznik, 422 U.S. at 209. In Erznoznik, the Supreme Court examined an ordinance prohibiting the showing of films containing nudity by a drive-in movie theater when its screen is visible from a public street or place. The Court held that the ordinance

was unconstitutional in that it discriminated among movies solely on the basis of content.

The government's interests in protecting the rights of unwilling viewers were not lost on the Court, those interests were just not found to be dispositive:

Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes.

422 U.S. at 210-11.

To differentiate content-based and content-neutral restrictions on expression, the Supreme Court has repeatedly held that content-based restrictions either distinguish favored speech from disfavored speech based on the views expressed or require governmental authorities to examine the content of the speech. See Turner Broadcasting System v. FCC, 512 U.S. 622, 642–43 (1994), aff'd, 520 U.S. 180 (1997); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Boos v. Barry, 485 U.S. 312, 318–19 (1988); Miami Herald Publ'g v. Tornillo, 418 U.S. 241, 256 (1974); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 13 (1986); FCC v. League of Women Voters of California, 468 U.S. 364, 383–84 (1984). “[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.” Turner Broadcasting System, 512 U.S. at 643. See also City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Heffron v. ISKCON, 452 U.S. 640, 649 (1981); Boehner v. McDermott, 191 F.3d 463, 467 (D.C. Cir. 1999); Time Warner Entm't v. FCC, 93 F.3d 957, 977 (D.C. Cir. 1996).

As the Supreme Court has explained, even when “a regulation . . . ‘does not favor either

side of a political controversy’ [it] is nonetheless impermissible because the ‘First Amendment’s hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.’” Boos v. Barry, 485 U.S. 312, 319 (1988) (citing Consol. Edison Co. v. Pub. Serv. Comm’n, 447 U.S. 530, 537 (1980)). In fact, “[t]he requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject matter Neutral.” ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 759–60 (1997). In the circumstances of content-neutral restrictions, the Court’s screening under the First Amendment is at a much lower level of scrutiny. See Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 190 (1983) (balancing test applied to content-neutral regulations).

Of course, it would overstate the case to claim that no restriction based on subject matter is ever capable of surviving constitutional scrutiny. From time to time the Court has found that the First Amendment interests typically jeopardized by content-based or viewpoint-based restrictions must give place to the regulation of special categories of expression. Those categories include, but are not limited to defamation, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), and incitement, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Indeed, as evidenced by the early case Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), the Court formerly treated commercial speech as outside the protection of the First Amendment. Subsequently, as in Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976), the Court rejected the bright line exclusion of commercial speech from First Amendment protection.

Under the First Amendment, the Supreme Court has concluded that individual choices – not governmental ones – are preferred. In this circumstance, then, it would be for the licensees

that carry a home shopping service to choose whether to broadcast such a service, and for the viewing audience within its reach whether to take advantage of such a service, or to give their viewing time and preferences to other broadcast voice. Consider, for example, the Court's decisions in Rowan v. Post Office, 397 U.S. 728 (1970) and in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). In Rowan, 397 U.S. at 737, the Supreme Court sustained, against constitutional challenge, a federal statute giving legal force to individual choices that the Post Office not deliver mailings from certain parties. On the other hand, in Bolger, 463 U.S. at 72, the Court struck as unconstitutional a federal statute on which the government had relied to justify its prohibition of mailing unsolicited ads for contraceptives. In Bolger, the Court noted "the important interest in allowing addressees to give notice to a mailer that they wish no further mailings But we have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." Id.

Here, the status quo, under which the public service value of broadcasting by licensees offering home shopping content has been recognized by the Commission, is akin to the Rowan matter. For the fact that a licensee operates in the public interest does not compel anyone to view its offerings, or prevent anyone from doing so. A change in the status quo resulting from a content-driven determination that home shopping channels do not serve the public interest would result in the kind of complete bar to broadcast access to home shopping channels that would be akin to the Bolger regime.

In application, the preference for individual choice over government ones means that home shopping channels will survive as broadcast licensees only for so long as the individual preferences of those residing within the viewing area of such licensees express their preferences

by viewing such fare. More specifically, the preference means that, under the Constitution, the Commission should leave aside the effort to impose new or additional regulatory burdens on licensees that exercise their editorial discretion by carrying such programming.

III. THE COMMISSION'S DISCRETION TO REGULATE ON THE BASIS OF CONTENT IS SEVERELY CIRCUMSCRIBED

The First Amendment's limitations on permissible content regulatory efforts by the government are remarkably severe. Indeed, only on one occasion has the Supreme Court sustained a Commission restriction on content of speech, in FCC v. Pacifica Foundation, 438 U.S. 726 (1978). That decision arose in the unique context of George Carlin's comedy routine focusing on the forbidden, taboo, meanings of words with expressly sexually charged meanings. The Pacifica Court sustained the regulation at issue there, and it did so substantially for the reason that the prohibition on the use of such language was the only available way to "protect the listener or viewer from unexpected program content," Pacifica, 438 U.S. at 748.

Broadcast regulations that depend, for their application in any instance, on an evaluation of the subject matter of programming, are subject to strict scrutiny under the First Amendment. Beginning at least with FCC v. League of Women Voters, 468 U.S. 364 (1984), the Supreme Court has applied a standard (in that case to strike down a federal statute barring editorialization by noncommercial, federally funded broadcast licensees) that cannot be, in any meaningful sense, distinguished from strict scrutiny. The Court held that Congress's restrictions must be "narrowly tailored to further a substantial governmental interest," 468 U.S. at 380, and that Congress could not burden free speech when its "interest[s] can be fully satisfied by less restrictive means that are readily available" 468 U.S. at 395. See also CBS v. DNC, 412 U.S. 94, 105 (1973)

("Congress appears to have concluded...that of [the] two choices -- private or official censorship -- Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided").

As Justice Souter observed in another context, while "the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 579 (1995) (emphasis added). Up until now, the Commission has proceeded on the apparent view that each new licensee adds a differing voice and differing views to the marketplace of ideas, and consequently promotes freedom of expression. In this proceeding, the Commission should scrupulously avoid the invitation to proceed on other assumptions.

IV. THE FIRST AMENDMENT PROHIBITS THE COMMISSION FROM PROCEEDING INCONSISTENTLY AND/OR THROUGH VAGUE RESTRICTIONS

A conclusion that broadcasters transmitting home shopping content should be subject to new, additional regulations is hardly free from constitutionally troubling ramifications.

As an initial matter, it might seem of small moment to conclude that licensees offering segments of home shopping content can be readily identified, either through self-regulation or by the Commission. But will the Commission reject the conclusion of a broadcast licensee that it does not program home shopping content, when it operates as a commercial licensee, carries commercial advertisements for goods and services, and includes programming interspersed with so-called "product placements"? American broadcast television programming offers a steady

diet of product placement: whether it is the familiar Apple Logo on laptop computers used by characters on Fox Television's popular "24," or the Coca Cola cups sitting in front of the judges on that network's "American Idol" program,² such product placements are just the tip of an iceberg of commercials on broadcast television. Indeed, beyond mere product placement there are the hidden persuaders:

ESPN, with the help of digital ad firm Princeton Video Image, has been inserting what seem to be product billboards on the walls behind home plate in its Major League Baseball broadcasts. Fans at the games, however, can't see them because the billboards are not there. During the coverage of the arrival of celebrities at the 2001 Grammy awards viewers watching the event on television saw a virtual street banner and logos on an entry canopy and sidewalks. The arriving celebrities, however, saw none of these advertisements, since they were not really there, but were inserted digitally for television viewers. Marketers are seemingly unperturbed by this increase in stealth (and sometimes not so stealth) advertising in the form of product placements. 'Maybe it is a subliminal commercial message,' one executive stated about film product placement in 2002, 'but there are so many much more overt commercial messages, especially in America, that I don't think anybody worries about it.'

John Bellamy Foster and Robert W. McChesney, "The Commercial Tidal Wave," in 54 MONTHLY REVIEW at ___ (Mar. 2003).³

There is no constitutionally sustainable basis for distinguishing the broadcast of hours of entertainment, sports, or other programming containing a glut of product placements, as well as being interspersed with actual commercial advertisement, from the broadcast of home shopping programming. Certainly pervasiveness is not a factually sustainable distinction, given the

2. The pervasiveness of product placement on American Idol is evidence by a First Quarter 2007 review of product placements and the television programs in which they appear. See http://www.marketingcharts.com/?attachment_id=672 (graphs showing shows with highest incidents of placement ("American Idol") and product most frequently placed ("Coca Cola").

3. See <http://www.businessweek.com/1998/25/b3583062.htm> (offering a "Hall of Fame" of products placed in movies and television programming) (last visited on July 6, 2007).

relentless presence of familiar products on broadcast television. Consequently, the temptation to regulate licensees that broadcast home shopping content in a manner different than other broadcasters should be avoided as the constitutionally problematic thicket that it is.

Short of declining to undertake the perilous adventure called for in the Petition for Reconsideration, the Commission would be well advised scrupulously to avoid any inconsistency in its enforcement of any such content-based regulation.

Accounting to entertainment fare such as CBS Television's "Survivor" or Fox's "24" a greater degree of constitutionally security over home shopping channels, if it can be accomplished without doing severe violence to the First Amendment's restrictions on content-based scrutiny of speech, must be done only with the most clear, and most carefully crafted measures.

Clearly, reconsideration of the status of home shopping channels risks the Commission adopting an approach to enforcement that disfavors speech promoting goods and service. To do so, however, would result in the Commission intrusively analyzing content of expression. Worse yet, the wrong of content-based decision making by the Commission would be exacerbated should the Commission fail to adopt a rigorously clear and precise regulatory framework. In NEA v. Finley, 554 U.S. 569 (1998), the Supreme Court held, "Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards." It is an important principle of First Amendment analysis that a statute or regulation is unconstitutionally vague if it either fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or authorizes or encourages arbitrary or discriminatory enforcement.

After having concluded that such home shopping programming satisfies the public service obligations of licensees, the Commission would dance perilously close to the abyss of “arbitrary and capricious” agency action if it concluded to the contrary based on nothing more than the subjective preferences of those who would prefer other programming on those same stations. Of course, the Commission may not proceed arbitrarily; that is, the Commission cannot be “guided by unpredictable or impulsive behavior,” BLACK'S LAW DICTIONARY 203 (7th ed. 1999). Nor may the Commission act in a manner unreasonably inconsistent with past policy. See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 981 (2005).

CONCLUSION

For the foregoing reasons, the Petition for Reconsideration should be denied, and the Commission should not revisit its determination that broadcast licensees offering a home shopping service do, in fact, act in the public interest and are, in fact, entitled to must-carry status.

Respectfully submitted,

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