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Sheila Tabron

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COMMENTS

Community Antenna Television and the Law

I. HISTORICAL BACKGROUND

The cable television industry started in 1948 in the hills of Pennsylvania and Oregon. This method of distributing television signals through a wire, rather than broadcasting those signals through the air, was first introduced in remote, mountainous areas where "over-the-air" broadcast TV reception was poor. Over twenty years ago, private entrepreneurs put TV antennas on mountain tops where they could pick up signals from distant stations. Coaxial cable was strung on poles from the antenna tower into towns, and individual homes were connected to this 'trunk' line, thus producing a system basically similar to the designs of telephone, gas, water, and power systems.¹

Those who subscribed to this service paid a one-time installation fee and a monthly service charge. This rate and fee structure was similar to that of utility companies; thus, Community Antenna Television (hereinafter referred to as CATV) was born.²

It was soon discovered that the quality of picture transmission was far superior to the same pictures received by off-the-air television sets closer to the point of origination. Additionally, cable subscribers could receive programs from distant stations. This better quality of reception results because cable signals are carried through insulated cables rather than broadcast over the air. Broadcast signals in close proximity can and frequently do interfere with each other.³

Additional channels are available because cable can use frequencies that broadcast television cannot use. Since signals on cable do not radiate into the air, cable can use all of the frequency spectrum, limited only by financial considerations.⁴

The signals go through the cable and can be received only where the actual cable goes. Therefore, the order in which franchises are awarded in each city, the order in which the franchise elects to install

1. Tate, *Back to Basics*, 4 CABLELINES 7, 8 (1976).

2. *Id.* at 7.

3. *Id.*

4. *Id.* at 23. This means that because cable does not project over the air waves, it is not subject to regulation and can thus use as many locations from one end of the band (channel) to the other, as their finances will permit. The term "frequency spectrum" refers to the channel band on radios and television.

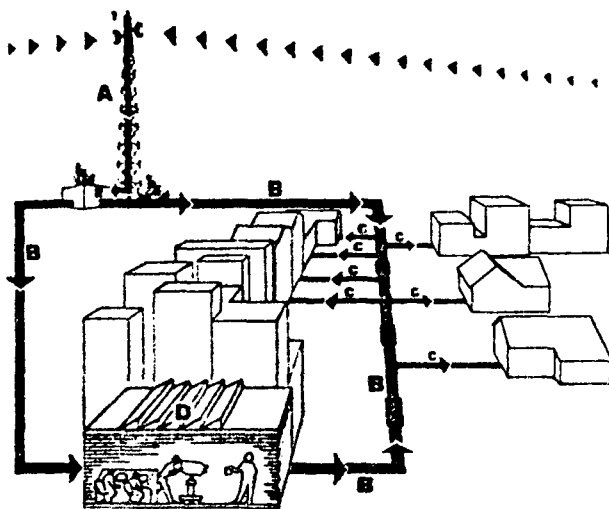
the lines within each part of the city, and the rate of cable plant construction determine who the consumers will be.⁵ Cable's potential for channel capacity and its ability to select its viewer population are two of the basic qualities that make the industry so attractive as vehicles of community communication.

Though growing fast, the cable industry remains in the budding stage of its development. After regulation and deregulation, the only hope left for public access is re-regulation, and the public access cable is very ripe for re-regulation.

As public interest grows and activates its strengths, the courts will be confronted repeatedly with requests for the establishment and enforcement of cable's rights. By virtue of its youthful thirty-two years, both case law and research resources regarding the cable industry are certain to flourish.

II. TECHNOLOGICAL BACKGROUND

"A cable television signal receives off-the-air broadcast signals and feeds them through amplifiers and cables to its subscribers".⁶



5. *Id.* at 8.

6. *Id.* at 7.

7. Copper or copper sheathed aluminum wire surrounded by an insulating layer of foam. The insulating layer of foam is covered with either braided copper wire or an aluminum sheath and a protective outer skin. The wire and sheath react electronically with each other and set up an electromagnetic field between them. This field reduces frequency loss and thus gives cable its great signal carrying capacity. *Id.*

8. Local programming originating from the cable station itself.

9. Tate, *supra* note 1, at 8.

The headend transmits the television signals carried in the distribution plant to the viewers' homes. The distribution plant, as mentioned, includes the coaxial cable trunk and feeder lines. When an individual subscribes to cable service, his television set is connected by a drop line that simply taps into the trunk and feeder lines to draw off the television signals that are being carried.¹⁰

III. FCC AUTHORITY: ORIGATION

The Communications Act of 1934,¹¹ in creating the Federal Communications Commission (hereinafter referred to as the FCC), declared that its primary objective should be to make available to the people of the United States an efficient and reasonably priced service that would provide rapid worldwide communication.¹² It was upon this rock that the Federal Communications Commission built its authority to regulate the cable television industry.

IV. COMMISSION ENFORCEMENT/JUDICIAL INTERPRETATION

"The FCC was first asked to assert jurisdiction over cable television in 1954 when a small West Virginia broadcast station complained that a community antenna television system intruded into its viewer market and refused to carry the local station's signal."¹³ The FCC declined to act on the grounds that cable systems were neither common carriers nor broadcasters and were thus not subject to their jurisdiction.¹⁴

A few years later, however, the FCC did begin to assert its authority over community antenna television systems through its power to regulate microwave systems.¹⁵ This indirect regulation was effected through the FCC's refusal to license microwave operators until the cable systems they served agreed to certain restrictions.¹⁶

This indirect method of regulation surfaced in *Carter Mountain*

10. *Id.*

11. 47 U.S.C. §§ 151-609 (1970 & Supp. V 1975).

12. D. LE DUC, *CABLE TELEVISION AND THE FCC* (1973).

13. Note, *Cable Television: The Practical Implications of Local Regulation and Control*, 27 *DRAKE L. REV.* 391, 393 (1976).

14. *Id.* "Common carriers" and "broadcasters" refer to presently existing mediums of communication such as radio and television.

15. *Id.* This is a method of transmitting closed circuit television signals through the air on a highly directional, line-of-sight system from the originating station to one or more receiving stations.

16. *Id.* The FCC required the petitioner to refile its application when it could show that the community antenna systems would carry the signal of the local outlet (intervenor) and would not duplicate its programming. *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1963).

*Transmission Corp. v. FCC.*¹⁷ There the FCC denied the application of the plaintiff, a common carrier by radio, to construct a microwave radio communication system to transmit signals (received from broadcast television systems located in distant cities) to community antenna systems established in small Wyoming towns. The Commission found that granting this license would result in the demise of an existing broadcast station which could result in loss of service to a substantial rural population not served by the proposed community antenna station. This rationale resurfaces in the struggle for the expansion of the cable industry for years to come.¹⁸ The court held that the FCC, by authority of the Communications Act of 1934, could weigh the net effect on the community to be served in fulfilling its duty to distribute licenses.¹⁹

The next cable-related litigation of significance appeared two years later between two private parties. *Cable Vision, Inc. v. KUTV, Inc.*²⁰ was a suit to establish the right of community antenna systems to compete with existing broadcast stations.

Originally, the CATV station sued the broadcast station (KUTV) for an antitrust violation. KUTV counterclaimed alleging that it had exclusive rights to the programs in question by virtue of a contract. Further, KUTV claimed that the activities of the cable station "constituted tortious interference with those contractual rights and unfair competition in that the community antenna receives identical programs broadcast by other distant stations and distributes them for profit simultaneously with the KLIX airings."²¹ The court held for the cable franchise, stating that unless the broadcast station could demonstrate a protected interest by virtue of an infringement of copyright laws, or in some other manner bring themselves within another recognized exception to the policy of promoting free access to matters in the public domain, they could not prevail against a CATV system for unfair competition in the reception and distribution of programs from distant stations.²² The court also rejected defendant's claim that plaintiff had tortiously interfered with their constitutional right to contract.²³ This

17. *Id.*

18. Broadcast stations are a part of an advertiser-supported medium. Cable cast stations are subscriber supported. An example of this rationale is found in *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964) where the broadcast station challenged the right of the cable station to compete with it. Substantially the same issue arose in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

19. 321 F.2d 359 (D.C. Cir. 1963).

20. 335 F.2d 348 (9th Cir. 1964).

21. *Id.* at 349.

22. *Id.* at 354.

23. In rejecting this claim the Court noted that public policy allows free access to copy

new judicial precedent opened doors for franchises everywhere. The establishment of this basic right to compete marked an important milestone in the infant industry's budding growth.

On April 22, 1965 the FCC asserted jurisdiction over microwave-fed CATV²⁴ in its First Report and Order.²⁵ The report and order required the carriage²⁶ of local broadcast station signals by cable systems receiving microwave service within the service area of the broadcast station. The CATV systems would not have to carry such signals if not requested by the local station, if the signal "substantially duplicated network programming of a higher grade signal,"²⁷ and if carrying the signal would, because of limited channel capacity, prevent the system from carrying a nonaffiliated commercial station or the signal of a noncommercial educational station."²⁸

The second portion of the First Report and Order dealt with nonduplication.²⁹ This portion prevented CATV systems from showing the same picture that the local broadcast station showed for a period of fifteen days following the showing by the local broadcast station.³⁰ This signified efforts to help cable stations and local broadcast stations coexist peacefully in a nonthreatening manner.

One year later, in its Second Report and Order,³¹ the FCC asserted jurisdiction over all CATV systems. There the rule prohibiting cable transmission of any show carried by the local station for a period of fifteen days before and after its showing was relaxed, and the period of required "non-duplication" was shortened from fifteen days to one broadcast day before and after. The carriage provisions were not subject to waiver, but certain cable systems were exempted from the requirement. Regarding educational TV, the FCC required that cable stations give "local and area ETV stations advance notice of CATV

whatever the federal patent and copyright laws leave in the public domain. "The general rule of law is that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become after voluntary communications to others, free as the air to common use. *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandies, J., dissenting)." *Id.* at 351.

24. C. TATE, *CABLE TELEVISION IN THE CITIES* 114 (1971).

25. 38 F.C.C. 683 (1965).

26. "Carriage" is the transmission of the signal over their wires.

27. This means that if the local station puts out a signal sufficiently strong, not requiring the usually superior reception of the cable station, then the cable station is not required to transmit the signal of the local station.

28. M. SEIDEL, *CATV USA* 86 (1972).

29. Nonduplication is aimed at preserving the local station's exclusivity as an outlet for the programs it has obtained the right to exhibit in the competitive program market. Nonduplication is restricted to the area in which the station acts as the exclusive outlet for its programming. 38 F.C.C. 683 (1965).

30. *Id.* at 87.

31. 2 F.C.C.2d 725 (1966). In part, the FCC reached an initial conclusion that it has jurisdiction over all community antenna television systems, whether or not microwave facilities are used.

proposals to bring in distant ETV signals.”³² This relaxed attitude can be attributed to the lower degree of competition in the educational television market.³³

The newest and most significant aspect of this Second Report, was the promulgation of the Major Market Distant Signal Policy.³⁴ This policy “prohibited cable systems from bringing distant signals into the 100 major television markets without hearings on the probable effect on local broadcasting.”³⁵ Based on economic impact and fair competition grounds, the enforcement of this policy forced the cable industry to stick to its original claims that a substantial void would be filled by the introduction of cable systems into areas where a minimum variety of shows are presently available.³⁶ This amounted to another way of ensuring local broadcast stations of some protection of their existing markets.³⁷ Consequently, cable television surged in rural areas.

On June 17, 1968 the Supreme Court was asked to determine whether the FCC had authority to order a cable franchise to restrict their carriage of signals into certain areas *pending* hearings to determine whether the carriage of such signals contravened the public interest.³⁸ Midwest Television, a broadcast station, brought suit against Southwestern Cable Company, claiming that the latter’s importation of Los Angeles signals had fragmented the San Diego audience. Midwest claimed that this reduced the advertising revenues of local stations and ultimately caused the termination of services provided by local broadcasting stations.³⁹ While investigating this claim, the FCC ordered

32. M. SEIDEL, *supra* note 28, at 91.

33. Other than educational interests, most of those presenting evidence on this subject were against extending any nonduplication protection to ETV, for the asserted reason that the widest possible dissemination of educational material is in the public interest. They further asserted that Community Antenna Television [hereinafter cited as CATV] competition has no economic impact on Educational Television [hereinafter cited as ETV] because it operates on a nonprofit basis. 2 F.C.C.2d at 760.

34. The most unique feature of the Second Report and Order on CATV was based on the same central grounds as those of the First Report and Order: “(1) economic impact based on CATV and UHF trends, and (2) a fair competition ground based on the . . . conditions under which the broadcasting and CATV industries compete.” M. SEIDEL, *supra* note 28, at 91.

35. NORTH CAROLINA CENTER FOR PUBLIC POLICY RESEARCH INC., CABLE TELEVISION IN NORTH CAROLINA 7 (1978).

36. Because signals are prohibited in the urban areas, expanding franchises were “forced” to engulf rural areas. This indirectly “forced” the cable industry into fulfilling its original promise of making a variety of shows available to an otherwise lacking rural audience. M. SEIDEL, *supra* note 28, at 91.

37. The effect of this policy on cable expansion in rural areas left the urban areas, temporarily free from cable intervenors, to the thriving broadcasters. *Id.*

38. United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

39. *Id.* at 160 n.4. Midwest averred that respondent’s CATV systems transmitted the signals of Los Angeles broadcasting stations into the San Diego area, and thereby had, inconsistent with the public interest, adversely affected Midwest’s San Diego station.

Southwestern to freeze its subscriber population in the disputed area. Southwestern in turn claimed that the FCC was exceeding its authority.

The Court found that "there [was] substantial evidence that the Commission cannot 'discharge its overall responsibilities without authority over this important aspect of television service.'"⁴⁰ The misconception communicated here is that the phrase "contravened the public interest" really means "contravened the economic interests of the existing local broadcast stations."⁴¹

This is not a bad decision inasmuch as it temporarily freezes expansion. This freeze can be traced to the problems of attempting to regulate an industry when the precise role of the industry is unknown.

The FCC found that sometimes the "public interest" demands "interim relief" in areas where its generalized regulations are inadequate. Limiting further expansion pending hearings to determine appropriate actions is such an instance.⁴² "This Court has recognized that 'the administrative process [must] possess sufficient flexibility to adjust itself to the 'dynamic aspects of radio transmission.'"⁴³ The decision in *United States v. Southwestern Cable Co.* shows a broadening of FCC regulation of the cable industry. This broadening, however, promotes again the interests of the television industry as opposed to the interests of the public. This is a trend that continued until the 1976 Report and Order of the FCC.⁴⁴

CATV systems carry motion picture programming received from broadcast stations. These broadcast stations must purchase licenses from the copyright holders of the motion pictures shown. In *Fortnightly Corporation v. United Artists Television, Inc.*,⁴⁵ the United States Supreme Court faced the issue of whether CATV systems were violating the Copyright Act of 1909⁴⁶ by infringing on the exclusive performance rights of the broadcast stations.

The function that CATV plays in the total process of television broadcasting and reception was the determinant factor. The Court

40. *Id.* at 177.

41. The real problem is revealed in 392 U.S. at 160 n.4: "Midwest asserted that respondent's importation of Los Angeles signals had fragmented the San Diego audience, that this would reduce the advertising revenues of local stations, and that the ultimate consequence would be to terminate or to curtail the services provided . . . by local broadcast stations."

42. The Commission has acknowledged:

[I]n this area of rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative. It has found that the present case may prove to be such a situation, and that the public interest demands 'interim relief . . . limiting further expansion,' pending hearings to determine appropriate Commission Action. Such orders do not exceed the Commission's authority.

Id. at 180.

43. *Id.*

44. 59 F.C.C.2d 294 (1976).

45. 392 U.S. 390 (1968).

46. Ch. 320, § 1, 35 Stat. 1075.

held that CATV operators, like viewers, but unlike broadcasters, do not, under the Copyright Act of 1909, "perform" the programs that they receive and carry, and hence do not infringe the latter's exclusive performance rights under the Act.⁴⁷ It appears that this only applies to "retransmitted" broadcasts, specifically excluding "original programming." The removal of this potentially stymying economic burden promoted a new sense of freedom in the growth of the cable industry.

In June of 1968 the FCC ruled that Section 214 of the Communications Act⁴⁸ required telephone companies to obtain FCC approval prior to constructing or extending CATV lines. On October 27, 1969 the United States Supreme Court upheld the FCC's right to require this approval.⁴⁹

*TV Pix, Inc. v. Taylor*⁵⁰ upheld a Nevada law giving the Nevada Public Service Commission authority to regulate cable TV. The United States District Court of Nevada found that "the apparatus of such a system was an appendage to interstate broadcasting facilities with incidents much more local than national, involving cable equipment through public streets, local franchises, local intrastate advertising and selling of services, and local intrastate collections, so that in this perspective, the system was essentially a local business of which state regulation, in the absence of federal legislative intervention, did not constitute a burden on interstate commerce."⁵¹ This marked the first judicial sanction of state regulation. Note, however, the federal preemption reservations.⁵²

On October 20, 1969, the FCC required cable systems with more than 3,500 subscribers to originate programming by April 1, 1977. On the surface it appeared that this was a victory for the accommodation of the public's interest. This order provided that CATV systems provide a public access channel. The rule, however, failed to specify that those systems be required to originate locally produced programming. One of the originally anticipated benefits of cable television was the

47. 392 U.S. 390 (1968).

48. No carrier shall undertake the construction of a new line . . . , or shall require or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation of such additional or extended line

49. U.S.C. § 214(a) (1970).

49. *Federal Broadcasting, Inc. v. FCC*, 369 U.S. 888 (1969).

50. 304 F. Supp. 459 (D. Nev. 1968).

51. *Id.* at 463.

52. The court gave weight to the established rule that in the absence of congressional occupation of the field, state action is presumptively constitutional. It is settled that Congress, in enacting the Federal Communications Act of 1934, did not intend absolute preemption of the field to the exclusion of all state regulation. *Id.* at 464.

opportunity for community expression. This expression was to include areas of local interest, such as local news, local high school sports programming, local weather information, etc. If federal regulation allows the cable system operators to fulfill the requirement with foreign programming, this benefit will never accrue to the local community.⁵³

Also, to lessen actual promotion of public interest, the system operators⁵⁴ were given the power to make and enforce operational rules for the public access channel. The FCC thereby failed to recognize that public access would remain unresolved because full public access would have been contrary to the economic interests of CATV operators.

This was the development and completion of the first phase of CATV regulation. It was primarily for the convenience of the broadcast television industry. The rules, practically speaking, were designed to limit cable's competitive impact on broadcast television.

In February of 1972 the FCC issued a Cable Television Report and Order⁵⁵ requiring that CATV systems must provide the following:

one dedicated, noncommercial public access channel, available without charge at all times on a first-come, first-serve nondiscriminatory basis and, without charge during a development period, one channel for educational use and another channel for local government use.⁵⁶

In providing those channels, the cable operator was prohibited from restricting content control over the materials,⁵⁷ thereby forcing the operators to relinquish their heretofore absolute authority to mold and enforce operational rules governing the public access channel. These rules became effective in March of 1972 and applied only to stations within the top 100 television markets.⁵⁸ This further reduced the number of systems actually affected by the order. There were also waiver provisions to accommodate stations that could not sustain the burden of these requirements.⁵⁹ With this perfect opportunity to inject subjectivity, the number of affected systems could substantially plunge.

Noting that local governments were intricately involved due to the use of their public rights of way and that local authorities were in a

53. To benefit the local community, the operators, in addition to retransmission of broadcast stations signals, would have to "originate their own" cablecasts of local interest topics, i.e., high school reports, community education, etc.

54. System operators are the owners of local cable franchises.

55. 36 F.C.C.2d 143 (1972).

56. *Id.* at 190.

57. *Id.* at 195.

58. "These access rules will be applicable to all new systems that become operational after March 31, 1972 in the top 100 television markets. Currently operating systems in those markets will have five years to comply with this section." *Id.*

59. "If these requirements should impose an undue burden on some isolated system, that is a matter to be dealt with in a waiver request, with an appropriate detailed showing." *Id.* at 197.

better position to follow up on subscriber complaints,⁶⁰ the FCC concluded that the industry was "uniquely suited to a type of federalism that encompassed a deliberately structured dualism."⁶¹ The FCC cited their responsibility to establish "minimum standards for franchises issued by local authorities" to assure fulfillment of their obligation to insure efficient communication service with adequate facilities at reasonable rates.⁶²

The FCC felt that CATV systems were generally unable to respond to local interests because they imported long distance signals. Another difference between cablecast and broadcast stations was that the latter had to pay for the production of its programming. These differences contributed to the slow development of public access as it took a back seat to the protection and promotion of broadcast stations and their economic interests.⁶³

In 1972, the Supreme Court in *United States v. Midwest Video Corporation* (hereinafter referred to as *Midwest I*),⁶⁴ was required to determine whether the FCC's program orientation rule was "reasonably ancillary to the effective performance of its various responsibilities for the regulation of television broadcasting."⁶⁵ The rule communicated the requirement that "no community antenna system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the cable system also operates to a significant extent as a local outlet by cablecasting,"⁶⁶ and has available facilities for local production and presentation of programs other than automated services."⁶⁷

The plurality found this First Report and Order ruling to promote the public interest within the meaning of the Communications Act of

60. The comments advance persuasive arguments for federal licensing:

We agree the conventional licensing would place an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts. Local authorities are also in a better position to follow up on service complaints.

Id.

61. *Id.* at 207.

62. The Commission was persuaded that because of the limited resources of states and municipalities and its own obligations to insure an efficient communications service with adequate facilities at reasonable charges, they must set at least minimum standards for franchises issued by local authorities. *Id.*

63. "If these requirements should impose an undue burden on some isolated system, that is a matter to be dealt with in a waiver request, with an appropriate detailed showing." *Id.* at 197.

64. 406 U.S. 649 (1972).

65. *Id.* at 663.

66. This is a means of increasing the number of local outlets for community self expression and for augmenting of the public's choice of programs and types of services without the use of broadcast spectrum.

67. 406 U.S. at 649.

1934.⁶⁸ The Chief Justice in *Midwest I* concluded that “until Congress acts to deal with the problems brought about by the emergence of CATV, the FCC should be allowed wide latitude.”⁶⁹ In so holding, the Court affirmed the FCC’s rejection of “the contention that a prohibition on CATV originations was necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program cast service,” and further held that “[b]roadcasters and CATV originators stand on the same footing in acquiring the program material with which they compete.”⁷⁰ Moreover, “a loss of audience or advertising revenue to a television station is not in itself a matter of moment to the public interest unless the result is a net loss of television service.”⁷¹

For the first time the Court expressed a concern for the budding cable industry that was not overshadowed with concern for preserving the status quo of the broadcast industry. The Eighth Circuit Court of Appeals had based their contrary findings on the view that the record did not support a finding that the origination rule furthered the public interest⁷² because the regulation, in their view, created “the risk that the added burden of cablecasting would result in increased subscription rates and even the termination of CATV services.”⁷³ The Supreme Court found this reasoning to be grossly incorrect inasmuch as the regulation only applies to systems with more than 3,500 subscribers and thus affects only thirty percent of the existing systems.⁷⁴ Also the potential burden is further lessened by the existence of waiver procedures which apply even while requests for waivers are pending.⁷⁵

68. “In the light of the record in this case, there is substantial evidence that the rule, with its 3,500 standard and as it is applied under FCC guidelines for waiver on a showing of financial hardship, will promote the public interest within the meaning of the Communications Act of 1934.” *Id.* at 650.

69. *Id.*

70. In so concluding, the FCC rejected the contention that a prohibition on CATV originations was “necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service.” 38 F.C.C. 683 (1965). See text accompanying notes 24-30 *supra*.

71. 406 U.S. at 655 n.10.

72. “The Commission report itself shows that upon the basis of the record made, it is highly speculative whether there is sufficient expertise or information available to support a finding that the origination rule will further the public interest.” *Id.*

73. *Id.* at 671.

74. On this basis, the Commission chose to apply the regulation to systems with 3,500 or more subscribers, effective January 1, 1971.

This standard [the Commission explained] appears more than reasonable in light of the [data filed with] our decision to permit advertising at natural breaks . . . , and the one year grace period. Moreover, it appears that approximately 70 percent of the systems now originating have fewer than 3,500 subscribers; indeed, about half of the systems now originating have fewer than 2,000 subscribers.

Id.

75. *Id.* at 673.

The dissenting opinion of the Supreme Court pointed out that the authority heretofore established through the courts concerned the re-transmission of signals originating elsewhere, but that CATV systems either supplement broadcasting by facilitating signal reception of local stations or transmit signals of distant stations.⁷⁶ They contrasted this historical role of CATV with the requirements imposed by origination which require new investments, new and different equipment, and additional personnel. The dissent concluded by noting that "there is not the slightest suggestion in the act or in its history that a carrier can be bludgeoned into becoming a broadcaster while other broadcasters live under more lenient rules."⁷⁷ This is a very convincing point which the plurality should have addressed.

The dissent makes a much more persuasive argument than does the plurality. The Court, in effect, is ordering the cable systems to produce on the same level as regular broadcast stations. This is clearly contrary to the nature of the cable industry, which is primarily to "re-transmit" and not to "produce." The additional costs this would involve could quickly cause the demise of many cable operations. The Court seems unable to accept one of the major differences between cable and broadcast systems—that cable operations do not require the expenses of production as do broadcast stations. The Court seems determined to equalize the costs. Also, this ruling would result in strict governmental control over the cable industry, unheard of in the longstanding broadcast industry.⁷⁸

Superficially, at this point it appears that the FCC is working hard to ensure effective public access programming. A deeper look, however, reveals that only the bare bones of public access are provided. "If interested parties do not press to realize the potential of access programming through hard work . . . , then other pressures, lack of interest, or ignorance will make public access ineffectual and unimportant."⁷⁹

The Rand Corporation report discussed the four major problems raised by the FCC rules for new systems in the top 100 markets:

1. Cable operators are required to maintain production facilities

76. *Id.* at 677.

77. *Id.* at 680.

78. The plurality opinion performs the legerdemain by saying that the requirement of CATV origination is 'reasonably ancillary' to the Commission's power to regulate television broadcasting. That requires a brand-new amendment to the broadcasting provisions of the Act, which only the Congress can effect. The Commission is not given *carte blanche* to initiate broadcasting stations; it cannot force people into the business. It cannot say to one who applies for a broadcast outlet in city A that the need is greater in city B and he will be licensed there. The fact that the Commission has authority to regulate origination of programs if CATV decides to enter the field does not mean that it can compel CATV to originate programs.

Id.

79. R. KLETTER, CATV: MAKING PUBLIC ACCESS EFFECTIVE 9 (1973).

within the franchised area for access use, including [five] minutes live time free. However, only minimal equipment for example, only one studio camera need be available, thus severely limiting effective programming.

2. With only one channel for public access, regular scheduling of programs or awarding of choice time slots becomes difficult.
3. By requiring systems with more than 3500 subscribers to originate substantial amounts of local programming, the FCC may be inviting conflict between cable origination and public access or community origination.
4. Funding: the FCC has left the financial problems of access up to each community and restricted the financial burden a community can impose on a cable operator through franchise fees and the like. The FCC also prohibits mandatory subsidy of access by the operator.

The requirements for access channels should not be confused with those for local origination. A cable system may have over 3500 subscribers but not be in the top 100 markets.

In that case it must originate programming but does not have to provide access channels. The local franchising authority can demand that it do so, however. While major market urban systems will undoubtedly have over 3500 subscribers, some major market suburbs may not have enough subscribers to require local origination.⁸⁰

May of 1976 brought its Third Report and Order⁸¹ in which the FCC pondered whether to discontinue their practice of requiring that separate access channels be provided to each community served. The FCC decided to keep the four designated access channels requirement for systems with 3,500 or more subscribers which have sufficient channel capacity without installing converters.⁸² Systems having adequate access capacity and less than 3,500 subscribers may use one designated access channel for shared use among public, educational, government, and leased users if such a system's activated channel capacity is sufficient to provide such channel.⁸³

80. *Id.* at 910.

81. 59 F.C.C. 2d 294, 313 (1976).

82. We have, accordingly, modified our rules in several major respects. First, while we shall maintain our commitment to the provisions of four specially designated access channels, we have modified this requirement to make clear that (a) it will only apply to those systems with 3,500 or more subscribers which have sufficient channel capability without installing converters, to provide such multiple channels.

Id. at 314.

83. Second, in view of our belief that in the majority of cases, all access needs can be met by the provision of one access channel for composite access programming, we have determined to modify our rules to require that cable television systems with 3,500 subscribers or more to provide at least one designated access channel for shared use among public, educational, local government and leased users, if such a systems activated channel capability is sufficient to provide such channel.

Id.

New regulation section 76-256, regarding access service equipment requirements, provides that each system having more than 3,500 subscribers shall have available equipment for local production and presentation of cablecast programs⁸⁴ and permit its use for the production and presentation of public access programs.⁸⁵ Additionally, it requires that no such system can contract away its time and thus inhibit the use of that equipment for a substantial portion of time for public access programming.⁸⁶

Then came the hardest judicial blow to public access. In *Midwest Video Corporation v. FCC* (hereinafter referred to as *Midwest II*),⁸⁷ the court held that the FCC's mandatory channel capacity, equipment, and access rules exceeded their jurisdiction.⁸⁸ This court-imposed deregulation marked a substantial setback to public access. The issue facing the court was "whether compelling cable systems to build and dedicate facilities to essentially free public use was within the FCC's jurisdiction."⁸⁹

The FCC said that because the United States Supreme Court (in a split decision 4-1-4) allowed the mandatory origination rule in *Midwest I*⁹⁰ as reasonably ancillary to their responsibilities for broadcast television, that the Eighth Circuit should rubber stamp the Commission's jurisdiction and their mandatory access rules. The FCC, however, had told the Supreme Court that the origination rule was an attempt to require cable systems to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters.⁹¹ This was a far cry from the FCC's 1976 Report and Order regulations that were an attempt to require cable systems to meet standards of responsibility to the public that cannot lawfully be imposed on broadcasters.⁹² Thus, the 1976 Report and Order Regulations are "necessarily divorced from, rather than reasonably ancillary to, the FCC's regulation of broadcasting."⁹³

84. *Id.* at 328.

85. These programs include local sports, town meetings, community affairs, weather, etc.

86. 59 F.C.C.2d at 328.

87. 571 F.2d 1025 (8th Cir. 1978).

88. *Id.*

89. *Id.* at 1041.

90. 406 U.S. 649 (1972).

91. *Id.* at 679.

92. Though the FCC tells us that *Midwest Video* legitimized its present common carrier type access regulations, the FCC told the Supreme Court that the origination rule there involved was an attempt to require cable systems "[t]o meet some of the same basic standards of responsibility to the public that are imposed on broadcasters." 571 F.2d at 1052.

93. *Id.* Because the FCC's 1976 report regulations are an attempt to require cable systems to meet "standards of responsibility to the public," they cannot lawfully be "imposed on broadcasters," and they are necessarily divorced from, rather than reasonably ancillary to, the FCC's regulations of broadcasting.

Cable operators felt that in many communities the channels and equipment would go unused, while the cost would be passed on to subscribers who may possibly be uninterested in viewing access programs.⁹⁴ The court in *Midwest II* noted that "it would appear that satisfaction of the FCC's desire to advance first amendment interests in increased communication via its access concept can actually be assured only by an Orwellian requirement that users *must* produce and cable consumers *must* watch access programs."⁹⁵

The *Midwest II* court rejected the mandatory access and equipment regulations for several reasons. First, they exceeded the FCC's jurisdictional statute.⁹⁶ The statute delegated regulatory authority over common carriers and broadcasters; cable systems are neither. "Hence the Act contains no specific grant of authority over cable systems, and there can have been no Congressional intent regarding them."⁹⁷ Other reasons are indicated in the court's findings that the regulations were not proven to be "reasonably ancillary" to the FCC's responsibilities, and that the mere existence of valid objectives does not confer jurisdiction.

Had the FCC shown that the regulations in question were "reasonably ancillary," with some nexus to their actual statutory responsibility, this case would not have come up. Because the free public access concept has nothing to do with retransmission of broadcast signals on existing channels, the relationship between cable and broadcast systems present in *United States v. Southwestern Cable Co.* and *Midwest I* is totally absent. "The present rules are not designed to require that cable systems do what broadcasters do, but relate to cable systems alone, and are designed to force them into unwanted activities having no bearing on the health and welfare of broadcasting."⁹⁸

The court found that "each regulation of cable television must stand or fall individually, not on legal precedent concerning other regulations, but on whether or not the regulation under the review meets the standard established by the Court."⁹⁹ —

The FCC stated *that its objectives*—(1) to make available to all citizens a rapid, efficient, nation-wide wire and radio communication service and (2) furthering the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression—*supported its jurisdiction* because the Court "approved" them in *Midwest I*.¹⁰⁰ The court in *Mid-*

94. *Id.* at 1032.

95. *Id.* at 1046.

96. See 47 U.S.C. §§ 151-609 (1970 & Supp. V 1975).

97. 571 F.2d at 1036.

98. *Id.* at 1038.

99. *Id.* at 1039. —

100. *Id.* at 1040-41.

west II, however, felt that every act of every government agency would be justified, jurisdictionally sound, and judicially approved, if such objectives were the sole criteria.

The court found strong constitutional grounds for setting these regulations aside. "Government control of business operations must be most closely scrutinized when it affects communication of information and ideas, and prior restraints in those circumstances are presumptively invalid."¹⁰¹

The FCC did not attempt to show that such regulation was necessary to protect a clear public interest threatened by a clear and present danger.¹⁰² Nor did they attempt to explain why cable systems are not entitled to the same first amendment rights as newspapers, movies, etc.¹⁰³ Nor did they offer proof that the regulations would result in quality, effective local programming.¹⁰⁴

In *Midwest II*, Midwest Video claimed, and rightfully so, that the rules at issue effect a taking of private property without just compensation while simultaneously denying system proprietors the chance to negotiate for the benefit of receiving a fair rate of return, in violation of the due process clause of the fifth amendment.¹⁰⁵

The court assumed that "no government agency has the fatal-to-freeedom power to force a newspaper to add [twenty] pages to its publication, *or* to dedicate three pages to free, first-come-first-served access by the public, educators, and government, *or* to lease the fourth page on the same basis"¹⁰⁶

It finally happened. The growing trend of regulation and expanding opportunities for public access reached their peak having enjoyed only thirteen short years of existence. The Third Report and Order¹⁰⁷ marked the first step back down the ladder of success for the growth of public access. *Midwest II*¹⁰⁸ carried the weight down the next ten steps of the ladder, leading the way to contraction of FCC authority.

In this second phase of regulation while public access had been dis-

101. *Id.* at 1053.

102. In wresting from cable operators the control of privately owned facilities for transmission of programs not acquired from public airwaves, the Commission makes no effort to show the action to have been necessary to protect a 'clear public interest, threatened not too doubtfully or remotely, but by clear and present danger,' or to show 'the gravest abuses, endangering paramount interests [which would] give occasion or permissible limitation.'

Id. at 1053-54.

103. *Id.* at 1055.

104. *Id.* at 1059-60.

105. Midwest argued persuasively that the 1976 mandatory construction and access rules constitute a taking of private property without just compensation and deny cable owners an opportunity to earn a fair rate of return, in violation of the due process clause of the fifth amendment.

106. 571 F.2d at 1056.

107. 59 F.C.C.2d 294 (1976).

108. 571 F.2d 1025 (8th Cir. 1978).

covered, its potential effectiveness had been thwarted by the the court's shortsightedness in promoting the cable industry and not the interest of the general public.

By the time public access became recognized as a legitimate interest, the courts had greatly abused their jurisdictional discretion in furtherance of the interests of the broadcast industry.¹⁰⁹

On September 29, 1978, the District of Columbia Circuit decided *Community-Service Broadcasting of Mid-America, Inc. v. FCC*.¹¹⁰ This case was very similar to *Midwest II*. Instead of requiring the plaintiff to originate community cablecasting, the FCC in this instance had required the plaintiff to "make audio recordings of all broadcasts in which any issue of public importance is discussed."¹¹¹ Plaintiffs, non-commercial educational broadcast stations, challenged the regulation on first and fifth amendment grounds, two of the strongest determining factors in *Midwest II*.¹¹² The court held that the requirement "placed substantial burdens on noncommercial educational broadcasters and presented the risk of direct governmental interference in program content and, since no substantial government interest had been shown, was unconstitutional under the first and fifth amendments."¹¹³

Less than one month later, the FCC, in a Memorandum Opinion and Order, denied a private petitioner five free minutes of live public access.¹¹⁴ Because *Midwest II*¹¹⁵ was pending at the time, the FCC alleged enforcement of the old rules. The results, however, were essentially the same. This was a strong indication of a permanent trend toward the limitation of public access.

Ron Kurtenbach, petitioner in the Memorandum Opinion and Order, alleged that respondent, T.V. Transmissions, Inc., had ignored his request for access. The respondent answered that the petitioner had never submitted a written request. The petitioner additionally alleged that the respondent had "conjured up controversial copyright issues as a means of prohibiting free expression. . . ."¹¹⁶ Regarding this con-

109. 406 U.S. 649 (1972).

110. 593 F.2d 1102 (D.C. Cir. 1978).

111. *Id.* at 1103.

112. See text accompanying notes 102-07 *supra*.

113. 593 F.2d 1102 (D.C. Cir. 1978).

114. 69 F.C.C.2d 1624 (1978).

115. 571 F.2d 1025 (8th Cir. 1978).

116. (c) Cablevision has conjured up controversial copyright issues as a means of prohibiting free expression on the non-live public access channel. The fact that Cablevision requires access program producers to sign a waiver which relieves Cablevision of legal responsibility for the program that is cablecast should obviate the need for such a stringent interpretation of the copyright laws by Cablevision. Although petitioner has served on the Lincoln Cable Television Advisory Board and has presented several prerecorded public access programs over the Cablevision access channel, he had never seen a copy of the Cablevision operating rules for access programming until they were submitted as an exhibit attached to an opposition pleading in this proceeding.

69 F.C.C.2d at 1625-26.

tention, the FCC held that T.V. Transmissions' request for copyright clearances seemed to be a simple and effective solution to potential copyright problems. Kurtenbach claimed that the reception of the channel reserved for public usage was of a substantially poorer quality than the reception available in the retransmission of regular broadcast programs. At this point, the respondent revealed that programs submitted by the petitioner were obscene and indecent. The petitioner's claim was too weak on its merits to win a victory for public access.¹¹⁷

Citing *Teleprompter of Worchester, Inc. v. FCC*,¹¹⁸ the FCC ruled that cable operators are not obligated to provide live cablecasting opportunities where taping facilities were made available to access users.¹¹⁹ The claimant there stated that he had never seen a copy of the Cablevision operating rules for access programming prior to the suit, which was met with a strong reminder by the court to the cable operators of their clear statutory obligations¹²⁰ to make such rules openly available for public inspection.¹²¹ In reprimanding the cable operator, the court gave new hope for the advancement of public access.

From its first assertion of direct jurisdiction in *Carter Mountain Transmission Corp. v. FCC*,¹²² the FCC expanded its regulatory grasps until *Midwest I*¹²³ in 1972, a mere nine year period. Repeatedly, the FCC alleged that its jurisdiction was "necessary to regulate the communication system in a manner designed to make available to all citizens wire and radio communications service with adequate facilities at reasonable charges." Equally as many times the court, at one level or

117. *Id.* at 1625.

118. 67 F.C.C.2d 643 (1978).

119. 69 F.C.C.2d at 1627. The Commission determined that the rules do not impose upon cable system operators a requirement to provide live cablecasting where taping facilities are made available to access users by the cable operator.

120. 47 C.F.R. § 76.256(a) (1978):

Equipment requirement. Each such system shall have available equipment for local production and presentation of cablecast programs other than automated services and permit its use for the production and presentation of public access programs. No such system shall enter into any contract, arrangement, or lease for use of its cablecasting equipment which prevents or inhibits the use of such equipment for a substantial portion of time for public access programming.

47 C.F.R. § 76.305(b) (1978):

Location of records. The public inspection file shall be maintained at the office which the cable television system maintains for the ordinary collection of subscriber charges, resolution of subscriber complaints, and other business or at any accessible place in the cable system's community (such as a public registry for documents or an attorney's office). The public inspection file shall be available for public inspection at any time during regular business hours.

121. "Finally, we remind Cablevision that its operating rules are required to be available for public inspection. The public inspection file is to be available at either the system's office or another accessible place in the community at any time during regular business hours." 69 F.C.C.2d at 1628.

122. 321 F.2d 359 (D.C. Cir. 1963).

123. 406 U.S. 649 (1972).

another, upheld the claims of the FCC, finding them to be “reasonably ancillary” to the statutory basis¹²⁴ upon which the FCC is based.¹²⁵

It was not until the FCC began imposing double standards on cablecast stations, as contrasted to broadcast stations,¹²⁶ that the judiciary was forced to withdraw its support. Public access thus was inadvertently sacrificed by an over-anxious yet well-meaning FCC. The concept of public access somehow ran its course without any substantive period of growth. The irony is both strong and unfortunate. Cable television was originally conceived as a brilliant and infinite outlet for community expression. The *promise* of public access is shown in an excerpt from a portion of the Rand Corporation’s extensive cable findings:

Public access is one of cable television’s most significant prospects. With programming created by local citizens for local citizens, and transmitted on cable channels dedicated for that special purpose, television may finally discover local issues and culture. It *may become* commonplace to see ordinary people videotaping programs in their own neighborhoods, bringing the problems and pleasures of local life to the attention of their communities. This phenomenon *could restore* to the television screen some qualities that have nearly been refined out of it: spontaneity; originality; controversy; realism; even attractive amateurishness.¹²⁷

V. CONCLUSION

At approximately the same time that the FCC found program origination by cable systems to be a good source of public expression, the television broadcast industry, which was heretofore a strong advocate of cable regulation because it was to their advantage, began advocating the deregulation of the cable industry.

Originally, the regulation of cable television was based, all too often, on vague notions of jurisdiction based on objectives and not on legitimate jurisdictional grounds. The resulting confusion gave the apparent (but false) impression that what cable needed was deregulation. To the contrary, what cable needed and still needs is re-regulation. Re-regulation should be based on public needs; re-regulation should be built on legitimate jurisdictional grounds. What the cable industry needs is a foundation built not upon supplementing the vast benefits of broadcast

124. 47 U.S.C. § 151-609 (1970 & Supp. V 1975)..

125. Cases where the FCC found their jurisdiction “reasonably ancillary” include *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1963) and *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

126. In *Midwest I*, the Commission *required* cable operators to originate programming and to provide equipment. Requirements of this nature have yet to be imposed on broadcast stations.

127. 406 U.S. 649 (1972).

television, but upon the promotion of public access as expressed in the findings of the Rand Corporation.

In addition to the problem of promoting the economic interests of the broadcast industry, of equal importance in the development of cable is the need for the education of the public. One reason for the presently sad state of cable affairs is that originally both the FCC and the courts based their findings on the premise that public interest was high, and thus public usage and benefit would be proportionate. Unfortunately, this was not the situation.

With the advent of re-regulation, emphasis should be placed on involving local municipalities and citizens. These are the groups that will assure the advancement of the cable industry in a direction beneficial to the originally posed justifications for FCC regulation. These are the groups that will keep the economic interests of the broadcast industry in check. This way, cable will serve the majority of the people.

SHEILA TABRON