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UNLEASHING CABLE T.V., LEASHING THE FCC: CONSTITUTIONAL LIMITATIONS ON GOVERNMENT REGULATION OF PAY TELEVISION

I. Introduction

In 1975, the Federal Communications Commission, acting under its rulemaking authority,¹ issued a series of regulations² prohibiting

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1. Communications Act of 1934, 47 U.S.C. § 151-609 (1970).
 2. The relevant portions of the Commission's Rules, 47 C.F.R. § 76.225 (1977) are as follows:

Cable television system operators or channel leasees engaging in origination or access cablecasting operations for which a per-program or per-channel charge is made shall comply with the following requirements:

(a) Feature films shall not be cablecast by a cable television system subject to the mandatory signal carriage requirements of Subpart D of this part, except as provided in this paragraph.

(1) A feature film may be cablecast if—

(i) The film has been in general release in theatres anywhere in the United States for three (3) years or less prior to its proposed cablecast;

(ii) A conventional television broadcast station licensed in the market of the cable system holds a present contractual right to exhibit the film. For purposes of this subparagraph, a television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right;

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed cablecast and the film has not been exhibited in the market of the cable television system over conventional television for three (3) years prior to its proposed cablecast. Once a film has been cablecast in the market pursuant to this subparagraph, or broadcast on a subscription basis pursuant to § 73.643(a)(1)(iii), such film may thereafter be cablecast in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language;

(2) Feature films otherwise excluded by this paragraph may be cablecast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market of the cable television system, or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.

(b) Sports events shall not be cablecast live by a cable television system subject to the mandatory signal carriage requirements of Subpart D of this part except as provided in this paragraph.

(1) A specific event may be cablecast if the event has not been broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast. If a regularly recurrent event takes place at intervals of more than one year (*e.g.*, summer Olympic Games), the event shall not be cablecast if it has been broadcast live over conventional television in the market during any one of the ten (10) years preceding the proposed cablecast.

(2) New specific sports events that result from the restructuring of existing sports shall not be cablecast until five (5) seasons after their first occurrence. Thereafter, subscription cablecasts shall be governed by paragraph (b)(1) of this section.

pay cablecasters from showing certain types of programming, on the rationale that pay cablevision, through successful competitive bidding, would "siphon" this programming away from broadcast television and thus deprive the general public of popular programs.³ Fifteen suits challenging these regulations were consolidated and argued before the Court of Appeals for the District of Columbia. *Home Box Office, Inc. v. Federal Communications Commission*,⁴ decided by that court in March, 1977, not only set aside the rules limiting pay cable programming, but also limited the FCC's general authority to regulate pay cable. Additionally, the opinion painted a "new perspective on ex parte contacts with a rather broad juris-

(3) The number of non-specific events which may be cablecast in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during each of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast.

(ii) If twenty-five (25) percent or more of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast. However, if the number of events in the category to be broadcast in the current season is a reduction from the number of events broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be cablecast pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast.

(d) Not more than ninety (90) percent of the total cablecast programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but absent a showing of good cause, the percentage of such programming hours may not exceed ninety-five (95) percent of the total cablecast programming hours in any calendar month.

(e) No commercial advertising announcements shall be carried on subscription channels during such operations except before and after such programs for promotion of other programs for which a per-program or per-channel charge is made.

Id.

Subsection (c) of section 76.225, which forbade the cablecasting of any series type of program with interconnected plot or the same cast of characters as had been broadcast over conventional television, was deleted by the FCC in *Second Report and Order*, 35 RAD. REG. 2d (Pike & Fischer) 767 (1975).

3. See *First Report and Order*, 52 F.C.C.2d 1 (1975).

4. 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 98 Sup. Ct. 111 (1977) [hereinafter *HBO*].

prudential brush."⁵ The court's ruling has drawn sharp criticism in subsequent opinions.^{5,1} This Note will examine the history behind this decision, the court of appeal's treatment of the FCC rules, and the decision's possible effect on future pay cable regulations.

II. Background

Until 1927, "the allocation of frequencies was left entirely to the private sector, and the result was chaos."⁶ The government discovered that the broadcast frequency spectrum was a scarce national resource, and decided that its ownership should be kept in the public domain.⁷ Otherwise, "[w]ith everybody on the air, nobody could be heard."⁸ From 1927 to 1934, the Federal Radio Commission allocated frequencies among competing applicants.⁹ Finally, the Federal Communications Commission was created in 1934 to grant broadcast licenses in a manner "consistent with the public interest, convenience, or necessity."¹⁰

Since its inception, the FCC has developed rules which have sought to ensure that licensees would be responsive to the public trust placed in them, while preserving the licensees' first amendment rights.¹¹ Generally, actual entertainment programming formats have been left to the discretion of the licensee and competitive market forces.¹² Instead, FCC regulations have centered on areas such as the Fairness Doctrine,¹³ or the news and community pro-

5. *Action for Children's Television v. FCC*, 564 F.2d 458, 474 (D.C. Cir. 1977) [hereafter ACT].

5.1. See notes 120-41 and accompanying text *infra*.

6. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969).

7. 47 U.S.C. § 301 (1970).

8. *National Broadcasting Co. v. United States*, 319 U.S. 190, 212 (1943).

9. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376-77 (1969), which reviews the early history of broadcast regulation.

10. 47 U.S.C. § 307(d) (1970).

11. See Hagelin, *The First Amendment Stake in New Technology: The Broadcast-cable Controversy*, 44 Cin. L. J. 427 (1975). See also *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 207, *cert. denied*, 397 U.S. 922 (1969); Comment: *FCC Broadcast Standards for Ascertaining Community Needs*, 5 Fordham Urb. L. J. 55 (1976).

12. *Notice of Inquiry in re: Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580 (1976). See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *FCC Programming Policy Statement*, 25 F. Reg. 7293 (1960).

13. The Fairness Doctrine requires that the broadcast media allocate equal time to opposing political viewpoints. The FCC points to spectrum scarcity to justify its application. The Supreme Court upheld the FCC's authority to enforce the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

grams and services which all licensees are obligated to provide.¹⁴

The present controversy concerning the FCC's power to regulate pay cable was germinated in 1952, when the first application to establish a subscription broadcast television (STV) service was filed with the Commission.¹⁵ This application in effect asked the FCC to reserve one or two precious channels in the broadcast spectrum for special programming which would be paid for per program or per channel by the viewer. The FCC did not grant a license to any such STV applicant until 1959, when it announced it would license a limited number of trial stations in order to gather more information about the effects of STV on the broadcast medium.¹⁶ By 1968, the FCC had made a thorough analysis of this trial, and on the basis of the results allowed STV to continue with certain limitations.¹⁷

The concern of the Commission and of opponents of STV throughout the trial run was that STV would pull popular programming away from the free networks and restrict its viewing to those few who were willing and able to pay.¹⁸ Thus, in 1968, the Commission promulgated rules¹⁹ designed to minimize the effects of such "siphoning."²⁰ The rules also were structured to ensure that sub-

14. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

15. 20 F. Reg. 988 n.1 (1955). Both subscription broadcasting (STV) and cable programming charge the viewer for receipt of a channel showing first-run motion pictures, sports events, and other programs not shown on conventional television. STV is available on the UHF/VHF broadcast spectrum. Pay cable programming requires initial installation of a cable hook-up for which there is an additional monthly charge. The basic cable hook-up usually provides better picture reception, as well as news, public access channels, and some original programming.

16. See *Third Report and Order*, 26 F.C.C. 265 (1959), *aff'd*, *Connecticut Comm. Against Pay TV v. FCC*, 301 F.2d 835, *cert. denied*, 371 U.S. 816 (1962). The Commission actually granted two licenses, only one of which, WHCT in Hartford, Connecticut, became operational in the summer of 1962. 15 F.C.C.2d 466, 467 (1968).

17. 15 F.C.C.2d at 556.

18. *Id.* at 493.

19. See 15 F.C.C.2d at 508-09 and 556-72, in which the rules and their rationale are set out at length. Briefly summarized, they restricted STV from showing: 1) feature films more than two but less than ten years old; 2) any sports programs which had been shown regularly on free television in that community within two years; and 3) week-to-week series programs. (The series rule was repealed by *Second Report and Order*, ____ F.C.C.2d ____, 35 RAD. REG. 2d (Pike & Fischer) 767 (1975)). Commercial advertising was also prohibited, and total programming could not consist of more than 90% feature films and sports programming. See notes 68-69 *infra* for the rationale behind these two rules.

20. 15 F.C.C.2d at 556-72. The 90% and no-advertising rules were not justified by the "siphoning" rationale, but were intended to promote diversity and unique formats. See notes 68-69 *infra*.

scription television would provide a distinct type of programming not available on free television, thereby justifying allocation of channels on the broadcast spectrum.²¹ The District of Columbia Court of Appeals upheld these rules when they were challenged on constitutional and anti-competitive grounds in *National Association of Theatre Owners (NATO) v. FCC*.²²

The STV rules were developed under the FCC's general authority to regulate the broadcast television spectrum, but cable television is not within this spectrum.²³ Community antenna television (CATV) originated in the 1940s to transmit distant signals by coaxial cable to communities not able to receive good broadcast reception.²⁴ It has expanded today into a cable system which has the capability of carrying 35 or more channels, some re-transmitting network programs and others providing *inter alia* original programming, public access stations, stock market reports, and news.²⁵ Because cable television takes up no part of that "scarce national resource," the broadcast spectrum, the rationale which allowed the FCC to regulate STV appeared at first glance to be inapplicable.

The FCC made no major effort to regulate CATV until 1960,²⁶ when it began to assert limited jurisdiction over cable to prevent CATV's conflict with broadcast television in carriage and non-duplication of programming.²⁷ The Commission's authority to regulate cable in these areas was upheld by the Supreme Court in *United States v. Southwestern Cable Co.*²⁸

21. 15 F.C.C.2d at 556-72.

22. 420 F.2d 194 (1969), *cert. denied*, 397 U.S. 922 (1970). In *NATO*, the FCC's power to authorize STV was challenged by theatre owners who would be competing with STV in showing first-run films. The Court of Appeals for the District of Columbia held that the FCC had the requisite authority both to license STV and to regulate it so that it would not conflict with free television. The court said that "competition among those providing broadcasting services in a given area would best protect the public interest." 420 F.2d at 203. As to the constitutional arguments raised, the court said that licensing STV did not discriminate against the poor (*id.* at 205-07) and the rules restricting STV "create[d] far less risk [than other regulations previously upheld] of diminishing the debate on vital public issues." *Id.* at 208. The rules did not affect the ideas which could be presented on STV; they only served to "ensure the continuing economic vitality of free television." *Id.*

23. 47 U.S.C. § 303 (1970).

24. 567 F.2d at 21-22.

25. Brief for Petitioners Home Box Office *et al.* at 8-9. *N.B.*: Citation to briefs of the various parties consolidated with Home Box Office, Inc. v. FCC will be abbreviated in the manner *supra*, with docket numbers provided when necessary for identification.

26. See generally *United States v. Southwestern Cable Co.*, 392 U.S. 157, 164-66 (1968).

27. *Id.*

28. 392 U.S. 157 (1968). *Southwestern Cable* held that the FCC had the right to regulate

After *Southwestern Cable* the FCC held further proceedings,²⁹ and in 1969 issued additional cable regulations and requirements.³⁰ However, it declined at that time to apply the STV rules³¹ to cable in the absence of data indicating a threat of siphoning by cable television.³² Nine months later the FCC abruptly reversed itself and adopted the STV rules for pay cable with little explanation.³³ While there was no new data to suggest a danger of siphoning, the FCC justified the rules as preventive medicine for a possible future harm.³⁴ Proponents of pay cable aver that the FCC had reversed itself upon the urging of broadcast interests that regarded cable as a threat to their hegemony.³⁵ These rules as modified in subsequent orders³⁶ were attacked in *Home Box Office, Inc. v. FCC*.

III. Arguments against the Rules

Numerous arguments were raised on all sides against the pay cable rules set forth in 47 C.F.R. § 76.225. Broadcast interests, while favoring broad regulation of cable television, attacked the rules because they allegedly promoted and encouraged the development of pay cable beyond the "supplementary service" role which compet-

cable transmissions to prevent cable stations from bringing distant signals into an area when this might pull viewers away from local broadcasting stations carrying the same programs. See notes 47-49 and accompanying text *infra*.

29. Informal rulemaking proceedings held by the FCC generally consist of a published notice to implement new rules, followed by submission by interested parties of their views and supportive data. Additionally, the Commission at its option may conduct discussions and hear formal arguments. For a general discussion of informal rulemaking, see 1 K. Davis, *ADMINISTRATIVE LAW TREATISE* § 6 (1958). See also *ACT*, 564 F.2d at 470-71.

30. *First Report and Order*, 20 F.C.C.2d 201 (1969).

31. See note 19 *supra*.

32. 20 F.C.C.2d at 204.

33. *Memorandum Opinion and Order*, 23 F.C.C.2d 825 (1970). This short release was concerned primarily with petitions to overturn FCC original programming requirements. Tacked on to the opinion denying those petitions were three sections dealing with requests for further regulation of cable, including adoption of siphoning and advertising rules. The FCC acquiesced to free television interests in adopting the cable rules, but made no effort in the single paragraph of the opinion devoted to this issue to explain why it had changed its stance. It simply announced that it was doing so. *Id.* at 827-28.

34. *Id.* at 828 n.6.

35. See, e.g., Brief for Petitioners *Home Box Office et al.* at 48-54.

36. The rules were modified by *First Report and Order*, 52 F.C.C.2d 1 (1975) (making several insubstantial changes) and *Second Report and Order*, ____ F.C.C.2d ____, 35 RAD. REG. 2d (Pike and Fischer) 767 (1975) (deleting the restriction against series programming. See note 2 *supra*).

ing broadcast networks envisioned for it.³⁷ On the other side, cable television groups and the Department of Justice, among others,³⁸ argued that the rules exceeded the Commission's statutory authority, were arbitrary and unsupported by factual findings, discouraged competition between communications media, and violated the First Amendment.³⁹ The court of appeals, in a lengthy opinion dissecting these arguments, found that the challenged regulations were "arbitrary, capricious, and unauthorized by law" insofar as they related to cable television.⁴⁰ The rules were set aside.⁴¹

A. Held: The Rules Are Unauthorized by Law

Since cable is not within the broadcast spectrum and since its carriage capabilities, while not limitless, are more vast than those of broadcast television, the court of appeals opined that "the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-defined and consistently held policy developed in the Commission's regulation of broadcast television"⁴² The court of appeals agreed that the FCC has some authority to regulate cable as set forth in *Southwestern Cable*⁴³ and in *United States v. Midwest Video Corp.*,⁴⁴ but stated that "these cases establish an outer boundary to the Commission's authority"⁴⁵ Additionally, "the Commission can act only for ends for which it could also regulate broadcast television."⁴⁶

37. See Brief for Petitioner American Broadcasting Companies at 22-24, No. 75-1788, consolidated with No. 75-1280.

38. A partial listing of interested parties included: Home Box Office, American Television and Communications, Manhattan Cable, Teleprompter, Columbia Cablevision, Viacom International, Warner Cable, Motion Picture Association of America, Metromedia, Columbia Pictures, United Artists, M-G-M, National Association of Broadcasters, American Broadcasting Companies, Columbia Broadcasting Co., National Broadcasting Co., Professional Baseball, Forward Communications, National Citizens Committee for Broadcasting, Twentieth Century Fox and American Mother's Committee. Petitioner Home Box Office lists an additional 74 groups and individuals who filed comments or testified at the F.C.C. proceedings in favor of cable interests. Reply Brief for Home Box Office at A-1.

39. See Briefs for Petitioner Motion Picture Association of America, No. 75-1555, and for Petitioners Home Box Office *et al.*

40. 567 F.2d at 18.

41. *Id.*

42. 567 F.2d at 28.

43. 392 U.S. 157 (1968).

44. 406 U.S. 649 (1972).

45. 567 F.2d at 28.

46. *Id.*

In *Southwestern Cable*⁴⁷ the FCC, pending a hearing, had restricted petitioner's cable television expansion into the San Diego area, where its programming would conflict with the local broadcast station.⁴⁸ Southwestern Cable Company challenged the FCC's authority to issue such an order. In upholding the Commission's order, the Supreme Court recognized only a limited FCC power:

[T]he authority which we recognize today . . . is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires." We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.⁴⁹

Midwest Video, in a plurality decision,⁵⁰ narrowly upheld the Commission's authority to require cable television to telecast original local programming in addition to intercepting and retransmitting broadcast signals.⁵¹ The Court found the rule requiring original programming

no different from Commission rules governing the technological quality of CATV broadcast carriage. In the one case, of course, the concern is with the strength of the picture and voice received by the subscriber, while in the other it is with the content of the programming offered. But in both cases the rules serve the policies of §§ 1 and 303(g) of the Communications Act on which the cablecasting regulation is specifically premised In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."⁵²

Neither decision, however, apparently went so far as to give the FCC authority to dictate which programs could *not* be carried on pay cable and yet could be carried by broadcast television.

47. 392 U.S. 157.

48. *Id.* at 160.

49. *Id.* at 178 (citations omitted).

50. 406 U.S. 649 (1972).

51. See *First Report and Order*, 20 F.C.C.2d 201 (1969). The FCC regulation challenged in *Midwest Video* provided that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." 47 C.F.R. § 74.1111(a) (1969).

52. *Midwest Video*, 406 U.S. at 669-70, citing *Southwestern Cable*, 392 U.S. at 178.

The court of appeals stated that the FCC should confine its cable rulemaking authority within the same limitations as are imposed on its broadcast rulemaking. It then sought to define these boundaries to see if they encompassed regulation of program format and content.⁵³ Support for the FCC authority to regulate cable format could be found, as the court of appeals noted, in *Citizens Committee to Save WEFM v. FCC*.⁵⁴ According to the *HBO* court, WEFM held that "the Communications Act not only allows, but in some instances requires, the Commission to consider the preferences of the public, and the Commission in discharging this authority must regulate . . . entertainment programming. . . ."⁵⁵ Thus, the WEFM opinion would support anti-siphoning rules, "since the end to be achieved—protection of preferred television service for those not served by cable television—would also justify regulation of the broadcast media."⁵⁶ Ironically, the court did not allow the *WEFM* opinion to serve as a basis for the anti-siphoning rules because the FCC itself had not followed that opinion.⁵⁷ The Commission rejected the WEFM position that it had statutory authority to regulate broadcasting entertainment formats.⁵⁸ Therefore the court concluded that the Commission could not be allowed to regulate cable in an area in which it was unwilling to regulate broadcast television.⁵⁹ Had the Commission phrased its position differently—for instance, "We have the authority, but choose to exercise it only in appropriate circumstances"—perhaps the court might have found that the FCC had the requisite authority. The FCC here is hoist with its own petard: if it refuses to accept and exercise authority over one medium, it then may not arbitrarily choose to exercise that authority over a competing medium.

53. 567 F.2d at 29-30.

54. 506 F.2d 246 (1974) (en banc). In *WEFM*, a citizens group sought to vacate an FCC order allowing WEFM Radio to change its format from classical to contemporary music. The court observed that where such a change might diminish the diversity of programs available in a locale, public hearings must be held before any such request could be granted. *Id.* at 261. If further held that the FCC had authority to regulate entertainment formats to preserve the public's interest in a particular format. *Id.* at 260.

55. 567 F.2d at 30.

56. *Id.*

57. *Id.* at 31.

58. *Id.*

59. *Id.* at 31, 34.

B. Held: The Rules are Arbitrary

The court of appeals may overturn only those federal agency actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." ⁶⁰ Under these criteria, the government agency must show a "rational connection between the facts found and the choice made." ⁶¹ Pay cable interests contended in *HBO* that the "anti-siphoning" rules were based on a supposition (that siphoning would occur) wholly unsupported by facts or evidence, and hence, arbitrary. ⁶² The FCC rebutted this argument by saying that protection of the public interest demanded preventive measures to avert the potential ill effects of siphoning before they are actually felt. ⁶³ The FCC and network competitors feared that cable would be able to out-bid the networks on rights, for instance, to the Super Bowl, the World Series, or a blockbuster movie and thus keep the large majority of Americans who lack pay cable from enjoying those events. ⁶⁴ The only concrete examples the FCC provided to support this supposition were the closed-circuit theatre televising of various boxing matches and of Evel Knievel's abortive attempt to leap the Snake River. ⁶⁵ The court of appeals found these examples, buttressed only by the networks' speculative statistics, insufficient to support the regulations. ⁶⁶

Additionally, the court found specific sections of the rules to be without a rational basis in established evidence. The pay cable rules found to be the most arbitrary were those concerning the televising of motion pictures, ⁶⁷ the "90-percent" rule, ⁶⁸ and the ban on commercial advertising. ⁶⁹

60. 5 U.S.C. § 706(2)(A).

61. 567 F.2d at 35.

62. See Reply Brief for Petitioners Home Box Office *et al.* at 5-17.

63. See *Memorandum Opinion and Order*, 23 F.C.C. 2d 825, 828 (1970).

64. See 52 F.C.C.2d at 49-50.

65. 567 F.2d at 37.

66. *Id.* at 36-38.

67. 47 C.F.R. § 76.225(a). See note 2 *supra* for full text of rule. In his dissenting statement to the 1975 regulations, Commissioner Robinson pondered the 3 to 10 year movie rule: "What is the significance of three and ten? Well, of course, the number ten is important for it is precisely the number of fingers on a human's hands. The number three is similarly important to the three-fingered sloth." 52 F.C.C.2d at 75 (Robinson, Comm'r, dissenting in part).

68. 47 C.F.R. § 76.225(c) (1975). See note 2 *supra*. The "90-percent" rule prohibited pay cable from exhibiting a programming content more than 90% of which was devoted to films or sports. The Commission intended that the 10% remaining should be filled with other types of programs, thus encouraging diversity. See also 52 F.C.C. at 66.

69. 47 C.F.R. § 76.225(d) (1975). See note 2 *supra*. The ban on advertising was promul-

1. *Motion Pictures*

When cable interests pointed out that there was no appreciable diminution of public interest in a good movie, and that therefore it could not be "siphoned" to the detriment of the free television audience,⁷⁰ the networks responded that the rules prevented delay in the public's viewing of the product.⁷¹ Thus, when the anti-siphoning rationale failed, the rule was justified as an anti-delay mechanism. However, the court of appeals noted that uncontradicted evidence showed "the popularity of film material does not decline with an increase in the interval between first theatre exhibition and first television broadcast."⁷² The court found no evidence which would support the purported time-delay purpose of the film regulations.

2. *The 90-Percent Rule and the Ban on Advertising*

The court likewise found the "90-percent" rule and the ban on commercial advertising to be without basis.⁷³ While these rules were upheld as applied to STV,⁷⁴ that decision was made within "the context of a need to allocate scarce spectrum resources Such an allocation problem [was] clearly not involved in this case."⁷⁵ Therefore, the court held that "[w]ithout further explanation of the function these rules are meant to serve, we cannot affirm the Commission's authority to promulgate them."⁷⁶

gated by the FCC with the intent of encouraging diversity and unique program content. It was felt that without commercials, cable would not be subject to the same pressures to produce bland programming of mass market appeal, but could gear itself to special interest groups. See 52 F.C.C. at 66. Cable interests agree with this contention, and in fact did not challenge the ban on advertising. See Brief for Petitioners Home Box Office *et al.* Rather, they pointed out that one of the unique features of pay cable is its freedom from commercial advertising and resultant creative restraints. *Id.* at 8-11.

The court of appeals, however, envisioned that cable could develop "some combination of user fees and advertising [which] might make subscription cable television available to the poor. . . ." 567 F.2d at 40. The court noted that the ban on advertising was carried over from the STV rules "not because of its intrinsic merit, but only because no one objected too much." *Id.*

70. Brief for Petitioners Home Box Office *et al.* at 63-64.

71. *Id.* at 64. See also Brief for Intervenor American Broadcasting Companies at 28, No. 75-1280.

72. 567 F.2d at 39.

73. *Id.* at 34.

74. *NATO v. FCC*, 420 F.2d 194, *cert. denied*, 397 U.S. 922 (1969).

75. 567 F.2d at 34.

76. *Id.*

3. Sports Events

The FCC averred that "[m]ost parties agree that some restrictions are needed to insure that the quantity and quality of sports events now shown over conventional television is not diminished by subscription operations."⁷⁷ An audience is far less interested in viewing a football or hockey game where the outcome is already known—such an event can be shown effectively only once.

This view was supported by Commissioner Robinson, who had disagreed with the movie siphoning rules.⁷⁸ It was also, surprisingly, supported by Professional Baseball, intervenor in the case.⁷⁹ One would have supposed that baseball would take a stance similar to that of the Motion Picture Association of America in opposition to rules which would limit its viewing outlets and, consequently, its income.⁸⁰ However, while Professional Baseball asserted its standing to intervene partly on its interest in negotiating with pay cable to televise additional games,⁸¹ it evidently did not consider the existing rules a barrier to such negotiations.⁸² Nevertheless, the court of appeals vacated the sports rules for lack of concrete supporting evidence⁸³ as well as on first amendment grounds.⁸⁴ The court supposed, in partial justification of its ruling, that cable firms which had purchased exhibition rights would then sell those rights to broadcast stations in areas not served by cable. Thus there would not be a complete blackout of the event on free television.⁸⁵ In spite of these arguments, it seems possible that a modified anti-siphoning rule for specific sports events might be upheld,⁸⁶ provided it were

77. 52 F.C.C.2d at 57.

78. *Id.* at 81 (Robinson, Comm'r, dissenting in part).

79. See Brief for Intervenor Professional Baseball, No. 75-1280.

80. See Brief for Petitioner MPAA, No. 75-1555, consolidated with Nos. 75-1280 *et al.* MPAA opposed the movie siphoning rules, which would cut into the market for its members' product.

81. Brief for Intervenor Professional Baseball at 4.

82. *Id.* at 16.

83. 567 F.2d at 37.

84. See discussion *infra* at section D.

85. 567 F.2d at 39. the FCC regarded this supposition as unfounded: "When any part, however small, of the audience within the reach of a broadcast station's signal has access to cable service, then the court's assumption about cable operators' willingness to share broadcast rights fails." Brief for Petitioner FCC at 27, *FCC v. Home Box Office et al.*, Supreme Court Docket Nos. 76-1724 *et al.*

86. However, the FCC has apparently discarded all of the cable rules, including those for sports, and does not appear inclined to resurrect them in modified form. See 42 F. Reg. 64,349 (Dec., 1977) (revoking the pay cable rules). The House sub-committee on communications issued on June 7, 1978 a proposal which would eliminate almost completely federal regulation of cable television. 46 U.S.L.W. 2690 (Media Law Reporter, June 27, 1978).

coupled with adequate waiver provisions and procedures so that "material not broadcast would be readily available to cablecasters, and viewers."⁸⁷

C. The Anti-Competitive Argument

While anti-trust regulation is not the bailiwick of the FCC, the court found that the Commission had taken anti-trust considerations into account in its proceedings.⁸⁸ In spite of this, cable interests, supported by the Department of Justice,⁸⁹ charged that the rules were designed to stymie the growth of a new medium in order to protect existing broadcast interests.⁹⁰ The court of appeals seemed to find merit in this argument "[t]he Commission has in no way justified its position that cable television must be a supplement to, rather than an equal of, broadcast television. . . . [T]he Commission has failed to crystallize what is in fact harmful about 'siphoning'."⁹¹ The court did not "perceive any *public* benefit to be achieved by hobbling cable television to correct the sort of unfair competition alleged by the Commission."⁹²

Nevertheless, the court restricted its ruling on this issue to a requirement that the FCC provide an adequate record to justify its anti-competitive regulations.⁹³ This record must show factual findings assessing the effects of its rules on competition.⁹⁴ However, the court's opinion does not appear to be a complete bar to regulations having an anticompetitive result, if that result comes only as a necessary side-effect of legitimate regulatory goals.

D. Held: The Rules Violate The First Amendment

Cable interests and supporters argued that the rules were a prior restraint on free speech, that they were overbroad as well as arbi-

87. See 567 F.2d at 49, n.95, and at 50-51 for discussion of waiver provisions.

88. *Id.* at 40-41.

89. 567 F.2d at 42-43. Note that the Department of Justice supported the cable group on the anti-trust issue despite its position as a statutory defendant.

90. Brief for Petitioners Home Box Office *et al.* at 48-54.

91. *Id.* at 36.

92. *Id.* at 42. The Commission complained that cable competition was unfair because local broadcasters had to pay copyright royalties on programming, while cable could rebroadcast the same programs without such payment. The court of appeals rejected this argument, noting that the Supreme Court has found that cable's free use of broadcast signals served the cause of promoting availability of the arts. *Id.* at 41-42.

93. *Id.* at 41.

94. *Id.* at 42-43.

trary, and that the material prohibited was a form of expression protected by the First Amendment.⁹⁵ *United States v. O'Brien*⁹⁶ articulated the Supreme Court's criteria for permissible government interference with first amendment rights:

[W]e think it clear that a government regulation is sufficiently justified [1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial government interest; [3] if the government interest in unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁹⁷

Applying the third criterion, the *HBO* court found that the rules were not intended to suppress free expression *per se*.⁹⁸ They did not proscribe the content of speech itself, but were similar to regulations affecting the time, place and manner of speech.⁹⁹ The court found, however, that the other criteria of *O'Brien* had not been met, and consequently held the rules unconstitutional.¹⁰⁰ The FCC lacked the power to promulgate the "90-percent" and no-advertising rules,¹⁰¹ and "[n]ot only do [these rules] serve no 'important or substantial . . . interest,' they serve no purpose which will withstand scrutiny on this record."¹⁰² The sports and motion picture regulations were similarly rejected on this ground, since the FCC had failed to establish a valid threat of siphoning.¹⁰³ The court doubted that the FCC's "interest in preventing delay of motion picture broadcasts could be shown to be important or substantial on any record"¹⁰⁴—effectively barring the possibility of passing a modified movie rule in the future.¹⁰⁵

95. See Briefs for Petitioners Home Box Office *et al.* and for Petitioner MPAA. MPAA argued that "(o)ne who erects a podium near an auditorium and engages in speech of his own (e.g., pay cable) may not be restrained because he thereby detracts from the public appeal of and audience for those speaking inside the auditorium (e.g., conventional television) . . ." Reply Brief for Petitioner MPAA at 6.

96. 391 U.S. 367 (1968).

97. *Id.* at 377 (numbering added).

98. 567 F.2d at 48.

99. *Id.* at 47-49.

100. *Id.* at 49-50.

101. See notes 53-59 and accompanying text *supra*.

102. 567 F.2d at 49-50 *citing* *United States v. O'Brien*, 391 U.S. at 377.

103. 567 F.2d at 50. "Where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible." *Id.* at 51.

104. *Id.* at 50.

105. For example, the rule might have been modified to exclude the ban on dubbed

Finally, the court, applying the *O'Brien* guidelines, held that, even if the need to prevent siphoning could be¹⁰⁶ established, the rules were grossly overbroad and went further than necessary to achieve that purpose. Since the regulations were a prior restraint on speech, they could be sustained only "where the proponent of the restraint can convincingly demonstrate a need."¹⁰⁷ Thus, the same regulations could be upheld and reaffirmed by the court of appeals as they applied to STV because the FCC had made a convincing demonstration of the need to regulate the use of the broadcast spectrum.¹⁰⁸

E. *Ex Parte* Contacts

The court of appeals in its *Home Box Office* opinion also considered the complaint by *amicus* Henry Geller¹⁰⁹ that the FCC rule-making proceedings had violated the *ex parte* communications doctrine enunciated in *Sangamon Valley Television Corp. v. United States*.¹¹⁰ *Sangamon Valley* held that *ex parte* contacts (*i.e.*, informal contacts, or lobbying, between interested parties and FCC members outside the informal proceedings) vitiated the Commission's action in informal rulemaking proceedings.¹¹¹ The decision forbade submission of off the record contentions in proceedings allocating television channels to particular communities.¹¹²

foreign language films, or on films less than 10 but more than 3 years old which had been exhibited by conventional television for 3 years prior to cablecast. Such a permutation might conceivably make the rule more closely fitted to its alleged purpose.

106. 567 F.2d at 51.

107. *Id.*

108. *Id.* at 59-60. See also *NATO v. FCC*, 420 F.2d 194. The court of appeals specifically held that *NATO* foreclosed first amendment objections to the STV rules. 567 F.2d at 59. However, the court did not explain why rules could be overbroad and could serve no rational purpose for pay cable, and yet be narrow enough and rational enough for STV. The court also enunciated a higher standard for would-be STV petitioners than for cable petitioners: STV must demonstrate that a rule was "patently unreasonable, having no relationship to the underlying regulatory problem." *Id.* at 60.

However, in the wake of *HBO*, the FCC has deleted the STV movie rules, 42 F. Reg. 62,372 (1977), and issued a proposal to delete the other STV rules so that rules for STV would conform to those for cable. *Notice of Proposed Rulemaking*, F.C.C. No. 77-813 (Dec. 7, 1977). Whether this will result in the rebirth of STV remains to be seen.

109. 567 F.2d at 51. Geller is a former FCC general counsel, and was an attorney on the brief for petitioner in *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977), a case which raised the same *ex parte* contacts issue. See notes 125-36 and accompanying text *infra*.

110. 269 F.2d 221 (1959), *cert. denied*, 376 U.S. 915 (1964).

111. 269 F.2d at 224-25.

112. *Id.*

An incomplete list supplied to the *HBO* court by the FCC indicated eighteen *ex parte* contacts by broadcast interests, nine by cable, and ten by sports and movie interests between the close of oral argument and the adoption of the rules.¹¹³ Neither these nor other contacts were fully documented and made public,¹¹⁴ thus giving adversary interests no opportunity to respond.¹¹⁵ The court said that since the FCC had possibly based its rules and regulations on information garnered from these contacts and yet failed to provide their substance to the court, judicial review was frustrated. Additionally, the contacts destroyed the efficacy of adversarial discussion¹¹⁶ and were inconsistent with "fundamental notions of fairness implicit in due process"¹¹⁷ Giving these reasons, the court enunciated a new rule that

once a notice of proposed rule-making has been issued . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rule-making proceeding, should 'refus[e] to discuss matters relating to the disposition of a [rule-making proceeding] with any interested private party . . . prior to the [agency's] decision'¹¹⁸

Further, the court said that if *ex parte* contacts do occur, any written material passed, as well as a summary of the meeting, must be placed on public file so that interested parties might respond.¹¹⁹

This sweeping rule has been criticized.¹²⁰ Never before had an agency been required to keep such stringent records in the informal

113. 567 F.2d at 53.

114. *Id.* at 52 n.108.

115. *Id.* at 55.

116. *Id.*

117. *Id.* at 56.

118. *Id.* at 57 citing Exec. Order 11920, 12 WEEKLY COMP. OF PRES. DOC. 1040 (1976). "Executive Order 11920 which the [*HBO*] opinion . . . adopts as an overarching principle of administrative law, is an executive branch prohibition of *ex parte* contacts with White House staffers regarding international air route allocations when such route certifications are before the President for approval." *ACT*, 564 F.2d at 474. The *ACT* court did not view this as sufficient basis to sustain the *ex parte* rule. See notes 125-36 and accompanying text *infra*.

119. 567 F.2d at 57.

120. See notes 122-41 and accompanying text *infra*. Support might be found in the writings of commentators, however:

At present [the procedures used in rulemaking] provide neither a satisfactory framework for agency decision making nor a structure to those decisions that would ease judicial review. . . . If rules, like formal adjudications, were based on clearly defined records, the efficiency of both rulemaking and judicial review would be increased.

Pederson, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38, 39 (1975).

(as opposed to formal) rulemaking process.¹²¹ Furthermore, its language applies to *any* informal rulemaking proceeding, regardless of the interests involved. Two months after the *HBO* decision was handed down, Circuit Judge MacKinnon filed a special concurring opinion which would limit the rule postulated to cases which involved "competitive interests of great monetary value"¹²² and which were essentially an "adjudication of the respective rights of the parties vis-a-vis each other."¹²³ The judge said that he "would not make an excessively broad statement to include *dictum* that could be interpreted to cover the entire universe of informal rulemaking. There are so many situations where the application of such a broad rule would be inappropriate that we should not paint with such a broad brush."¹²⁴

Shortly thereafter, the *ex parte* contacts argument was raised again in *Action for Children's Television v. FCC*.¹²⁵ The petitioner, ACT, contended that the behind closed doors negotiation between the FCC and the television industry "undermines the administrative process since it denies public participation at *every* stage of the regulatory process when issues of critical public importance are considered, frustrates judicial review, and renders the extensive comment-gathering stage 'little more than a sop . . .'"¹²⁶ The ACT court¹²⁷ concluded that, although *ex parte* contacts had been made outside of the formal and informal public proceedings,¹²⁸ the FCC had met the procedural requirements set forth by Congress.¹²⁹ That court, dealing with *HBO's* prohibition of *ex parte* contacts, agreed with Judge MacKinnon that the rule enunciated in *HBO* "should not apply—as the opinion would clearly have it—to every case of informal rulemaking."¹³⁰

121. See *Rules Governing Ex Parte Communications*, 1 F.C.C.2d 49 (1965); *Rule Making Procedures*, 30 F. Reg. 9277 (1975).

122. 567 F.2d at 62. (MacKinnon, J., concurring specially).

123. *Id.*

124. *Id.*

125. 564 F.2d 458 (D.C. Cir. 1977) (citation omitted).

126. *Id.* at 468.

127. The three-judge panel in this case consisted of two circuit judges, Tamm and Wilkey, neither of whom participated in the *HBO* decision, plus Circuit Judge MacKinnon, author of the special concurring opinion which would limit that *HBO* ruling. See notes 122-24 *supra* and accompanying text. The opinion in ACT was filed by Circuit Judge Tamm.

128. 564 F.2d at 469.

129. 5 U.S.C. § 553(c)(Supp. V 1975). See also 564 F.2d at 470-71 n.19.

130. *Id.* at 474.

The *ACT* court would limit the *ex parte* contact rule to quasi-judicial proceedings involving resolution of "competing claims to a valuable privilege."¹³¹ In contradiction to *HBO's* implied presumption of agency irregularity,¹³² the *ACT* court opined that "*ex parte* contacts do not per se vitiate agency informal rulemaking action, but only do so if it appears from the administrative record under review that they may have materially influenced the action ultimately taken."¹³³

The *HBO* ruling was criticized additionally for its tenuous basis in legislation¹³⁴ and in previous holdings.¹³⁵ However, the *ACT* court did not specifically overrule *HBO's ex parte* rule: it held only that the ruling should not apply retroactively to the instant proceedings "inasmuch as [the rule] constitutes a clear departure from established law when applied to informal rulemaking proceedings"¹³⁶

The *HBO ex parte* rule has raised other problems which now face the FCC. In a *Memorandum Opinion and Order*¹³⁷ released a month after *ACT v. FCC*, the issue of *ex parte* contacts was raised yet again. Petitioner Citizens for Cable Awareness in Pennsylvania (CCAP), citing *HBO*, filed a request to stay effectuation of a new class of cable rules until all *ex parte* contacts had been reduced to the record.¹³⁸ The Commission was in doubt, despite *ACT v. FCC*, as to whether the *HBO* opinion should apply retroactively to all proceedings already concluded.¹³⁹ It queried whether the decision should apply just to competing claims for a valuable privilege, and not generally to legislative rulemaking, and additionally whether proceedings should be reopened on any evidence of *ex parte* contacts, regardless of whether the contacts influenced the proceeding.¹⁴⁰ The Commission set aside these questions pending the Su-

131. *Id.* at 477, citing *HBO*, 567 F.2d at 64 (MacKinnon, J., concurring specially).

132. 567 F.2d at 51. The *HBO* court said, "a reviewing court cannot presume that the agency has acted properly [when it fails to disclose relevant information presented to it] . . . but must treat the agency's justifications as a fictional account of the actual decision-making process and must perforce find its actions arbitrary." *Id.* (citations omitted).

133. 564 F.2d at 476.

134. See 564 F.2d at 474 and note 118 *supra*.

135. 564 F.2d at 475.

136. *Id.* at 474.

137. 65 F.C.C.2d 644 (July 24, 1977).

138. *Id.* at 645.

139. *Id.* at 646.

140. *Id.*

preme Court's disposition of *HBO*. The Court denied *certiorari*, however, and so the questions remain.

IV. Conclusion

The Home Box Office decision was a resounding victory for cable television interests, and a defeat for broadcasters which would see cable only as a supplement to conventional television. Whether broadcasting's dire predictions of siphoning will come to pass remains far in the future. Should a cable system manage to acquire the exclusive rights to the Olympics or a Super Bowl game, the public outcry might be loud enough to move Congress to give the FCC authority to act, at least in the area of sports event telecasting. This possibility has not been barred by the *HBO* opinion. But the movie rules, the 90-percent rule and the ban on advertising effectively have been barred from future modification by the court's holding that they were unconstitutional.¹⁴²

The Federal Communications Commission also has been greatly affected by the disaffirmance of its cable rules. Its authority to regulate cable television apparently has been limited to areas in which cable would conflict with broadcast television. Furthermore, the Commission is drastically affected by the court's *ex parte* contacts rule. It will require further adjudication to clarify the depth and scope of this pronouncement. The Supreme Court may hear another case that is not so inextricably intertwined with other issues. Until that occurs, however, the FCC and other government agencies which hold informal rulemaking proceedings have a sweeping and confused mandate with which to comply.¹⁴³

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141. *Id.*

142. *But see* note 100 *supra*.

143. The FCC is currently attempting to promulgate *ex parte* contact rules in keeping with the *HBO* decision, as modified by *ACT* (if in fact *ACT* did modify *HBO*—a problem about which there seems to be some confusion. *See* note 139 and accompanying text *supra*).

