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Samuel Fifer

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UNITED STATES v. MIDWEST VIDEO CORP.—CABLE  
TELEVISION AND THE PROGRAM ORIGINATION RULE

On October 24, 1969, the Federal Communications Commission adopted its *First Report and Order*<sup>1</sup> dealing with community antenna television (CATV)<sup>2</sup> program origination. The Midwest Video Corporation, an operator of CATV systems in Missouri, New Mexico, and Texas, sought review of this order, and a subsequent one<sup>3</sup> denying reconsideration of the initial order. The order<sup>4</sup> embodied rules requiring CATV systems with 3500 or more subscribers<sup>5</sup> to produce original programming, rules limiting the nature of programming which CATV systems might offer upon the basis of a program per channel charge, and rules generally dealing with the origination of CATV programs, notably equal time provisions, sponsorship identification and fairness requirements.<sup>6</sup> Midwest Video appealed the order on the basis that Congress had never authorized the FCC to prescribe such rules, and the United States Court of Appeals for the Eighth Circuit agreed, setting aside the order.<sup>7</sup> The FCC then appealed and the Supreme Court granted review.<sup>8</sup> The Supreme Court reversed the Court of Appeals, reinstating the suspended

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1. 20 F.C.C.2d 201 (1969).

2. The FCC defines CATV as: "Any facility that, in whole or in part, receives directly, or indirectly over the air, and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves only the residents of one or more apartment buildings under common ownership, control or management, and commercial establishments located on the premises of such an apartment house." 47 C.F.R. § 76.5(a) (1972). For an understandable description of the technical aspects of CATV, see ON THE CABLE, THE TELEVISION OF ABUNDANCE, REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS (1971). See especially Chapter Two, *The Technology—A Primer*.

3. Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970).

4. Cable Television Service, § 76.201, 37 Fed. Reg. 3251, 3287 (1972).

5. The rule would affect an estimated 800 of the existing 2800 systems. BROADCASTING, June 12, 1972, at 19.

6. First Report and Order, 20 F.C.C.2d 201 (1969). Both the Order and the Memorandum, listed under FCC Docket No. 18397 were issued pursuant to Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417 (1968).

7. Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971).

8. 404 U.S. 1014 (1972).

rule,<sup>9</sup> holding (1) that the origination rule was "reasonably ancillary to the effective performance of [the Commission's] various responsibilities for the regulation of television broadcasting . . .;"<sup>10</sup> (2) that its effect will

further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. . . ;<sup>11</sup>

and (3) that the regulation is supported by substantial evidence that it will promote the public interest. *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

The Court's decision stands, obviously, as a reinstatement of the FCC's program origination rule,<sup>12</sup> as well as an expansion of the concept what is "reasonably ancillary" in delineating the Commission's authority, which is pivotal in interpreting the outer limits of Commission authority as granted by the Communications Act of 1934.<sup>13</sup> In addition, it can be viewed alternatively as an expansion of the Commission's regulatory powers as interpreted in *United States v. Southwestern Cable Co.*<sup>14</sup> or as a confusion of this same interpretation. If, in the former instance, it is an expansion of the Commission's authority, the decision could provide possible support for FCC regulation of future technological innovations in the field of communications. More immediately, it opens up new areas for program expansion and simultaneously presents concurrent problems for cable operators, especially those who operate in marginal subscriber areas, and whose profit margins might be adversely affected by the cost of origination.<sup>15</sup> Finally, it presents issues of preemption *vis-a-vis* local control of CATV.<sup>16</sup>

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9. See 36 Fed. Reg. 10876 (1971).

10. *United States v. Midwest Video Corp.*, 406 U.S. 649, 651 (1972).

11. *Id.* at 654.

12. 20 F.C.C.2d 201 (1969).

13. 47 U.S.C. § 152(a) (1970). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

14. 392 U.S. 157 (1968).

15. For a discussion of costs, see First Report and Order, 20 F.C.C.2d 201, 209-11 (1969).

16. See generally Annotation, 41 A.L.R.3d 384 (1972); see also Brief for State of Illinois, as Amicus Curiae, and, Brief for American Civil Liberties Union, as Amicus Curiae, *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). See Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 (1972); Hochberg, *A Step Into the Regulatory Vacuum: Cable Television in the District of Columbia*, 21 CATH. U.L. REV. 63 (1971); Comment, *Federal, State, and Local Regulation of CATV—After You, Alphonse . . .* 28 U. PITT. L. REV. 109 (1967).

The purpose of this note will be to examine the judicial and administrative history of CATV, including previous attempts to exercise jurisdiction over CATV, and the development of the origination rule; to examine how, and indeed if, the rule being upheld by the Court is "reasonably ancillary" to the Commission's authority;<sup>17</sup> to ask whether or not the Court acted consistently with the Commission's regulatory goal of wide dissemination by increasing the number of local outlets and augmenting the public's choice of programs and types of services;<sup>18</sup> to see whether or not the Court's decision is in the public interest, as the term has been applied in the past.<sup>19</sup>

Community antenna television (CATV) is a phenomenon which utilizes a facility employing a large antenna that either receives microwave transmissions of distant television signals, or receives them in the same manner that an ordinary antenna does, conducts the signals to an amplification system by means of coaxial cable, and by this same means, conducts these enhanced signals to the receivers of subscribers. In this way, communities that are unable to receive a quality image of any kind are able to enjoy broadcasts of distant stations.<sup>20</sup> The commercial baptism of CATV occurred in Lansford, Pennsylvania (near Philadelphia) in 1950. Robert J. Tarlton, a radio sales and service man, successfully improved reception by erecting individual antennas for set owners living on a mountain which had previously blocked signals. This technological improvement was commercially advanced by the newly created Panther Valley Television Company. The Company constructed a large antenna on top of the mountain to receive the Philadelphia signals, fed these signals to an amplifier to boost their strength, and then fed them to individual subscribers. As a result, viewers who subscribed to the cable service got better reception than did viewers who lived within Philadelphia's prime viewing area.<sup>21</sup> Since that time, CATV's growth has been enormous.<sup>22</sup>

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17. 406 U.S. at 664.

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

19. *See National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), and *Carter Mountain Transmission Corp. v. FCC*, 32 F.C.C. 459 (1969), 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963).

20. Verrill, *CATV's Emerging Role: Cablecaster or Common Carrier*, 34 *LAW & CONTEMP. PROB.* 586 (1969).

21. Smith, *The Wired Nation*, *NATION*, May 18, 1970, at 582.

22. Enormous is hardly powerful enough: "There are about 2,750 operating cable systems in the U.S. There are another 1,950 systems approved but not built, and 2,900 applications pending before local governments. Pennsylvania, where cable began, has the most systems: about 300. Systems currently in operation reach about 6 million homes, perhaps 18.5 million viewers. The average system has

The Federal Communications Commission's interest in CATV has revolved around jurisdictional questions.<sup>23</sup> In 1959, the FCC rejected the assertion of jurisdiction over CATV. In so doing, the FCC denied four arguments proffered by broadcasters, whose interests in the matter were grounded in concern for possible "adverse economic impact of the auxiliary services [including CATV]"<sup>24</sup> and who urged that "the Commission should recognize this and take steps to alleviate the situation."<sup>25</sup> The broadcasters argued, first, that the Commission could base its jurisdiction over CATV as a common carrier under Title II of the Communications Act.<sup>26</sup> The FCC rejected this, citing as precedent a Commission decision<sup>27</sup> which held that CATV operations did not come within the meaning of "common carrier" as that term is commonly defined. Further, the Commission noted that even if CATVs were to be viewed as common carriers, it would have been doubtful that the FCC could restrict CATV systems pursuant to its common carrier powers and consistent with the Commission's interest in protecting the television broadcast service.<sup>28</sup> Second, the Commission rejected the argument that

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2,150 subscribers. The largest—in San Diego—has over 51,000. Some have fewer than 100. Most systems offer between 6 and 12 channels; the average for all is 10.4. Most new systems being constructed have 20 channels. The state-of-the-art maximum is about 48 forward channels. Monthly fees average about \$4.95. Installation fees range from nothing to over \$100; the average is \$20. Total cost of an average system is estimated between \$500,000 and \$1 million. The cost of laying cable ranges from \$4,000 per mile in rural areas to more than \$50,000 per mile in large cities. Over 400 systems have the capability of originating programs, and nearly 300 do so on a regularly scheduled basis—an average of 16 hours a week. Almost 800 have the capability of providing such automated originations as time and weather services and stock market reports. Advertising is known to be carried by 53 systems which originate programs. Another 375 accept advertising with automated services. The average charge is \$15 per minute, \$88 per hour-long program. About 42% of the cable industry is owned by other communication interests. Broadcasters account for 30%, newspaper publishers for 7%, telephone companies for 5%. The CATV industry had total subscribed revenues estimated at \$360 million in 1971." *A Short Course in Cable, 1972*, BROADCASTING, May 15, 1972, at 45.

23. Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366 (1965).

24. *CATV and TV Repeater Services*, 26 F.C.C. 403, 411 (1959).

25. *Id.*

26. Title I deals with general provisions, Title II with Common Carriers and Title III covers special provisions relating to radio.

27. *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958).

28. *Id.* at 255. To remedy the situation created by the Commission's determination that CATV systems were neither common carriers nor broadcasters, the FCC recommended the immediate passage of Senate Bill 2653, designed to bring CATV under Federal regulation. The bill was defeated by one vote. 106 CONG. REC. 11462 (1960). Sometime later, another proposed bill, Senate Bill 1044, which would have given the Commission jurisdiction over CATV was introduced, but no action

CATVs were engaged in broadcasting, as defined by the Communications Act.<sup>29</sup> The rejection was based on a finding that there was "no basis in the definitions contained in [Section 153] for the assumption of authority over these systems."<sup>30</sup> Third, the Commission rejected the argument that authority could be asserted by virtue of its plenary powers, as enumerated by the Communications Act.<sup>31</sup> Last, the Commission rejected the contention that it must regulate CATV systems which are engaged in rebroadcasting programs without the authority of the originating station.<sup>32</sup>

The Commission retreated somewhat from their "hands-off" stance in *Carter Mountain Transmission Corp. v. FCC*.<sup>33</sup> Here, the FCC denied the application of a common carrier<sup>34</sup> to transmit microwave signals to its customers. In this case, the signals were to have gone to a CATV system.<sup>35</sup> In denying the application, the FCC based its decision upon the ultimate adverse effect to broadcasters that might result from allowing the importation of distant signals.<sup>36</sup> In affirming the denial, the court of appeals relied upon the "end-use" theory<sup>37</sup> to determine whether granting

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was ever taken on it. 107 CONG. REC. 2523 (1969). See also Note, *CATV—The FCC's Dilemma*, 3 SUFFOLK L. REV. 343 (1969). The question of the Commission's authority to regulate CATV activities when they take on the character of a common carrier is no longer in dispute. See 47 U.S.C. § 214 (1970) and *General Tel. Co. of Cal. v. FCC*, 413 F.2d 390 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969).

29. 47 U.S.C. §§ 153(b), (c), (dd) (1970).

30. CATV and TV Repeater Systems, 26 F.C.C. 403, 429 (1959).

31. "[W]e do not believe we have 'plenary power' to regulate any and all enterprises which happen to be connected with one of the many aspects of communications." *Id.*

32. "No person within the jurisdiction of the United States shall . . . nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." 47 U.S.C. § 325(a) (1970).

33. 32 F.C.C. 459 (1962), 321 F.2d 359 (D.C. Cir. 1963), cert. denied, 375 U.S. 951. Noted, 13 AM. UNIV. L. REV. 98 (1963).

34. Defined as: "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . but a person engaged in radio broadcasting shall not . . . be deemed a common carrier." 47 U.S.C. § 153(h) (1970).

35. Note, *CATV—The FCC's Dilemma*, 3 SUFFOLK L. REV. 343 (1969).

36. The complainant local outlet, KWRB-TV, Riverton, Wyoming had been operating within the public interest and if the station were to be forced to close—and the station was in financial danger—one-half of the people then being served would be without TV service of any kind since it was economically unreasonable to extend CATV service to the one-half who lived in rural areas.

37. *Federal Power Commission v. Transcontinental Pipeline Corp.*, 365 U.S. 1 (1961). The "end-use" theory was applied in this case to give jurisdiction to a regulatory agency—the Federal Power Commission—to compel a carrier to re-

the application was in the public interest.<sup>38</sup>

Soon after the *Carter Mountain* decision, the Commission issued its *First Report and Order*<sup>39</sup> containing its rules concerning microwave CATV systems. In that order, the Commission determined that the Communications Act gave the FCC the appropriate rulemaking authority over both microwave CATV and "off-the-air" CATV.<sup>40</sup> In the *Second Report and Order*,<sup>41</sup> for all practical purposes the beginning of FCC regulation of CATV,<sup>42</sup> the Commission made four major rulings dealing with: compulsory carriage,<sup>43</sup> nonduplication,<sup>44</sup> distant importation of signals into major markets,<sup>45</sup> and program origination.<sup>46</sup>

In *Midwest Television, Inc.*<sup>47</sup> the Commission was faced with a complaint filed by Midwest Television, licensee of KFMB-TV, Channel 8, San Diego, for temporary relief pending an investigatory hearing into the effects of CATV upon broadcast stations in the San Diego area.<sup>48</sup> Considering the ultimate impact such importation might have on television broadcasters, and particularly upon UHF broadcasters, the Com-

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frain from a particular use of natural gas. The jurisdictional grant was given viewing the carrier's activities in terms of the eventual use of the gas.

38. 321 F.2d at 363.

39. 38 F.C.C. 683 (1965).

40. 38 F.C.C. at 685. See also Commission's Memorandum on its Jurisdiction and Authority, 1 F.C.C.2d 478 (1965).

41. 2 F.C.C.2d 725 (1966).

42. Barnett and Greenberg, *Regulating CATV Systems: An Analysis of FCC Policy and an Alternative*, 34 LAW & CONTEMP. PROB. 562 (1969).

43. It requires a CATV system to carry the signals of local stations.

44. CATV systems were forbidden from duplicating the prime-time network programming of a local station by importing this programming on the same day that it was being broadcast.

45. Under the rule, a CATV system could not import a signal beyond its Grade B Contour into any of the top 100 markets unless the Commission first gave permission, after a hearing to determine whether or not such importation was consistent with the public interest and whether or not such importation was consistent with the vigorous maintenance of UHF television broadcasting. The Grade B Contour is defined as that area, relative to the transmitter antenna, within which a good picture is available 90% of the time at 50% of receiver locations. Sixth Report and Order, 17 Fed. Reg. 3905 (1952).

46. The FCC expressed the desire to eliminate or greatly limit the origination of programming by CATV systems. See Greenberg, *Wire Television and the FCC's Second Report and Order on CATV Systems*, 10 J. LAW & ECON. 181 (1967).

47. 4 F.C.C.2d 612 (1966).

48. Midwest objected to CATV systems importing Los Angeles signals into the San Diego area. The CATV operators countered by saying that San Diego was within the Grade B Contour of Los Angeles and hence, such importation was allowable. In truth, only the northern portion of San Diego was within this contour. See *Midwest Television, Inc.*, 13 F.C.C.2d 478, 545 (1968).

mission temporarily granted the relief requested—first, ordering a limitation on Los Angeles signals being imported, second, prohibiting any additional importation and third, preserving existing CATV service.<sup>49</sup> The ruling was appealed<sup>50</sup> and vacated, on the ground that the Commission had no authority to regulate CATV. Relying on *Regents of the University System of Georgia v. Carroll*,<sup>51</sup> the court held that the FCC's regulatory powers were confined to those authorized by Congress and that therefore the FCC's power was limited to granting licenses, and that the refusal to grant a license was the Commission's sole sanction in enforcing its decisions.<sup>52</sup> On appeal<sup>53</sup> the Supreme Court reversed the lower court, interpreting the Communications Act as granting broad authority,<sup>54</sup> including jurisdiction over CATV, and that the prohibitory order neither exceeded nor abused the FCC's authority.<sup>55</sup> The Court based its decision, first on the observation that:

CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to national audiences. . . . The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' [CATV] activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that 'is not only appropriate but essential to the efficient use of radio facilities.'<sup>56</sup>

Once the Court determined that CATV came within the broad regulatory powers granted to the Commission by Congress, the Court recognized, as the Commission had, that the unshackled growth of CATV might have potentially deleterious effects on commercial television, and especially on UHF television.<sup>57</sup> Having recognized the Commission's role, the

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49. 4 F.C.C.2d at 625-26.

50. *Southwestern Cable Co. v. United States*, 378 F.2d 118 (9th Cir. 1967).

51. 338 U.S. 586 (1950).

52. The sanction question involved the Commission's power to issue a cease and desist order, pursuant to 47 U.S.C. §§ 154(i), 303(r) (1970).

53. 392 U.S. 157 (1968).

54. "We have found no reason to believe that [47 U.S.C.] § 152 does not, as its terms suggest confer regulatory authority over 'all interstate . . . communication by wire or radio.'" *Id.* at 173.

55. *Id.* at 178, 181.

56. *Id.* at 168-69.

57. First Report and Order, 38 F.C.C. 683 (1965). This popular rationale was used by the Court of Appeals for the Eighth Circuit in allowing that the FCC had the authority to regulate both microwave and non-microwave CATV. *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). For an explanation of the phenomenon, See *Current Problems—TV Service and the FCC*, 46 TEXAS L. REV. 1100, 1142 (1968).



Court was reluctant to prevent it from exercising its authority, observing that without evidence of a contrary intention by Congress, the Court could not "prohibit administrative action imperative for the achievement of an agency's ultimate purposes."<sup>58</sup> Finally, the Court restricted the Commission's authority to that same standard adopted by the Court in *United States v. Midwest Video Corp.*,<sup>59</sup> namely, that this authority was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."<sup>60</sup> Significantly, the Court left the question open as to whether the Commission had authority to regulate CATV under any other circumstances than those encountered in the *Southwestern* case.<sup>61</sup> Upon remand, the relief initially requested was permanently granted.<sup>62</sup>

In that same remand order, the Commission's first real consideration of CATV origination was forwarded. In its findings, the Commission said that "the public interest is served by encouraging CATV systems to act as additional outlets for community self-expression."<sup>63</sup> The Commission's favorable disposition towards origination stemmed from the thinking that a local CATV outlet could provide practically any community with a significant addition to its choice of programs and services, without the usual necessary allocation of spectrum space.<sup>64</sup> Pursuant to its concern about CATV, the Commission authorized a test of unrestricted program origination<sup>65</sup> by CATV systems in the San Diego area, and conditioned the carriage "of broadcast signals by one system upon a requirement that it operate to a significant extent as an outlet for non-commercial community self-expression."<sup>66</sup> This part of the order was

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58. 392 U.S. at 177.

59. 406 U.S. 649 (1972).

60. 392 U.S. at 178.

61. The Court's recognition of the FCC's authority came in the wake of a similar decision made by the Court of Appeals for the District of Columbia. In *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967) the court of appeals found that the FCC had the authority to regulate CATV which it characterized as a form of wire communication which in essence enlarged the signal range of broadcasters to the potential detriment of the entire regulatory scheme. It was this decision that made the consideration of the *Southwestern* case, at least to the Court, a matter of importance. 392 U.S. at 161 n.7.

62. *Midwest Television, Inc.*, 13 F.C.C.2d 478 (1968). In that report, the Commission thought it had the power to compel origination, but thought the instant case was not the proper vehicle.

63. *Id.* at 503.

64. *Id.* at 505.

65. See Brief for the United States at 4 n.5, *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

66. 13 F.C.C.2d at 510.

appealed and subsequently affirmed.<sup>67</sup>

On December 12, 1968, the FCC issued its *Notice of Proposed Rule-making and Notice of Inquiry*, to fully explore the question of CATV origination and how best to develop it consistent with the public interest.<sup>68</sup> In the *Notice*, the FCC recognized the promise of CATV origination<sup>69</sup> as well as the many uses for CATV above and beyond distant-signal importation.<sup>70</sup> In noting the promise of CATV origination, the Commission pointed out areas where origination would avoid problems faced by CATV up to that time.<sup>71</sup> In addition, the Commission suggested a minimum cut-off point for the size of systems to be affected by the origination rule being proposed.<sup>72</sup> The response to the *Notice* was definite and relatively swift. The *First Report and Order*<sup>73</sup> was issued on October 24, 1969. Most CATV operators responding to the *Notice* favored origination, but markedly opposed compulsory origination.<sup>74</sup> The cut-off point in terms of system size was 3500 subscribers.<sup>75</sup> These systems were compelled to operate to a significant extent<sup>76</sup> as cablecasters,<sup>77</sup> as

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67. *Midwest Television, Inc. v. FCC*, 426 F.2d 1222 (D.C. Cir. 1970).

68. 15 F.C.C.2d 417 (1968). Pursuant to the general discussion, the Commission invited comments as to the propriety of allowing advertising on CATV systems, and as to whether or not equal time and fairness doctrine provisions should apply.

69. 15 F.C.C.2d at 421.

70. These applications are numerous. See *infra*, note 145.

71. "CATV program origination does not entail the question of 'unfair competition' posed by CATV importation of broadcast signals from another market . . . or any disparate situation with respect to copyright liability . . ." 15 F.C.C.2d at 421. For an interesting treatment of CATV and copyright, See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

72. "Accordingly, consideration will be given to exempting the smallest systems. Comments are requested as to a reasonable cut off point in light of the cost of the equipment and personnel minimally necessary for local origination." 15 F.C.C.2d at 422.

73. 20 F.C.C.2d 201 (1969).

74. "On the other hand, broadcast interests—particularly those without CATV holdings—generally urged that program origination should be prohibited altogether, or at least restricted to local originations of the public service type, and that advertising should be barred. It is claimed that this is necessary to prevent fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service." 20 F.C.C.2d at 202. The Commission's about-face is apparent; formerly, in the *Second Report and Order*, 2 F.C.C.2d 725 (1966) origination was opposed.

75. The Commission was prepared to extend the minimum system size from 3500 subscribers to 10,000 on an *ad hoc* basis. Memorandum Opinion and Order, 27 F.C.C.2d 778 (1971).

76. "By significant extent we mean something more than the origination of automated services (such as time and weather, news ticker, stock ticker, etc.) and aural

a condition to carrying the signals of any television broadcast station. The Commission based its authority to issue the order upon a variety of the "end-use" theory,<sup>78</sup> though in this usage, it more resembled that of a "benefit-conferred" theory.

The use of broadcast signals has enabled CATV to finance the construction of high capacity cable facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to 'encourage the larger and more effective use of radios in the public interest' . . . . The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities . . . , in areas where we have been unable to accomplish this through broadcast media. . . . Moreover, in authorizing the receipt, forwarding, and delivery of broadcast signals, the Commission is in effect authorizing CATV to engage in radio communication, and may condition this authorization upon reasonable requirements governing activities which are closely related to such radio communication and facilities.<sup>79</sup>

In essence, then, the Commission was imposing the burdens of regulation upon those systems that benefited by the interception and retransmission of broadcast signals. In addition, the Commission conditioned operation of CATV systems upon recognition of and compliance with the equal time provision of the Communication Act<sup>80</sup> and the so-called fair-

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services (such as music and announcements). Since one of the purposes of the originations requirement is to insure that cablecasting equipment will be available for use by others originating on common carrier channels, 'operation to a significant extent as a local outlet' in essence necessitates that the CATV operator have some kind of video cablecasting system for the production of local live and delayed programming (e.g., a camera and a video tape recorder). If the cablecasting equipment and technical personnel are available, there should be a natural tendency for the CATV operator to use them for some origination presenting local personages and events. However, . . . we do not mean to suggest that origination to a significant extent could not also include films and tapes produced by others and CATV network programming." 20 F.C.C.2d at 214.

77. Cablecasting is defined as: "Programming (exclusive of broadcast signals) carried on a cable television system." 47 C.F.R. § 76.5(v) (1972).

Origination cablecasting is defined as: "Programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator." 47 C.F.R. § 76.5(w) (1972).

78. Federal Power Commission v. Transcontinental Pipeline Corp., 365 U.S. 1 (1961). See note 37, *supra*.

79. 20 F.C.C.2d at 208-09. The "benefit-conferred" theory differs slightly from the "end-use" theory. As explained in *General Telephone Co. of Cal. v. FCC*, 413 F.2d 390 (D.C. Cir. 1969), a cablecaster who places himself within the stream of communication, here characterized by the CATV phenomenon, cannot benefit by participating in it while being free of the jurisdiction of the Commission. See note 113, *infra*.

80. 47 U.S.C. § 315 (1970) and 47 C.F.R. § 76.205 (1972).

ness doctrine.<sup>81</sup> With respect to advertising, the Commission recognized the realities of economics and conceded that traditional sponsorship might be necessary to support the costs of origination.<sup>82</sup> The latest regulation allows advertising at the beginning and end of CATV programs and at natural intermissions or breaks within a cablecast.<sup>83</sup>

In the majority opinion, the Court recognized the FCC's authority to regulate CATV as within the reasonably ancillary limits proposed by the Court in *United States v. Southwestern Cable Co.*<sup>84</sup> The meaning of the expression is not very agreeably defined. While the court of appeals and the respondents both gave restrictive interpretations to the authority of the FCC to compel origination,<sup>85</sup> the Court expanded upon the traditional conception of what the Commission's responsibilities for the regulation of broadcasting were meant to include. Rather than restrict their conception of the FCC's regulatory responsibilities, the Court chose to go beyond the protective nature of the Commission's prior pronouncements,<sup>86</sup> and emphasize that aspect of the Commission's authority which is intended to encourage and promote the advancement and the effective use of broadcasting.<sup>87</sup> Even though CATV origination, or for that matter

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81. 47 U.S.C. § 317 (1970) and 47 C.F.R. § 76.209 (1972). See also *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969).

82. The American Civil Liberties Union asserted that such advertising might subject CATV to the same motivational evils encountered by commercial broadcasting and urged subscriber-financing instead. The Commission saw this alternative, while perhaps desirable, as impractical. See First Report and Order, 20 F.C.C. 2d 201, 215 (1969). See also Note, *Who's Afraid of CATV?*, 16 N. Y. L. F. 187 (1970).

83. 47 C.F.R. § 76.217 (1972). See *Cable Television Service*, 37 Fed. Reg. 3251 (1972), and *Reconsideration of Report and Order*, 37 Fed. Reg. 13847 (1972), *denied*, 37 Fed. Reg. 15173 (1972).

84. 392 U.S. 157 (1968).

85. Brief for Midwest Video at 20, *Midwest Video Corp. v. United States*, 441 F.2d 1322 (8th Cir. 1971).

86. These include the FCC's numerous references to the regulation of CATV in order to protect broadcast interests, and especially the vulnerable UHF stations. See Second Report and Order, 2 F.C.C.2d 725 (1966). In addition, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) represents a variation on the theme of protection; a case where protection of a financially threatened licensee gave way to the encouragement of an applicant, where to do otherwise would have granted an effective monopoly to the struggling licensee.

87. 47 U.S.C. § 303(g) (1970). Respondents and the court of appeals suggested a distinction between broadcasting and CATV origination by relying on *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1967). In *Fortnightly*, the Court distinguished broadcast signals from CATV signals by saying that CATV does little more than enhance a captured signal, and has little in common with broadcasting. Here, the action was in copyright and the Court held that CATV more properly fell within the viewer's province than within the broad-

CATV itself, might have been beyond the realm of early FCC and/or judicial or Congressional expectation, the fact remains, as the Court points out<sup>88</sup> that Congress intended to give the Commission "not niggardly but expansive powers . . . a comprehensive mandate 'to encourage the larger and more effective use of radio in the public interest' "<sup>89</sup> and expressed a desire "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."<sup>90</sup> Lack of technological foresight did not indicate lack of administrative foresight: Congress in passing the Communications Act of 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.<sup>91</sup>

This construction of the Commission's authority would favor a promotion order such as the origination rule, and such a construction is not unique. There are a variety of cases, working within the framework of the Commission's various responsibilities for the regulation of broadcasting which indicate recognition of FCC authority to promote the development of radio broadcasting.<sup>92</sup>

The FCC's regulatory role is based upon an avowed purpose:

to make available, so far as possible, to all people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . .<sup>93</sup>

The FCC was not intended to act as an instrument to aid the adjustment of private rights<sup>94</sup> but rather, it was designed to maintain a measure of

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caster's, and therefore a CATV operator needs no copyright license. Fortas' dissent criticizes the decision as flying in the face of the case the majority proposed it was following, *Buck v. Jewell—LaSalle Realty Corp.*, 283 U.S. 191 (1931). See 392 U.S. at 402-08.

88. 406 U.S. at 660-61.

89. *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 219 (1943).

90. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

91. *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

92. To prevent any confusion, it has been noted that television clearly comes under the general description of "radio broadcasting," *Allen B. Dumont Laboratories, Inc. v. Carroll*, 184 F.2d 153 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951), a general term including a slice of the electromagnetic spectrum. For an excellent discussion of some of the technological aspects of broadcasting, including the nature of the electromagnetic spectrum, see Barrow and Manelli, *Communications Technology—A Forecast of Change (Part I)*, 34 LAW & CONTEMP. PROB. 205 (1969).

93. 47 U.S.C. § 151 (1970).

94. See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). *Contra*, *Carroll Broadcasting*

administrative control over broadcasting.<sup>95</sup> The scope of the Act is generally broad,<sup>96</sup> especially § 303(g)<sup>97</sup> which has been interpreted as giving the Commission the freedom<sup>98</sup> to dictate the choice of a color television system for the broadcast industry,<sup>99</sup> to authorize experimental uses for TV,<sup>100</sup> to require that all television receivers sold through interstate commerce or manufactured in the United States have the capability to receive UHF signals,<sup>101</sup> and the authority to issue rules and ultimately to authorize a nationwide system of over-the-air subscription television, or "pay-TV."<sup>102</sup> All of these apparently legitimate exercises of Commission authority would seem to fit in the category of "promotional" as opposed to "protective" rules or orders and in that sense would appear to represent a certain amount of precedent—along with the *Southwestern* decision and the FCC's first exercise in CATV regulation, the *Second Report and Order*<sup>103</sup>—for the Court's expansion of the Commission's responsibilities.

Conversely, Mr. Justice Douglas in his dissenting opinion expressed alarm over what he saw as an overly broad expansion of these same powers to encourage the larger and more effective use of radio in the public interest.<sup>104</sup> Douglas regarded the expansion of the reasonably ancillary standard as granting to the Commission "a forbidding authority"<sup>105</sup> empowering the Commission to force CATV operators into the broadcasting business, a power, he thought, reserved to the Congress.

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Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958); *Post v. Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971).

95. *American Broadcasting Co. v. FCC*, 191 F.2d 492 (D.C. Cir. 1951).

96. 47 U.S.C. § 152(a) (1970).

97. 47 U.S.C. § 303(r) (1970), which empowers the Commission to: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." *Id.*

98. *Id.*

99. *Radio Corp. of America v. United States*, 341 U.S. 412 (1951); this case eventually brought the present system of color TV into American homes, a system which was chosen over the superior CBS system because of the RCA system's compatibility with existing monochrome receivers.

100. *Connecticut Committee Against Pay TV v. FCC*, 301 F.2d 835 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 816 (1962).

101. 47 U.S.C. § 303(s) (1970). See Webbink, *The Impact of UHF Promotion: The All-Channel Television Receiver Law*, 34 LAW & CONTEMP. PROB. 535 (1969).

102. *Fourth Report and Order on Subscription Television*, 15 F.C.C.2d 466 (1968), *aff'd*, *National Association of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

103. 2 F.C.C.2d 725 (1966).

104. 47 U.S.C. § 303(g) (1970).

105. 406 U.S. at 681.

In his concurring opinion, Mr. Chief Justice Burger disagreed with the compulsion problem expressed by Justice Douglas, but interpreted the role of Congress in a significantly different way. He chose to leave the Commission's assertion of wide authority undisturbed, deferring to its expertise, until such time as Congress may choose to act on the matter.

This particular disagreement between Justices Douglas and Burger is intriguing, since it is generally accepted practice to defer to the expertise of an administrative agency whose reason for existence in the first instance is to handle matters beyond that realm of congressional knowledge.<sup>106</sup> Nevertheless, it has been held that while great deference must be accorded to the Commission, Congress has placed limits on the power of the Commission (indeed any such agency) and it is the Court's duty to define these limits in the course of judicial review.<sup>107</sup> The impact of this particular issue will probably be negligible since of the five concurring justices in the majority, only Chief Justice Burger in his separate opinion saw fit to address himself to the issue. The weight of this one vote cast in favor of deference to the Commission is slight, and is, in any case, consistent with the traditional view.<sup>108</sup>

This conflict provides no guidance, however, through a thorny area, described both in the lower court opinion<sup>109</sup> and in the argument of the Midwest Video Corporation.<sup>110</sup> Both the court of appeals and the respondents argued that the compulsory origination rule would, in effect, force some CATV operators to enter the broadcasting business.<sup>111</sup> The Court dismissed the argument, relying on the stance that the rule is reasonably ancillary to the Commission's authority.<sup>112</sup> In addition, though

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106. *American Trucking Associations v. United States*, 344 U.S. 298 (1953).

107. *East Texas Lines v. Frozen Food Express*, 351 U.S. 49 (1956). See 47 U.S.C. § 402 (1970).

108. *Contra*, *Social Security Board v. Nierotko*, 327 U.S. 358 (1946).

109. 441 F.2d 1322 (8th Cir. 1971).

110. See Brief for Appellant, *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

111. An evil which the respondent managed to express in rather homespun terms: "[T]he same argument could justify a municipality which has granted appropriate licenses for a corner grocery store to require it to open a dry goods store as a condition to continue to hold a license." Brief for Appellant at 39, *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). Midwest Video relied on a series of regulatory cases, *ICC v. Oregon-Washington Railroad & Navigation Co.*, 288 U.S. 14 (1933); *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583 (1926); *Northern Pacific Ry. v. North Dakota*, 236 U.S. 585 (1915), which held that a company need not be compelled to assume the burdens of a common carrier merely by participating in a particular field of regulated activity; *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 100 F.2d 770 (10th Cir. 1938), *rev'd on other grounds*, 300 U.S. 4 (1939).

112. 406 U.S. at 663-64 n.22.

in a slightly different context, the court adopted the "benefit-conferred" theory as a rationale for regulation of CATV, and for forcing the implementation of the rule,<sup>113</sup> disposing of respondent's contrary argument without considering its merits.<sup>114</sup> This omission is perhaps the weakest feature of the Court's decision.<sup>115</sup>

The fact remains that once the question of jurisdiction over CATV had been answered<sup>116</sup> the application of the reasonably ancillary standard must necessarily have taken into account factors other than those formally presented by the parties within the framework of reasoned argument.<sup>117</sup> Such unspoken factors might have fallen within the Commission's regulatory goal of eventual wide dissemination by increasing the number of local outlets and augmenting the public's choice of programs and types of services—a goal which the Court found to be consistent with the origination rule.<sup>118</sup> This goal has been enunciated by the Court in *National*

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113. See *General Telephone Co. of California v. FCC*, 413 F.2d 390 (D.C. Cir. 1969), cited by the Court in 406 U.S. at 663 n.21: "The Petitioners . . . have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They can not have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission." Mr. Chief Justice Burger adopted this view as well in his concurring opinion. 406 U.S. at 676.

114. See Brief for Appellant at 27-39, *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

115. The Court's brief treatment of the matter is at best sparse and at worst circular: "This [the respondent's] conclusion might follow only if the program origination requirement is not reasonably ancillary to the Commission's jurisdiction over broadcasting. For as we held in *Southwestern*, CATV operators are, at least to that extent, engaged in a business subject to the Commission's regulation. Our holding on the 'reasonably ancillary' issue is therefore dispositive of respondent's additional claim." 406 U.S. at 663-64 n.22. The Court elsewhere considers the "compulsion" argument. But again, the treatment given is familiar: "The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking." 406 U.S. at 670.

116. The parties did not dispute the *Southwestern* holding that CATV transmissions are subject to the FCC's jurisdiction, whether interstate or intrastate.

117. Such thoughts have been entertained. The prospect of program diversity and access to the tools of broadcasting has been a concern of the Court. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Cable TV, with its multiplicity of channels affords opportunities for access not available to broadcast television. Compulsory origination is probably one way to ensure eventual development of this resource. See Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419 (1972).

118. 406 U.S. at 667-68.



*Broadcasting Co., v. United States*,<sup>119</sup> as well as in the FCC's own pronouncements.<sup>120</sup>

In *National Broadcasting Co.*, the Commission imposed restrictions on the operation of radio networks, restrictions which had the effect of encouraging more diverse programming by striking down certain network exclusivity agreements. The Court's reasoning turned on the desire to provide the widest and most diverse broadcast service possible, a goal which the "chain broadcasting" provisions had a tendency to thwart. The Court extended this to apply to the origination rule by saying that the rule served the same interests as did the goal forwarded in *National Broadcasting Co.*<sup>121</sup> While conceding that cablecasts do not share the physical limitations on spectrum space that broadcasting encounters,<sup>122</sup> the Court maintained that the origination rule served the same end as the *National Broadcasting Co.* decision did: providing the public with suitably diversified programming. It equated the rule with one defining technological standards, saying that regulations specifying technological standards and regulations governing programming content equally served the Commission's regulatory goal of diverse and efficiently distributed television service, and hence were both reasonably ancillary to the Commission's authority.<sup>123</sup>

The Commission itself has expressed the diversity goal frequently. In the order announcing the origination rule, the Commission observed:

It has long been a basic tenet of national communications policy that the 'widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'<sup>124</sup>

In *Midwest Television, Inc.*,<sup>125</sup> in the 1966 Order,<sup>126</sup> in the 1965 No-

119. 319 U.S. 190 (1943).

120. See Fourth Report and Order, 37 Fed. Reg. 3251 (1972).

121. 406 U.S. at 669.

122. The number of allocable frequencies is finite. See Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 LAW & CONTEMP. PROB. 505 (1969), and, Levin, *The Radio Spectrum Resource*, 11 J. LAW & ECON. 433 (1968).

123. 406 U.S. at 669. The curious equation is unexplained and puzzled Mr. Justice Douglas in his dissent. *Id.* at 678 n.1.

124. First Report and Order, 20 F.C.C.2d 201, 205 (1969). See also *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Associated Press v. United States*, 326 U.S. 1 (1945); *The Goodwill Stations, Inc. v. FCC*, 325 F.2d 637 (D.C. Cir. 1963); First Report and Order, 38 F.C.C. 683 (1965).

125. "CATV program origination offers promise as a means for increasing the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service, without use of spectrum . . . .

*tice*,<sup>127</sup> and in the 1959 *Report*,<sup>128</sup> the Commission expressed the desire to provide such diverse service, and especially to provide television service of some kind to those areas that could otherwise obtain none at all. The Court's desire to further the goal is not novel.<sup>129</sup> But in no case have the facts been as peculiar.

Another question considered by the Court was whether or not the regulation was supported by substantial evidence that it would promote the public interest. The Court fleetingly considered it, employing an analysis of a narrow feature of the order, the prospect of potential costs.<sup>130</sup> The standard of operating within the "public interest, convenience, or necessity" is typically applied to licensing actions,<sup>131</sup> serving as a functional guide to the Commission and to a limited extent<sup>132</sup> as a guide to courts of review,<sup>133</sup> as well as an administrative creed.<sup>134</sup> The standard is not clearly defined, but is intended to be flexible so that:

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[A]lmost every community of any appreciable size could have its own CATV system and therefore its own local outlet." 13 F.C.C.2d at 505.

126. "[O]ur goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States . . . both those who are cable viewers and those dependent on off-the-air service." Second Report and Order, 2 F.C.C.2d 725, 746 (1966).

127. Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453 (1965).

128. This expressed the need for a variety of local program origination. CATV and TV Repeater Systems, 26 F.C.C. 403 (1959).

129. See *National Broadcasting Co. v. FCC*, 319 U.S. 190 (1943); *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968); *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967).

130. 406 U.S. at 671. The Court discussed the court of appeals' concern over the risks presented by cablecasting. Not only did the Court find their concern was misplaced—saying that cable systems were in no real danger because of the origination rule—but also that such an assessment of the risks involved was, in any case, beyond the competence of the court of appeals. Citing *National Broadcasting Co. v. United States*, the Court said: "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will [in fact] be furthered or retarded by the [regulation]." 319 U.S. 190, 224 (1943).

131. 47 U.S.C. § 309(a) (1970).

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

133. *FCC v. R.C.A. Communications*, 346 U.S. 86 (1953); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *General Tel. Co. of Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971); *Consolidated Nine, Inc. v. FCC*, 403 F.2d 585 (D.C. Cir. 1968); *Spanish Int'l Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967); *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299 (D.C. Cir. 1967); *Kessler v. FCC*, 326 F.2d 673

In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.<sup>135</sup>

The Court's encounter with the standard was not wholly substantive but dealt, instead, with a conception of what the Court considered "substantial evidence" that the origination rule was in the public interest. The Court simply asserted that the origination rule, when supported by the subsequent *Memorandum*<sup>136</sup> which provided for an *ad hoc* waiver of the 3,500 subscriber cut-off point "is plainly supported by substantial evidence that it will promote the public interest."<sup>137</sup> The effect of the waiver would be to exempt certain systems from compulsory origination where to do otherwise would threaten them financially. According to the Court, no further treatment of the public interest standard was allowable,<sup>138</sup> even though the Court once held that:

Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vaguish penumbral bounds expressed by the standard of 'public interest.'<sup>139</sup>

This position indicated that a consideration of the origination rule, in full light of the public interest, however that standard should have been interpreted, would not have been improper.

The Court's action in upholding the origination rule, and in so doing

(D.C. Cir. 1963); *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958); *Harbenito Broadcasting Co. v. FCC*, 218 F.2d 28 (D.C. Cir. 1954); *Democrat Printing Co. v. FCC*, 202 F.2d 298 (D.C. Cir. 1952); *American Broadcasting Co. v. FCC*, 191 F.2d 492 (D.C. Cir. 1951); *Scripps-Howard Radio v. FCC*, 189 F.2d 677 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 830 (1951); *Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950); *Stahlman v. FCC*, 126 F.2d 124 (D.C. Cir. 1942); *Yankee Network v. F.C.C.*, 107 F.2d 212 (D.C. Cir. 1939); *Colonial Broadcasters v. FCC*, 105 F.2d 781 (D.C. Cir. 1939); *Courier Post Pub. Co. v. FCC*, 104 F.2d 213 (D.C. Cir. 1939).

134. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Carter Mountain Transmission Corp.*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963).

135. *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943). This standard was connected with the dynamics of the licensing procedure involving constraints fundamentally different from those encountered in the CATV context. See *supra* note 92.

136. 27 F.C.C.2d 778 (1971).

137. 406 U.S. at 673. See also at n.31, where the Court says that the failure to grant so-called "grandfather" rights has no effect on the rule's validity.

138. See *supra* note 130. See also Barrow and Manelli, *Communications Technology—A Forecast of Change (Part II)*, 34 LAW & CONTEMP. PROB. 431 (1969).

139. *FCC v. R.C.A. Communications, Inc.*, 346 U.S. 86, 91 (1953).

angering some,<sup>140</sup> while pleasing others,<sup>141</sup> can be viewed as a stop-gap measure. While the Commission, in drafting rules such as the origination rule, is to be accorded a certain amount of leeway in order to cope with the burgeoning CATV industry,<sup>142</sup> the courts are faced with the potential burden of rationalizing further administrative exercises, all the while operating in the shadow of Congress's legislative function. As Mr. Chief Justice Burger candidly acknowledged:

the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.<sup>143</sup>

The need for Congressional consideration of the matter is, if not clearly indicated, at least well-advised.<sup>144</sup>

At the same time, the impact of CATV at the more immediate local level presents regulatory and administrative problems that cannot be cured and indeed might even be aggravated by the *Midwest Video* decision.<sup>145</sup> At least one writer has characterized the struggle as one between state and local authorities, one which would ultimately be best resolved by a mixed state-local approach to regulation.<sup>146</sup> While this characterization of the problem has merit, the source of tension might

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140. Several groups, including the National Association of Broadcasters, disapproved of the rule from the very beginning, because of the oft-repeated fear of siphoning off of free TV's most popular programming and the total loss of existing TV service to low income groups and those in rural areas. BROADCASTING, Dec. 8, 1969, at 46.

141. David Foster, President of the National Cable Television Association: "[I]t would seem that the FCC's authority to regulate and encourage the growth of CATV has been given a significant boost. We are pleased with this clarification of the Commission's authority." Raymond P. Shafer, board chairman of the Teleprompter Corp., largest single CATV operator in the nation which owns 140 systems with 639,000 subscribers, saw the rule as: "an affirmation of cable TV's potential for dramatic growth." BROADCASTING, June 12, 1972, at 19.

142. See *General Telephone Co. of Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

143. 406 U.S. at 676.

144. See letter from Dean Burch, reprinted at 117 CONG. REC. S13628 (1971), and H.R. 15757, by Rep. Tiernan of Rhode Island, 118 CONG. REC. H6281 (1972).

145. While states have the authority to regulate CATV, local bodies may still have the final say in awarding a franchise. See *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd mem.*, 396 U.S. 556 (1970). See, e.g., ILL. REV. STAT. Ch. 24, § 11-42-11 (1971). See also Barnett, *supra* note 16. The element of aggravation might come because of the prospect of financial threat to small systems forced to originate programming.

146. Barnett, *supra* note 16.

more properly be described as that existing between the federal government and local authorities, the states themselves and/or local bodies. The scope of the problem is best envisioned when one considers the fact that at some time in the near future, there may be as many as 7600 CATV systems in this country<sup>147</sup> all of which will be subject to some degree of federal regulation and, in many cases, local control as well. While the operation of the two control sources might not result in blatantly inconsistent approaches to a given problem,<sup>148</sup> the formulation of applicable standards might be hampered somewhat by the lack of a uniform approach.

While local governmental units are probably the best judges of the cable needs of their communities, the fact remains that a certain amount of uniformity in the administration of CATV—whether that takes the form of federal franchising or licensing procedures or federal guidelines more along the lines of the FCC's recent rules<sup>149</sup>—might serve to provide CATV with a suitably constrained medium for moderate growth.<sup>150</sup>

The possible uses for CATV in its various forms are numerous,<sup>151</sup> and present the potential for varied and complex problems of regulatory apportionment. Until such time as Congress acts—if indeed it ever does—*Midwest Video* stands as a further rationale to buttress FCC regulation of future technological developments that may not appear at first blush to be within the Commission's proper regulatory province.

*Samuel Fifer*

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147. *A Short Course in Cable, 1972*, BROADCASTING, May 15, 1972, at 45.

148. See ON THE CABLE, THE TELEVISION OF ABUNDANCE, REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS (1971) at 151-63.

149. Fourth Report and Order, 37 Fed. Reg. 3251 (1972).

150. The FCC considered and rejected the idea of licensing CATV systems in the way that it licenses normal broadcast stations, noting that such a program would present unmanageable burdens. In addition, the Commission recognized the role of local government and welcomed the opportunity for what it characterized as "creative federalism." Fourth Report and Order, 37 Fed. Reg. 3251, 3276 (1972). Whether this creative federalism can withstand the combined stresses of the burgeoning CATV industry and all of its technological adjuncts remains a matter of conjecture.

151. See Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 420 (1968). See also, Carne, *Telecommunications: Its Impact on Business*, HARV. BUS. REV. July-August, 1972, at 125.