Communications Law

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COMMUNICATIONS LAW

THE FCC'S CABLE TELEVISION REGULATIONS—ROUND FOUR

MICHAEL BOTEIN

On February 2, 1972 the Federal Communications Commission issued the Cable Television Report and Order,1 which established a new set of ground rules for cable television.2 The Report and Order affects such controversial areas as the use of broadcast television signals, access to cable television, and intergovernmental regulatory relationships. For a change, practically all parties professed happiness with — or at least acquiescence in — the regulations; the Chairman of the National Cable Television Association even termed them "the watershed" of cable development.3 The rules theoretically represent a thaw in the "freeze" on cable television, but realistically are only a nominal change from the status quo.

I

Up, Down and Around the Hill: Background to the Report and Order

Throughout its twenty-year existence, cable television has lived in a chaotic regulatory environment. Local franchising has been uncoordinat-

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1. 37 Fed. Reg. 3251 (1972) [hereinafter cited as Cable Television Report and Order].
2. Cable television is also known as community antenna television (CATV), a name reflecting its original function of providing television signals to areas which could not receive over-the-air broadcasts. As the medium has changed, however, so has its name; CATV is no longer appropriate or even accurate, since there is little use of antennas—and even less community—in cable television today.

A cable television system has four main components. First, it either receives television signals by an antenna or microwave relay, or originates them at some local point. Second, the signals are sent to a "headend," where they are amplified and where their frequency is sometimes changed. Third, the signals are sent out over trunk and feeder lines throughout the cable system's area. Finally, individual drop lines carry the signals from the trunk or feeder lines into each subscriber's home. For a simple but accurate description of the process, see Knox, Cable Television, SCIENTIFIC AM., Oct. 1971, at 22.

3. BROADCASTING, Feb. 7, 1972, at 17. Though the National Association of Broadcasters apparently acquiesced in the rules (as the Broadcaster-Cable Agreement, see notes 23-24 infra and accompanying text, presumably forced it to do), certain other television interests were less than ecstatic. Id. at 44.
ed, uninformed, and at times unscrupulous; the handful of states in the area have acted with confusion and delay; and the Federal Communications Commission has assumed a veritable Kama Sutra of regulatory positions, remaining consistent only in its unwavering freeze on cable development.

The real bone of contention on the federal level has been and remains cable's use of "distant signals" — signals of stations which normally cannot be received in a cable system's community. Cable operators see importation of distant signals as necessary to attract subscribers. Broadcasters fear, however, that cable's use of distant signals will lure away a portion of their usually captive audience, thus decreasing their advertising revenues. Moreover, program owners have opposed cable's use of both distant and local signals ever since *Fortnightly Corp. v. United Artists Television, Inc.* held that cable's use of broadcast signals did not constitute copyright infringement. Congress obviously has the authority to resolve the copyright and distant signal issues, but the balance of political power has prevented it from acting. In fact, the cable controversy has kept the long overdue copyright reform act locked up in committee since 1965.

When first presented with the problem of cable in 1959, the Commission responded by largely ignoring it. It simply refused to take

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6. See text accompanying notes 7-25 infra.

7. Actually, the new rules have developed several different definitions for both distant and local signals. See text accompanying notes 28-38 infra.

8. Realistically, this fear does not seem to have much solid factual support. See text accompanying notes 66-67 infra.


10. An entire succession of cable copyright bills has been introduced, only to die slow deaths in committee. Botein, *supra* note 4, at 839-42.

jurisdiction over cable television on the grounds that it lacked statutory authority and that cable posed no threat to broadcast television. By 1966 cable’s dramatic growth had changed the latter proposition, however, and the Commission reconsidered the former in light of its broadcast clients’ anguished cries. As a result, in its Second Report and Order the Commission slapped a virtual freeze on cable; it prohibited systems in the major, i.e., the one hundred largest, television markets from carrying distant signals unless they underwent a lengthy evidentiary proceeding — only one of which was ever completed.

This tactic, however, soon began to look somewhat dilatory. In 1968 the Commission suspended the regulations and proposed requiring that cable systems secure the “retransmission consent” of stations broadcasting distant signals. Although this requirement should have equalized broadcaster-cable competition, the cable operators somehow never were able to get consent. Then in 1970 the Commission proposed its chicken-in-every-pot “public dividend plan” as another alternative. This delightful but unworkable proposal would have allowed major market cable systems to import four distant signals in return for substituting local stations’ commercials on those signals and donating five percent of their gross receipts to public television.

By the summer of 1971, the Commission had decided that neither

12. See Report and Order, 26 F.C.C. 403 (1959). The Commission was correct in deciding that cable was of little danger to broadcast television, since at that time there were only about 600 cable systems with a total of a quarter of a million subscribers. Knox, supra note 2, at 24.

13. 2 F.C.C.2d 725 (1966). Actually, the Commission had claimed jurisdiction over cable previously in its First Report and Order, 38 F.C.C. 683 (1963), but had promulgated rules only for systems which imported signals by microwave relays.

14. 47 C.F.R. § 74.1107 (1971) put the burden on major market cable systems to show that importation of distant signals would “be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area.” In addition, a combination of two other rules, 47 C.F.R. §§ 74.1105, 74.1109 (1971), resulted in the imposition of a virtually identical requirement for smaller market cable systems whenever an objection was leveled at a system’s use of distant signals. It has been noted that “in practice there are no lack of objectors.” Memorandum Opinion and Order, 6 F.C.C.2d 309, 339 (1967) (Loevinger, Comm’r, dissenting).


16. Notice of Proposed Rule Making and Notice of Inquiry, 15 F.C.C.2d 417 (1968). The Commission stated that pending the conclusion of the proposed rule making, which turned out to be rather distant, it would process only applications consistent with the proposed rules. Id. at 437-38.

17. The one cable system to experiment with retransmission consent found that most stations and program owners denied permission for a whole variety of reasons. Cable Television Report and Order at 3255-56.

the retransmission consent nor the public dividend plan was feasible and thus set to work on still another set of proposals.19 Because of political and time pressures, the Commission took the somewhat unusual step of sending a "letter of intent" to Congress.20 The Commission therein proposed allowing cable systems to import enough distant signals to offer cable viewers "minimum service"—three network and three independent signals in the fifty largest markets, three network and two independent signals in the fifty next largest markets, and three network signals and one independent signal in the smaller markets. In addition, cable systems in the major markets would have been permitted to carry two additional "wild card" distant signals. If distant signals were used to provide minimum service, however, the number of additional wild card signals would decrease proportionately.21 For example, a New York City cable system would not have needed distant signals to provide minimum service and instead could have used its wild cards to bring in two additional independent signals.

This new proposal thus put the Commission in a rather anomalous position; by the end of 1971 it had one suspended set of rules, two discredited sets of proposed rules, and one informally announced proposal.22 As might be expected, the impasse ultimately was resolved behind closed doors. Throughout 1971, Commission Chairman Burch and Office of Telecommunications Policy Director Whitehead played musical chairs in mediating negotiations between broadcasting and cable representatives.23 On November 11, 1971, they emerged with an accord—the "Broadcaster-Cable Agreement".24

19. In two almost identical speeches, Commission Chairman Burch made it clear that both of the plans had been scrapped. Hearings Before the Communications Subcomm. of the Senate Commerce Comm., 92nd Cong., 1st Sess. at 16 et seq. (Testimony of Chairman Dean Burch); Hearings before the Communications Subcomm. of the House Comm. on Interstate and Foreign Commerce, 92nd Cong., 1st Sess. at 17 et seq. (Testimony of Chairman Dean Burch).


21. Id. at 1764-65.

22. Because of this confused state of affairs, the Commission was not able to deliver upon the promise of expedited action which it had made in June, 1970. At that time it had warned parties "not [to] follow what has all too often been the practice in these complex rule making proceedings—doing nothing for several months and then seeking extensions when the third month deadline looms upon them." Second Further Notice of Proposed Rule Making, 35 Fed. Reg. 11,045, 11,049 (1970).

23. BROADCASTING, Nov. 15, 1971, at 16. Although the final agreement appeared to be mainly the product of Director Whitehead's efforts, id., the Commission noted just that "[t]he Office of Telecommunications Policy provided valuable assistance in the negotiations that led to this agreement." Cable Television Report and Order at 3260.

Predictably enough, Commissioner Nicholas Johnson condemned the "secret bargaining sessions" which led to the accord. Cable Television Report and Order, 24 P & F RADIO REG. 2d 1589 (1972) (Johnson, Comm'r, dissenting).

24. Cable Television Report and Order at 3341 [hereinafter cited at Broadcaster-Cable Agreement].
purportedly authorized as many distant signals as the Letter of Intent, but it also created "exclusivity" limitations as to the programs which could be carried on a distant signal. Irrespective of this restrictive facet, however, the Agreement proved the key to the distant signal dilemma and opened the door to the *Cable Television Report and Order.*

II

**Now You See Them, Now You Don't: Cable Use of Broadcast Signals**

The *Cable Television Report and Order* is an amalgam of the Letter of Intent and the Broadcaster-Cable Agreement. Realistically, it also represents an attempt to lock the Agreement into law before the parties could have second thoughts. As a result, the local signal provisions follow the Letter of Intent and the distant signal provisions follow the Agreement.

*Local Signals.*—Although everyone agrees that cable systems should be required to carry local signals, there is no consensus as to which signals are "local." In 1966 the Commission initially defined a local signal as that of any television station which placed a projected Grade B contour — a theoretically receivable signal — over a cable system's community. This standard soon proved simplistic rather than simple, however, since quirks of terrain often create a substantial difference between projected and actual coverage. The new mandatory carriage rules therefore employ a number of separate and often overlapping tests.

Even though the rules differ for major markets, smaller markets, 28

25. For an analysis of the provisions in the agreement, see Botein, *Cable TV: A One-Degree Thaw in the Freeze?*, N.Y.L.J., Nov. 29, 1971, at 1, col. 1.

26. By promulgating final rules without first issuing a notice of proposed rule making, the Commission probably was attempting to cement down the pact. Commissioners Robert Lee and Richard Wiley apparently wanted to issue a notice of proposed rule making but were voted down. *Broadcasting*, January 31, 1972, at 8.

27. 47 C.F.R. § 74.1101 (i) (1971). A television station's signal is measured by three main standards of increasing coverage and decreasing signal quality: principal community contour, Grade A contour, and Grade B contour. 47 C.F.R. §§ 73.683 (a)—73.685 (a) (1972). Each contour varies in relation to the station's power, frequency, antenna height, etc.

28. Thus the rules require major market cable systems to carry (1) stations within whose specified zones they are located, (2) public television stations within whose Grade B contours they are located, (3) commercial television translator, i.e., relay, stations with one hundred or more watts, (4) stations licensed to their market, (5) significantly viewed commercial stations, and (6) non-commercial translators with five or more watts. 47 C.F.R. §§ 76.61 (a), 76.63 (a) (1972).

The Grade B contour standard for public television stations represents a partial subsidy, since these stations' lack of mass appeal prevents them from meeting the viewability test. The requirement that cable systems carry all stations licensed to their market is largely redundant, since almost all stations within a market will meet either the specified zone or the viewability test. The rule will rationalize a few situations, however, in which a station is theoretically licensed to one market but actually has most of its audience in another.

The rules represent an improvement to the extent that they do not mandate car-
and areas outside of all markets, they have produced two important new definitions of a local signal — "specified zone" and "significant viewing." A specified zone is simply a thirty-five mile radius from a reference point in each television station's community. As a result, the specified zone carriage requirement favors Ultra High Frequency (UHF) stations, since UHF signals do not travel as far as Very High Frequency (VHF) signals.

The second criterion, viewability, is framed in terms of share — a station's percentage of the total audience viewing time — and net weekly circulation — a station's percentage of the total viewing audience. In order to have a right to cable carriage, a network station must have a three percent share and a twenty-five percent net weekly circulation, while an independent station needs two and five percent respectively. In theory, this approach is eminently reasonable, since it measures a station's real rather than projected coverage. In practice, however, it may be nugatory. The percentages are so high that few stations will qualify for carriage under the viewability test alone. In addition, special petitions for carriage must include at least two "independent professional

riage, but rather only require it "on request of the relevant licensee or permittee." Id. § 76.61 (a). Though most cable systems will want to carry all local signals and most local stations will want to be carried, the rules at least put the burden of triggering the carriage requirement on the station.

29. 47 C.F.R § 76.59 (a) (1972). The carriage requirements applicable to cable systems within smaller markets include all the standards for major market systems plus the requirement that they carry commercial as well as non-commercial stations within whose Grade B contour they are located.

30. 47 C.F.R. § 76.57 (a) (1972) requires cable systems outside of all television markets to carry (1) stations within whose Grade B contours they are located, (2) translators with one hundred or more watts, (3) public television stations within whose specified zones they are located, (4) significantly viewed commercial television stations, and (5) any non-commercial translator with 5 or more watts power. The more lenient standard for non-commercial television translators was added in the Memorandum Opinion and Order, 37 Fed. Reg. 13848, 13849 (1972) [hereinafter cited as Reconsideration Opinion].

The Grade B contour carriage requirement for cable systems located outside of any market is probably a concession to the small but vocal group of Rocky Mountain broadcasters who vigorously opposed the broadcaster-cable agreement. BROADCASTING, Nov. 22, 1971, at 40. In fact, the Commission specifically noted that for these broadcasters "an effective zone must be much greater (e.g., Grade B contour) . . ." and promised to give "careful scrutiny" to their petitions for special relief. Cable Television Report and Order at 3265.

31. 47 C.F.R. § 76.5 (f) (1972). 47 C.F.R. § 76.53 (1972) gives a fairly extensive list of reference points in various communities. In the rare cases where no reference point is specified, "the geographic coordinates of the main post office in the community shall be used" — a standard no less rational than any other. Id.

32. The Commission acknowledged this result at least tacitly by noting that the specified zone standard is intended to aid "less powerful stations" which are usually UHF. Cable Television Report and Order at 3263.

33. 47 C.F.R. § 76.5 (k) (1972).

34. For example, no Baltimore, Maryland stations would qualify under the viewability test for carriage by a District of Columbia cable system, even though several put receivable signals over the District.
Finally, the rules also limit signal carriage by a cable system located between two major markets, the so-called "footnote 69" situation. The Commission essentially adopted its 1968 proposal that an overlapping market cable system carry only those stations within whose specified zone it is located. Although this formulation sometimes would restrict a system from carrying a signal receivable off the air, the viewability test should counteract this bar and bring the rule into line with reality.

Distant Signals.—The distant signal regulations purport to follow the Letter of Intent by providing for the same "minimum service" and "wild cards." They are not as generous, however, as they appear.

First, under the new regulations a cable system must choose the geographical source of its distant signals in accordance with the "leapfrogging" rules. Thus, if a major market system desires signals from any of the top twenty-five markets — as is likely to be common since the most attractive independent stations are in these markets — it must go to the nearest of them. Furthermore, if a system can play a wild card for a third independent distant signal, it must look first to any UHF station within two hundred miles and, if no such station exists, then to either a VHF station within two hundred miles or a UHF station anywhere. As a result, cable operators must go further — and thus pay more — in order

35. 47 C.F.R. § 76.54 (1972). Moreover, "to minimize controversy" in the initial stages of the new program, the rule provides that the Commission will not entertain special petitions until a year after the effective date of the rules. The Commission recognized the severity of these restrictions, but argued that "signals once permitted to be carried will not be deleted ..." — a position which reflects a rather dim, but perhaps realistic view of its own enforcement processes. Cable Television Report and Order at 3264.

On reconsideration, however, the Commission indicated that it would waive the one year moratorium where it had changed its original list of viewable stations. Reconsideration Opinion at 13855.

At the same time, the Commission added a requirement that notice of any viewability survey be given to local television and cable television operators. Reconsideration Opinion at 13856.

36. The phrase is derived from the fact that the problem was first mentioned briefly in the Second Report and Order, 2 F.C.C.2d 725, 786 n.69 (1966).


38. 47 C.F.R. § 76.61 (a) (1) (1972).

39. 47 C.F.R. §§ 76.59 (b), 76.61 (b), (c), 76.63 (a) (1972).

40. 47 C.F.R. § 76.61 (b) (2) (1972).
to get authorized signals. Theoretically, the leapfrogging restrictions are
designed to prevent cable operators from importing only a few, highly
attractive independent stations; but realistically, they give priority, and
another low-visibility subsidy, to UHF independent stations.

Second, and far more importantly, attached to the Letter of Intent's
distant signal regulations are the Broadcaster-Cable Agreement's exclu­
sivity provisions. Thus what the Commission gave in terms of distant
signals it took away in the name of exclusivity. Even though authorized
to import a signal, a cable system may not carry programs on the signal
to which a local broadcaster has exclusive rights.

In the top fifty markets, a cable system may not show a syndicated,
i.e., non-network, program for "one year from the date that program is
first licensed or sold..." to any station — even if it has not been bought
by a local station. A television station therefore has a one year grace
period in which to decide whether to purchase a show. As in the Broad­
caster-Cable Agreement, a cable system may not import a program which
any local station is showing if the contract between the broadcaster and
program supplier provides for exclusivity. The upshot is simply that
cable systems in the fifty largest markets are barred from importing
almost any independent programming in perpetuum — aside from non-
syndicated, locally-produced and thus comparatively valueless shows. The
theory behind the ban is that importation would harm independent
producers, since syndicated programs earn their greatest revenues in the
top fifty markets. A combination of limited importation and compulsory
copyright payments, however, would be a more acceptable compromise.

In the fifty next largest markets the exclusivity provisions also follow
the Agreement. Although they do not impose the one year pre-sale ban,
they allow very extensive contractual exclusivity rights. A station may
contract with a program owner to bar syndicated re-runs for up to a year.
and to prohibit new syndicated series programs, non-series programs, and feature films for up to two years. As a result, cable systems in the lower major markets must search for programs which have run more than one or two years — a rather meager diet for a growing industry.

The exclusivity provisions make perfect sense in terms of free enterprise reasoning, since they apply only where a station has contracted for exclusivity “both over-the-air and by cable.” Arguably, cable systems could pay a program supplier to withhold exclusivity from a local station, but pragmatically, they will not be able to afford such payments within the foreseeable future. Although a few cable operators boast about out-bidding broadcasters, cable systems will not generate the necessary revenue until they attract more subscribers — thus creating a situation analogous to the as yet unresolved chicken and egg proposition.

The only bright spots in the exclusivity provisions are the grandfather clause, the temporary abandonment of the sports blackout rule, and the notification procedure. First, the grandfather clause allows a system to continue importing any signals carried as of the effective date of the rules. Moreover, any other system within the same community will receive the same rights, whenever it begins operation. Although apparently designed to equalize competitive disadvantages, this rule has the beneficial side effect of making the exclusivity provisions inapplicable in many areas. Since the rules' effective date is after their promulgation date, however, they also may have promoted races to begin distant signal importation.

Second, the Commission did not adopt the Letter of Intent's proposed ban on importation of locally blacked-out sports

45. 47 C.F.R. § 76.151 (b) (1972). Compare Broadcaster-Cable Agreement. The severity of the restrictions in the lower fifty major markets is especially anomalous in light of the Commission’s own recognition that copyright owners earn most of their revenues in the top fifty markets. See note 44 supra and accompanying text.

46. 47 C.F.R. § 76.151 (b) (1972). In this respect, the rules represent a minor improvement over the Broadcaster-Cable Agreement, since the latter required only “contractual exclusivity.”

47. Hearings Before the Subcomm. on Communications and Power of the House Interstate and Foreign Commerce Comm. on Regulation of Community Antenna Television Systems, 91st Cong., 1st Sess. 55-56 (1969) (Testimony of Irving Kahn, President, Teleprompter Corp.).

48. For a view contrary to the Commission’s on the subject of exclusivity, see SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE: 52-54 (1971), which recommended that very stringent limitations be placed on exclusivity provisions.

49. 47 C.F.R. § 76.159 (1972) provides that the exclusivity provisions do not apply to “any signal that was carried prior to March 31, 1972, or that any other cable system in the same community was carrying prior to March 31, 1972.”

50. Cable Television Report and Order at 3268.

51. This problem appears to have been mitigated, however, by the fact that new importation of distant signals was still frozen and that the Commission apparently granted no special waivers before the effective date of the rules.
Instead, it spun the question off into a separate, and hopefully lengthy, rule-making proceeding. Since the professional sports' statutory anti-trust exemption is itself somewhat suspect, expanding it still further appears inappropriate. Finally, and most importantly, the exclusivity provisions are operable only if a copyright owner or local station gives a cable operator actual and detailed notice of the protected programming. The inherent difficulty of notifying almost three thousand systems will generate tremendous transactional costs, thus perhaps confining exclusivity claims to the few highly valuable programs where they rightfully belong.

Like the Agreement, the rules reduce exclusivity for network programs from same-day to simultaneous protection in most cases. This is scant solace, however, for the cable operator. Practically all major markets have three network stations; thus a duplicate network signal makes a system only marginally more attractive to subscribers. Moreover, the reduction in network exclusivity follows a well established pattern; the shrinking exclusivity rule started out as thirty days, then went to fifteen and eventually stabilized at one.

The rules are noteworthy, however, not just for what they provide, but also for what they fail to provide — most notably, protection for broadcasters in markets below the top one hundred. Smaller market cable systems may import enough signals to carry three network stations and one independent station. Since many smaller markets have only one or two stations, however, the rules allow a far greater percentage increase in signals — and accordingly increased audience fragmentation — in a smaller market than in a major market.

The rules provide for increased nonduplication protection upon the filing of a special petition if a cable system in one time zone carries programs before a local station in another time zone. The rules do not prevent a cable system from carrying a network program before a local station, however, if the station delays its broadcast. This seems only reasonable, since a station's change in scheduling is a conscious election and is most likely where smaller market stations have multiple affiliations.

Also, on reconsideration, the Commission indicated that "simultaneous" meant "5 or 10 minutes." The rules provide for increased nonduplication protection upon the filing of a special petition if a cable system in one time zone carries programs before a local station in another time zone. The rules do not prevent a cable system from carrying a network program before a local station, however, if the station delays its broadcast. This seems only reasonable, since a station's change in scheduling is a conscious election and is most likely where smaller market stations have multiple affiliations.

52. See Letter of Intent at 1768-69.
55. 47 C.F.R. § 76.93 (a) (1972).
56. 47 C.F.R. § 76.93 (a) (1972). The Rocky Mountain broadcasters, however, were able to win their battle for same-day nonduplication, note 30 supra, when the Commission, on reconsideration, gave them the same-day rule. Reconsideration Opinion at 13852.
57. See First Report and Order, 38 F.C.C. 683, 721-30 (1965); Cable Television Report and Order at 3266.
58. 47 C.F.R. § 76.59 (b) (1972).
59. For example, in a market with only two stations the rules would result in a one hundred percent increase in the number of available signals. In a market like New York
Corporation study concluded that cable poses its only real threat to broadcasting in precisely these markets. Similarly, cable systems outside of any television market may import an unlimited number of distant signals. Aside from potentially injuring broadcasters with marginal audiences in such areas, this provision would reverse the Commission's traditional allocation of broadcast signals in proportion to population size.

This pattern of severe restrictions on distant signal importation seems to lack a firm policy basis. The Commission gave no rationale for its distant signal formula, but merely concluded that the formula somehow would allow cable to develop without injuring broadcasting. Perhaps by way of understatement, the Commission noted that there was "no consensus" or "sure barometer" as to cable's impact on broadcasting. To a very real extent, the distant signal controversy has become a war of statistics. The broadcasters trot out their experts to show extreme cable impact; the cable interests bring forth their experts to demonstrate the exact opposite. The only up-to-date independent study, however, indicated that cable hurt VHF stations slightly and aided UHF stations.

City, on the other hand, the greatest possible increase would be on the order of twenty percent. See also Comment, Federal and State Regulation of Cable Television: An Analysis of the New FCC Rules, 1971 Duke L.J. 1151, 1175.

60. R. PARK, POTENTIAL IMPACT OF CABLE GROWTH ON TELEVISION BROADCASTING 68-70 (Rand Corp. 1970). The Commission did not accept Dr. Park's conclusions fully, but seemed to grant them some validity. See Cable Television Report and Order at 3261. Park's conclusions might be a bit pessimistic at worst, however, since he based his calculations on the public dividend plan's four distant signals (see note 18 supra and accompanying text), rather than on the much more limited importation allowed by the new rules.

61. See note 30 supra.
62. 47 C.F.R. § 76.57 (b) (1972).
64. The Commission just noted that "[i]n so regulating distant signal carriage, we hope to give cable impetus to develop in the larger markets without creating an unacceptable risk of adverse impact on local television broadcast service." Cable Television Report and Order at 3260. This language largely echoed the Commission's prior rationale in the Letter of Intent at 1761.
65. Cable Television Report and Order at 3261.
66. The opening round was a study done for the Commission in 1965, which found that cable was not a threat to broadcasting. M. SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY (1965). The National Association of Broadcasters immediately fired back with its own study, which to no one's surprise found that cable had a serious impact on broadcasting. Fisher & Ferrall, Community Antenna Television Systems and Local Television Station Audiences, 80 Q.J. Econ. 227 (1965). More recently, another broadcasters' analysis undertook to impeach Dr. Park's findings, supra note 60, and document substantial cable impact. L. FISCHMAN, EVALUATION OF FCC AUGUST 5, 1971 DISTANT-SIGNAL PROPOSALS FOR CABLE TELEVISION IN TERMS OF THEIR IMPACT ON OVER-THE-AIR BROADCASTING (Report by Economic Associates, Inc., at the request of Covington & Burling 1971).
significantly. As a result, the basis for the rules appears to be rather tenuous and arguably nonexistent. The Commission made a political rather than a principled decision; it attempted to fashion rules which would satisfy both cable and broadcasting interests.

But if the distant signal limitations are questionable, the exclusivity provisions amount to regulatory overkill. The Commission attempted to rationalize their severity by arguing that the lack of distant signals would force cable to develop alternative communications services for attracting subscribers. Although cable's future in the major markets probably does lie with nonbroadcast services, this line of reasoning seems somewhat post hoc propter hoc; the Commission could have reached the same goal by an outright ban on importation, rather than by its unwieldy exclusivity rules.

Reduced to its bare bones, the distant signal controversy is purely and simply an issue of economic protectionism. Cable systems presently do have a certain unfair competitive edge, since they need not pay for their programming. This situation will not last very long, however, since the exclusivity provisions cannot be implemented without new copyright legislation, as the Commission is the first to recognize. If the future copyright statute resembles past bills, it will give cable systems a compulsory — though probably costly — license for distant signals. Cable systems thus will be in the same competitive posture as broadcasters, except that their payments will be fixed by law rather than negotiation. If cable's license fees are in line with broadcasters', as is likely, cable systems will have merely a rather technical advantage. The only justification for restricting importation of distant signals, then, would be some social value in preserving broadcast television. Cable's capacity and flexibility, however, render this value arguable at best and hypocritical at worst.

67. PARK, supra note 50, at 71, 74, 77.
68. Cable Television Report and Order at 3260.
69. See also R. PARK, PROSPECTS FOR CABLE IN THE 100 LARGEST TELEVISION MARKETS 27-31 (Rand Corp. 1971). In this study, Dr. Park found that price, service and income were far more relevant than carriage of distant signals to cable penetration.
70. As Commissioner Nicholas Johnson noted, "[t]he question is only how much protectionism is warranted and necessary at a time when no station has yet gone off the air because of cable." Cable Television Report and Order, 24 P&F RADIO REG. 2d 1591 (1972) (Johnson, Comm'r, dissenting).
71. Cable Television Report and Order at 3261. In announcing the issuance of the rules, Chairman Burch noted that without copyright legislation "our problem is acute." BROADCASTING, Feb. 7, 1972, at 18.
72. Under S. 543, 91st Cong., 1st Sess., § 111 (c) (1) (B) (1969), cable systems would have had a compulsory license for all local signals and for as many distant signals as the Commission authorized. For an analysis of the controversy over copyright legislation, see Botein, supra note 4, at 840-43.
III
ACCESS TO GRIND: CABLE USE OF NON-BROADCAST SIGNALS

Despite its discussion of distant signals as an "incentive" for cable development, the Commission is relying less on a "carrot" than on a "stick" approach to insure that cable produces its promised new services — such as subscription television, shopping by cable, instant polls, home safety monitoring systems, and other two-way modes of communication. The Commission has retained its requirement that cable systems with more than 3,500 subscribers originate programming "to a significant extent as a local outlet," which the Supreme Court recently upheld. More importantly, the Commission at last has taken some tentative, albeit ill-defined, steps towards implementing a right of access to cable television. The Commission's new interest in access may be, of course, just a response to new demands for public access to the mass media — as reflected most dramatically in the District of Columbia Circuit's hesitant recognition of a first amendment right of access to television. The Commission thus might be attempting to take the heat off broadcasting by transferring it to cable.

The Commission's most important step towards implementing access may be in providing the necessary technological hardware. The rules require that all major market cable systems have as many channels for nonbroadcast as for broadcast uses, with a minimum capacity of twenty

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73. Cable Television Report and Order at 3260.
74. 47 C.F.R. § 76.201 (1972).
75. See notes 126-131 infra and accompanying text.
76. For a more complete discussion of the problems which access raises, see Botein, Access to Cable Television, 57 CORNELL L. REV. 419 (1972).
77. In Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), the court held that television stations' intimate involvement with the federal government imbued them with state action and that a "flat ban on editorial advertising" thus violated the first amendment. The court did not establish a full right of access, however, and gave no indication of how far its holding extended.

In addition, the District of Columbia Circuit has been active in expanding the right to reply time under the fairness doctrine and in facilitating challenges to license renewals. In Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971), it held that product commercials could violate the fairness doctrine, and in Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), it invalidated the Commission's lenient license renewal standard.

These are, of course, just the visible signs of the new trend for public access. Broadcasters today find themselves under increasing pressure to follow the wishes of their communities. And when Broadcasting—the mouthpiece of the broadcaster establishment —ran a two-part series on various aspects of the access controversy, it signaled that the new demands had left their mark. Zeidenburg, The Struggle Over Broadcast Access, BROADCASTING, Sept. 20, 1971, at 32; id., Sept. 27, 1971, at 24.
channels. Though commendably generous, this approach may place too much emphasis on number of broadcast signals rather than on actual local needs. It might be more appropriate, although more complicated, to use a population standard in determining channel capacity — as the Commission has attempted to do in allocating broadcast licenses. Despite this difficulty, the channel capacity requirement is a major development in implementing access. Less than ten percent of existing cable systems have more than twelve channels, and "retrofitting" a system for increased capacity is almost prohibitively expensive. As a result, cable systems should be forced to develop the necessary channel capacity at the outset.

As a corollary to the channel capacity requirement, the rules provide that all major market cable systems must build in at least some capability for two-way communications between subscribers and the system. The Commission has left this requirement deliberately vague, however, and probably is concerned only that operators lay cable which can accommodate future two-way communications. Although far short of pie in the sky, this seems economically reasonable at the present time. Two-way communication is far more expensive than originally estimated. For example, even a simple non-voice subscriber response system — suitable for subscription television or shopping by cable — doubles the cost of a cable system.

Though providing the hardware for access, the Commission has failed to create a regulatory system. Its comment that "[t]hese access rules constitute not a complete body of detailed regulations but a basic framework ..." goes far by way of understatement. To be sure, the rules do require all major market cable systems to provide a free "public access," "education access," and "local government access" channel. They also

78. 47 C.F.R. § 76.251 (a) (1), (2) (1972).
79. For example, it would require a San Francisco cable system to have almost as many nonbroadcast channels as a New York City cable system, even though the former market is only one fourth the size of the latter.
80. 41 TELEVISION FACTBOOK: SERVICES VOLUME 82-a (1971).
81. See W. BAER, INTERACTIVE TELEVISION: PROSPECTS FOR TWO-WAY SERVICES ON CABLE 76-77 (Rand Corp. 1971).
82. The rules call for "technical capacity for non-voice return communications," 47 C.F.R. § 76.251 (a) (3) (1972), but the Report talks in terms of "the potential or eventually providing return communications ..." Cable Television Report and Order at 3270. At the same time, the Commission may be indirectly attempting to encourage development of two-way services through its selection of required technical standards. E.g., 47 C.F.R. § 76.605 (2) (1972) which allows a wider frequency deviation for systems with converters, which are the first and most basic piece of subscriber terminal hardware for two-way communications.
83. BAER, supra note 81, at 66.
84. Cable Television Report and Order at 3269.
85. 47 C.F.R. § 76.251 (a) (4) to (6) (1972).
clear up an ambiguity in the Letter of Intent by providing that a cable system "shall" offer to lease all unused channel capacity.

Unfortunately, however, the rules do not guarantee access to either free or leased channels. First, they do not define which channel a potential user is entitled to. Thus the three free channels may overlap in their scope; a local school board conceivably could qualify as a public access user, an educational user, or a local governmental user. More importantly, the Commission has delegated to cable operators the power to choose users for the channels. The rules do not establish standards, but instead require only that systems "shall establish rules requiring first-come nondiscriminatory access." Thus, a cable operator presumably may make long-term and large-scale commitments for both free and leased channels, leaving many potential users out in the cold. Although apparently aware of this possibility, the Commission did little to prevent it. In theory, the access problem should be alleviated by the requirement — previously known as "N+1" — that a cable system add a new channel whenever all nonbroadcast channels "are in use during 80 percent of the weekdays (Monday-Friday) for 80 percent of the time during any consecutive 3-hour period for 6 consecutive weeks...." Pragmatically, however, this requirement probably will be of little help. The rules invite cable operators to stay under the magic figure, which should be easy enough through a variety of overt and covert means. Moreover, retrofitting is so expensive that the Commission is unlikely to require expansion except by activation of an existing channel.

Potential access users require not only program time but also production facilities; a medium without a message is useless. The extent of a

86. The Letter of Intent had provided that operators "may" lease excess channel capacity, but then went on to require that all leasing be on a "first-come, first-served nondiscriminatory basis." Letter of Intent at 1774-75.
87. 47 C.F.R. § 76.251 (a) (7) (1972).
88. 47 C.F.R. § 76.251 (a) (11) (i), (iii) (1972). Moreover, the Commission has effectively tied local governments' hands by providing that "no local entity shall prescribe any other rules concerning the number or manner of operation of access channels" without Commission approval. 47 C.F.R. § 76.251 (a) (11) (iv) (1972). This apparently bars franchise authorities from imposing requirements more stringent, as well as more lenient, than the Commission's. Cable Television Report and Order at 3271.
89. The rules exert some effort toward rectifying this problem by requiring that "[o]n at least one of the leased channels, priority shall be given to part-time users." 47 C.F.R. § 76.251 (a) (7) (1972). The rule is sufficiently vague to allow only token compliance, however, and by its terms does not apply to the three designated free channels.
90. Letter of Intent at 1773.
91. 47 C.F.R. § 76.251 (a) (8) (1972). It should be noted, however, that the rule may require a cable operator to make available only a leased channel when all free channels are occupied, since it mandates a channel "for any or all of the above-described purposes." Id.
92. For a proposal of the type of facilities a cable system should make available to
cable system's obligation to provide production facilities, however, is unclear. The rules opt for tokenism by requiring only that a cable operator maintain free equipment for five minute live presentations on the public access channel, thus leaving the operator free to charge whatever the market will bear for any additional production.93

In designing the access provisions, the Commission specifically rejected proposals that cable be regulated as a common carrier.94 Although attractive, the common carrier approach is presently infeasible. First, no one yet has devised a workable and equitable scheme for the allocation of channels which have unquantifiable but different values.95 Second, cable is still an infant industry which requires massive infusions of venture capital; investors will be loathe to risk their money, however, if cable promises only a conventional public utility rate of return.96 But although it rejected the common carrier approach, the Commission took at least a tentative step towards divorcing ownership from control; the rules provide that cable systems “shall exercise no control over program content” on either free or leased channels.97 The only fly in this first amendment ointment is the Commission’s accompanying requirement that cable systems exclude obscenity, lotteries, etc.98 This latter mandate presumably requires previewing and thus allows the cable operator to pass prior judgment on all programming. Since the rules make the cable operator's decision highly discretionary, a flat ban on any interference with programming would be more appropriate.

Many of the problems with access in general and censorship in particular could have been mitigated by more stringent restrictions on cable ownership by other media and by multiple cable system operators.99 Unfortunately, the Commission took absolutely no action on concentration of control, but rather just retained its weak prohibition of cable ownership by local television stations, national networks, and telephone companies.100

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93. 47 C.F.R. § 76.251 (a) (10) (ii) (1972). This provision is inadequate for the simple reason that few things worth saying can be said in less than five minutes of total production—as distinguished from viewing—time.
94. Cable Television Report and Order at 3272.
95. See Note, supra note 92, at 533-34.
96. See Jones, supra note 4, at 122-23, 183; Comment, supra note 59, at 1187-88.
97. 47 C.F.R. § 76.251 (a) (9) (1972). The rule specifically allows, however, “appropriate steps to insure compliance” with the requirement of excluding certain prohibited types of programming. Id. See note 98 infra.
98. 47 C.F.R. § 76.251 (a) (11) (1972).
99. See Botein, supra note 76, at 492-98.
100. 47 C.F.R. § 76.501 (1972) was taken verbatim from 47 C.F.R. § 74.1131 (1971). In its Notice of Proposed Rule Making and of Inquiry, 35 Fed. Reg. 11,042, 11,043 (1970), the Commission proposed two alternative bans on multiple ownership, one based on geography, the other on total number of subscribers. Neither one was very satisfactory,
IV

BOXES WITHIN BOXES: FEDERAL, STATE AND LOCAL REGULATORY RELATIONSHIPS

Unlike broadcast television, cable television traditionally has been regulated by all three levels of government, partially because it has some inherently local characteristics and partially because the Commission failed to act for so long. The Commission has been slow to coordinate its regulation with states and cities and as recently as 1970 announced that it was "without any overall plan as to the Federal-local relationship."101 Thus cable regulation has become a two- and sometimes three-tiered bureaucratic nightmare, replete with conflicting policies. The Cable Television Report and Order does not restructure intergovernmental relationships, however, but merely imposes some very general restrictions — analogous to the Letter of Intent's "guidelines"102 — on state and local agencies. The Commission obviously was interested not just in setting outer limits on corruption-ridden local franchise proceedings,103 but also in scaring potential state agencies out of the field.

Perhaps most significant is the requirement that a cable system "have a franchise or other appropriate authorization..."104 Though still somewhat vague, this may overrule the state court cases which have held that municipalities lacked the power to franchise cable systems.105 In addition, the rules marginally increase citizen participation by requiring a "public proceeding affording due process" in the franchising and rate-making processes.106 Though a definite improvement over the Letter of

(see Botein, supra note 4, at 838-39), but the proposals at least indicated some thought on the subject.

102. Letter of Intent at 1780-89.
103. See note 4 supra.
104. 47 C.F.R. § 76.31 (a) (1972). The rule is somewhat ambiguous, however. Although it speaks of "a franchise or other appropriate authorization" at the beginning, it later talks in terms of the "franchising authority" and the "franchise"—an open invitation to construe it as applicable only to franchised systems. Moreover, in passing on petitions for reconsideration the Commission appeared ready to waive the requirement of a local authorization where a local jurisdictional void existed. The Commission indicated that it would grant special certificates of compliance where no local franchising or other authorizing body was in existence; thus seemingly abolishing its requirement of a franchise. Reconsideration Opinion at 13863.

The regulations are noteworthy for the fact that they impose requirements on cable systems, not directly on franchising authorities. Id. As a result, a local government is theoretically free to disregard the Commission's standards—at the cost of preventing its franchisee from carrying broadcast television signals. This somewhat circuitous means of regulating the franchise process is presumably a product of the Commission's unvoiced, though legitimate, doubts about its power to pre-empt local authorities.

105. For a discussion of these state cases, see Botein, supra note 4, at 820-21.
106. 47 C.F.R. § 76.31 (a) (1) (1972).
Intent's "suggestion" concerning hearings, the vagueness of the rule obviously allows minimal compliance.

Though the rules set a maximum initial franchise length of fifteen years, they require that renewals be only of "reasonable duration." Municipalities thus still can lock themselves into long-term commitments, similar to New York City's twenty-year franchises. A franchise longer than ten years is unnecessary to attract venture capital, however, since most cable systems are fully amortized in seven or eight years. Moreover, lengthy franchise terms invite obsolescence in equipment and trafficking in franchises.

The rules also make some faint gestures in the direction of consumer protection. First, they require local franchising authorities to pass on cable systems' rates, therefore giving citizens at least a foot in the door. The Commission may intend local governments to set rates only for the carriage of broadcast signals and not for the provision of new communications services. Although seemingly unfair to subscribers, cable systems must be allowed to charge high—perhaps even exorbitant—initial rates for new services in order to attract the requisite venture capital. Second, the rules require franchises to include procedures for handling subscribers' complaints, a provision borrowed from several proposed state statutes. These rules are couched in exceedingly general terms, but nevertheless give subscribers minimal leverage. Third, the rules provide that cable systems must wire a "substantial percentage"—suggested to be twenty percent—of their franchise areas annually, thus reducing systems' ability to "creamskim" the more affluent parts of their communities.

Finally, the rules limit local franchise fees to three percent of a system's gross receipts, unless the Commission approves a higher

107. Letter of Intent at 1780.
108. Moreover, public hearings may be of little real value. The closest analogy to such proceedings is the Commission's own comparative licensing procedure, which has been fraught with inconsistency and undue influence. R.A. ANTHONY, COMPARATIVE BROADCAST LICENSING PROCEEDINGS: MAKING THEM SIMPLER AND MORE OBJECTIVE 31-42 (1971).
109. 47 C.F.R. § 76.31 (a) (3) (1972); Reconsideration Opinion at 13862.
110. THE CENTER FOR ANALYSIS OF PUBLIC ISSUES, supra note 4, at 56.
111. 47 C.F.R. § 76.31 (a) (4) (1972).
112. By its terms, the rule applies only to "installation of equipment and regular subscriber services," 47 C.F.R. § 76.31 (a) (4) (1972), and the Commission talked solely in terms of "services regularly furnished to all subscribers." Cable Television Report and Order at 3276.
113. 47 C.F.R. § 76.31 (a) (5) (1972).
115. 47 C.F.R. § 76.31 (a) (2) (1972). The rule also requires a cable operator to "accomplish significant construction within one (1) year after receiving Commission certification...." Id.
116. Cable Television Report and Order at 3276.
amount.\textsuperscript{117} This probably represents a compromise between the two percent previously proposed by the Commission\textsuperscript{118} and the five percent charged by most cities, including New York.\textsuperscript{119} Even the three percent figure far exceeds actual regulatory expenses,\textsuperscript{120} and thus constitutes a windfall for financially-starved municipalities — at the cost of an indirect and regressive tax on cable subscribers.

V

THE LEGALITY OF THE RULES: MIDWEST BY SOUTHWESTERN

The rules may be vulnerable on two grounds. First, the Commission's failure to issue the exclusivity provisions as proposed rules may violate the Administrative Procedure Act.\textsuperscript{121} Second, the Commission may lack the statutory power to impose the access and franchise provisions.

The first argument appears tenuous. Notice of the exclusivity provisions was never published in the Federal Register, but few "persons subject thereto" could have escaped "actual notice."\textsuperscript{122} Every trade magazine greeted the Broadcaster-Cable Agreement with banner headlines and described its provisions in detail. Thus, finding anyone in the field who did not know of the Agreement probably would be impossible.

Until very recently the jurisdictional argument would have had some validity. Though the Commission's general jurisdiction over cable has long been accepted, its precise extent never has been clear. Thus in \textit{United States v. Southwestern Cable Co.},\textsuperscript{123} the Supreme Court upheld the Commission's jurisdiction but declined to pass upon the validity of the 1966 regulations. Instead, it somewhat Delphically held that "the authority which we recognize today . . . is restricted to that reasonably ancillary to the effective performance of the Commission's various

\textsuperscript{117} 47 C.F.R. § 76.31 (b) (1972).
\textsuperscript{119} New York City Bd. of Estimate, Proposed Form of Contract with Sterling Information Services, Ltd. § 7 (a) (1970). \textit{See} \textit{JONES}, supra note 4, at 134-35.
\textsuperscript{120} As the Commission noted, its own cable regulatory fees are only about one half of one percent of a cable system's gross receipts. Cable Television Report and Order at 3277.
\textsuperscript{122} 5 U.S.C. § 553 (b) (1970) provides, in pertinent part: "General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law . . . ." For an analysis of the case law interpreting the "actual notice" requirement, \textit{see} K. C. DAVIS, \textit{ADMINISTRATIVE LAW TREATISE} § 6.10, at 395-97 (1959).

Moreover, the rules might fall within the provisions of 5 U.S.C. § 553 (b) (B) (1970), which exempts the requirement of notice "where the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." For language within the report which might be deemed to fall under this exemption, \textit{see} Cable Television Report and Order at 3277.
\textsuperscript{123} 392 U.S. 157 (1968).
responsibilities for the regulation of television broadcasting." This less than precise language touched off a still raging debate over the meaning of "reasonably ancillary."

The Supreme Court recently dampened the controversy somewhat in United States v. Midwest Video Corp., which upheld the origination requirement. In the process, however, the Court split 4-1-4 and was forced to hold that "reasonably ancillary" meant far more than Southwestern had indicated.

The plurality's test was whether the regulations fulfilled "objectives for which the Commission's regulatory power over CATV might properly be exercised." This standard's breadth and novelty are reflected in the plurality's almost casual comment that "the Commission's legitimate concern in the regulation of CATV is not limited to controlling the competitive impact CATV may have on broadcast services." Indeed, the plurality found "no sensible distinction" between protection of broadcasting and development of cable—a far cry from Southwestern's reasoning. In fact if not in theory, the plurality abandoned the Southwestern definition of "reasonably ancillary." Indeed, the plurality's emphasis on proper "objectives" indicates that "reasonably ancillary" now may be equivalent to the Communications Act's "public interest" standard for regulation of broadcasters.

124. Id. at 178.
125. Botein, supra note 76, at 456. Realistically, of course, the Communications Act grants the Commission no authority over cable at all. Cable is obviously neither a common carrier under Title II of the Act nor a broadcaster under Title III of the Act. Indeed, even the Commission takes the position that cable is a somewhat mystical "hybrid" of the two. Cable Television Report and Order at 3277. Cable thus has been jammed into some interstice between Titles II and III of the Act. And the new rules may exacerbate this doctrinally difficult situation by requiring cable systems to file applications for initial "certificates of compliance" as well as annual financial and programming reports—a procedure which looks suspiciously like either licensing or tariffing. 47 C.F.R. §§ 76.11, 76.13 (a) (2) (1972). The certificate of compliance device appears to stem from some Commission officials' desire to make cable operators more secure by "giving them something to hang on the wall."
127. See note 74 supra and accompanying text.
128. 40 U.S.L.W. at 4630.
129. Id. at 4631 (emphasis added).
130. Id.
131. Thus Chief Justice Burger, who supplied the deciding vote, felt compelled to state in his concurring opinion that "candor requires acknowledgment, for me at least, that 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." Id. at 4634. The Chief Justice's approach was perhaps the most intellectually honest. Indeed, he might well have gone with the dissent, had he not worked as a circuit court judge towards promoting access to the mass media. See, e.g., Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).
As a result of Midwest Video, the access and franchise provisions' survival appears assured. The access provisions are just a reasonable extension of the origination requirement and serve the same regulatory as well as first amendment interests. Similarly, the franchise requirements are designed to guarantee meaningful local participation in the cable regulatory process—a goal in which the Midwest Video court obviously was quite interested. Midwest Video thus empowers the Commission to protect the interest of the public as well as of the broadcasting establishment.

**CONCLUSION**

Although far from ideal, the new cable television regulations at least represent a move off dead center. The distant signal regulations remain protectionist and end the freeze in name only. The access provisions reflect more sophistication than in the past, however, and the franchise requirements guarantee at least minimal citizen participation. The *Cable Television Report and Order* is therefore perhaps most important not for what it has done, but rather for what it has left undone; it represents the first, not the final word on cable regulation.

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133. Whether the Commission has the power to pre-empt state and local authorities is less than clear. Federal statutes are supreme over state law, *Farmers Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959), but administrative regulations may not be. The Commission's uncertainty is indicated by its decision not to impose franchising standards directly on local governments, but rather on cable systems over whose use of broadcast signals its jurisdiction is clear. See note 104 supra. But cf. Comment, supra note 59, at 1190-91.

134. Realistically, Midwest Video may have rested as much on first amendment as on regulatory grounds; the Court obviously was interested in origination's subtle but very real first amendment aspects. The Court recently and repeatedly has committed itself to diversity of programming and access to the mass media. See, e.g., *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29 (1971); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). The plurality often noted the origination channel's potential uses. 40 U.S.L.W. at 4628 n.8, 4632.

135. *Id.*