FEDERAL PREEMPTION OF STATE REGULATION IN CABLE TELEVISION

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Abstract

An overview of federal jurisdiction preemption over cable television regulation is presented. The history of federal assertion of jurisdiction is examined, emphasizing its impact on states, statutory preemption, regulatory preemption, and case law affecting authority over cable. Judicial decisions leading to the Federal Communications Commission Cable Television Report and Order in 1972 are reviewed, and subsequent decisions both upholding and denying federal jurisdiction are analyzed. The future of federal preemption is considered in light of current court and FCC decisions, as well as the introduction of congressional legislation dealing directly with federal preemption.

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When the Federal Communications Commission asserted comprehensive cable television jurisdiction in March 1972,[1] vast amounts of time were spent in analyzing what had been done by the FCC.[2] No one could foresee that the assertion of jurisdiction by the Commission over cable was to be, in the words of the Eighth Circuit Court, "consistently and continually revised, unenforced, withdrawn, waivered, and abandoned."[3]

In the communications area, at least, no single set of rules has been attacked and amended with the regularity of the cable television regulations. For example, in the first six years after the adoption of the Cable Television Report and Order,[4] the FCC's rules dealing with cable television were amended 98 times in dealing with various aspects of regulation.[5] While many of these changes have been minor, others have been major and fundamental, such as changes in those systems to be regulated, signals to be carried, programming to be deleted, pay-cable, technical aspects, ownership questions, and -- most significantly for the purposes of this inquiry -- the assertion of federal preemption over state regulation.

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[1] Cable Television Report and Order, 37 Fed. Reg. 3252, 36 FCC 2d 143, 24 RR 2d 1501 (1972).

[2] See, e.g., Rivkin, Cable Television: A Guide to Federal Regulations (RAND Corp., 1973); Hochberg, "Which Way is Cable TV Going", 59 A.B.A.J. 77 (1973).

[3] Midwest Video Corp. v. FCC, 571 F.2d 1025, 1033, n. 17 (8th Cir. 1978) (hereinafter "Midwest Video II").

[4] See note 1, supra.

[5] See Study by Policy Review & Development Division, Cable Television Bureau, Federal Communications Commission Cable Television Rulemaking Proceedings (August 1977) and subsequent Commission actions in Dockets 19995, 20520, 20561, 21002, and 21006.

Obviously, as for Humpty-Dumpty,[6] when the FCC says it is regulating, that regulation can mean anything the Commission says it is supposed to mean -- except if the courts say it means something else.

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[6] "When I use a word," Humpty-Dumpty said in a rather scornful tone, "it means just what I choose it to mean -- nothing more nor less." Carroll, Through the Looking Glass, Chapter 5.

I. OVERVIEW OF FEDERAL/STATE JURISDICTION

From the standpoint of federal preemption of state and local cable jurisdiction,[7] no preemption in fact exists in a vacuum. To deny states all opportunity to act, the federal government must step in in some way; absent a stated preemption, the states are free to regulate.[8]

This very point was raised when the jurisdiction of the Nevada Public Service Commission was challenged by cable systems in 1968.[9] The systems urged that they were an integral part of interstate commerce and that state regulation was a "burden" on that commerce. The court agreed that cable systems were an integral part of interstate commerce, but likened the affected commerce to

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[7] Inasmuch as cities and counties are only political subdivisions of states, and have no independent legal basis, regulation of cable television other than under federal authority is entirely a question of applicable state law. This obviously can lead to conflicting state-local problems, such as where an authority regulating telephone systems on a state level can preempt a local municipality from requiring a franchise. See, e.g. New York v. Comtel, Inc., 57 Misc. 2d 585, 293 N.Y.S. 2d 599, aff'd, 30 App. Div. 2d 1049, 294 N.Y.S. 2d 981, aff'd, 25 N.Y. 2d 922, 304 N.Y.S. 2d 853, 252 N.E. 2d 285 (1968). See also General Electric Cablevision Corp. v. City of Peoria, 291 N.E. 2d 295 (Ill. 1971); City of Owensboro v. Top Vision Cable Co. of Kentucky, 487 S.W. 2d 283 (Ky. 1971).

[8] Assuming the subject is one that does not demand a uniform national treatment, states may regulate in matters affecting interstate commerce in the absence of Congressional occupation of the field. See Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

This, of course, begs one of the very real questions which later cable decisions have alluded to: Can the FCC preempt and then not regulate? The answer clearly would appear to be in the affirmative. The need for a uniform national policy in any particular area does not speak to the need for regulations in that area.

[9] TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968). See also Dispatch, Inc. v. City of Erie, 249 F. Supp. 267 (W.D.Pa. 1975), where the right of the City of Erie, Pennsylvania, to issue a franchise was upheld, the court finding that the city's grant of a franchise for the use of a local facility did not place any burden on interstate commerce. Judgment vacated and case remanded, 364 F.2d 539 (3d Cir. 1966; see further, Lamb Enterprises v. City of Erie, 286 F. Supp. 865 (W.D.Pa. 1967), aff'd, 396 F.2d 752 (3d Cir. 1968).

> a local express or parcel delivery service or a local pilotage or lighter service organized to facilitate the final interstate delivery of goods to the named consignee.[10]

State regulation in the absence of federal legislation, said the court, is not prohibited.[11] Moreover, the subjects being regulated -- the quality of and rates for CATV service -- were not such as to demand national uniformity, but rather lent themselves to local control.

The court was greatly influenced by the 1963 Supreme Court decision in Head v. New Mexico Board,[12] which dealt with a successful attempt by the State of New Mexico to regulate aspects of radio advertising. That decision had held that, absent a positive legislative statement of intention to preempt,[13] state statutes must be given a presumption of validity. As to whether preemption had occurred in the Nevada case, the court said

> ...[it] depends on whether the Federal Communications Commission has, in fact, regulated in this area and not upon whether it has the power to do so.[14]

Not only had Congress not spoken to the issue, but the Commission (at that point) had not asserted pervasive powers of regulation. Notwithstanding the urging of the cable industry to overturn the Nevada decision (countered by an amicus brief by the National Association of Regulatory Utility Commis-

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10 TV Pix, Inc. v. Taylor, note 9, supra, at 463.

11 See, e.g., Eicholz v. PSC, 306 U.S. 268 (1939); Kelly v. Washington, 302 U.S. 1 (1937); Margaus Steamship Co. v. La. Bd. of Health, 118 U.S. 455 (1886).

12 374 U.S. 424 (1963).

13 Obviously, this would be a stronger case for preemption than an agency interpretation that it has authority through a broad statutory construction.

14 See note 8, supra, at 465.

sioners supporting Nevada), the Supreme Court, in a one-sentence opinion, affirmed the decision.[15]

The decision simply stands for the proposition that the states are not precluded ipso facto from all CATV regulation. Just as importantly, the decision does not stand for either the proposition that (a) states by definition have certain areas reserved for them,[16] or (b) that a jurisdictional assertion by the FCC (absent statutory guidance), depriving the states of authority, will be upheld in the courts.[17]

These two extremes of the state-federal relationship -- and the focus of this paper[18] -- are pointedly illustrated by two decisions in the United States Court of Appeals:

- Brookhaven Cable TV v. Kelly [19]

On March 1, 1976, the New York State Commission on Cable Television asserted jurisdiction over rates charged for pay-cable services, requiring franchise amendments for rate changes and approval by state and local franchising authorities. In 1974, however, the FCC had asserted jurisdiction over regulation of rates for auxiliary services, such as pay-cable -- although imposing no regulation.

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15 396 U.S. 556 (1970).

16 Indeed, the FCC -- to say nothing of Congress -- might attempt to preempt even the most "local" of duties.

17 Some cable activities probably are wholly intrastate and outside the Commission's jurisdiction. See text accompanying note 21, infra.

18 In a sense, the two extremes pose an "easy" either-or choice, since the courts have two entities vying for jurisdiction. A more difficult philosophical problem may arise for the courts, however, if denying federal jurisdiction leaves a regulatory vacuum.

19 573 F.2d 765 (2d Cir. 1978). Review by the Supreme Court has been sought.

On March 29, 1978, the Second Circuit upheld the federal preemption, denying states authority to regulate these kinds of rates.[20]

• National Association of Regulatory Utility Commissioners v. FCC [21]

On November 21, 1974, the FCC announced that it was finally preempting all regulation of access channels, including that of point-to-point intrastate communications.[22]

The District of Columbia Circuit held that the assertion of jurisdiction was outside the scope of the Commission's authority in that the operations were not "ancillary" to broadcasting and were those of an intrastate common carrier, whose regulation falls to the states, absent Congressional action.[23]

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[20] For a fuller discussion of the case, see text accompanying notes 128-135, infra.

[21] 533 F.2d 601 (D.C. Cir. 1976).

[22] Id. at 606, n. 15.

[23] For a fuller discussion of the case, see text accompanying notes 137-143, infra.

II. ASSERTION OF FEDERAL JURISDICTION

A. The Impact of Federal Assertion on States

In the early days of cable, local franchises often contained provisions later preempted by the federal government. The provisions often were inserted at the behest of a local vested interest. For instance, it was not unusual to find a clause in the local franchise prohibiting pay-cable (included by theatre owners or the local television station) or requiring the franchisee to sign a lease-back contract with the local telephone company (included by the telephone company itself). Some local provisions later found their way into federal rules after preemption (e.g. required carriage of certain stations; non-duplication of certain programs).

A successful assertion of federal jurisdiction -- either through specific legislation or agency grasp -- could deprive the states (and the municipalities) of authority to regulate in various areas. For example, in the area of franchise fees, the assertion of FCC jurisdiction precludes municipalities from charging in excess of three percent of gross revenues.[24] When the FCC first proposed this assertion, it justified the limitation as follows:

> Such a proposed maximum fee is no more than 2% [25] of a CATV system's gross revenues. We recognize that some communities have bargained for larger percentages of receipts. These arrangements could be grandfathered if not in the core city of the 100 largest markets. As to such CATV operations, we note that with this plan, we are greatly facilitating the expansion of the system, with resultant greater revenues; thus 2% of this expanded system is far more valuable to the city than 7-9% of

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[24] In some cases, this may be as much as five percent.

[25] Later changed to the three-to-five percent standard of Section 76.31.

> either no system or a much reduced one. We stress again that the proposal is not designed to withdraw revenues from franchising authorities, but rather to strike a balance which permits the achievement of the federal goals and at the same time substantial revenues to the local entities.[26]

The question may be raised, however, as to what made the Commission so certain that the two percent proposal "would be far more valuable to the city"? Why did seven to nine percent by definition create "no system or a much reduced one"?[27] Likewise, suppose the community when granting the franchise decided it wanted no restraints on the number of signals carried (or alternatively wanted to limit importation to protect local television stations)? Or suppose the community had a history of granting long municipal franchises and was content with granting a 20- or 25-year franchise?[28]

The FCC's successful assertion would take these decisions out of the hands of the local community -- arguably in the best position to gauge the local needs and interests of its residents. It is incontrovertible that the preemption by the FCC in any area would impact on what could be done at the non-federal level.

B. Statutory Preemption

Whatever doubt may exist as to the extent of the authority of the Federal Communications Commission to preempt jurisdiction in any aspect of

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[26] Notice of Proposed Rulemaking in Docket No. 18892, 35 Fed. Reg. 11044, 11045, 25 FCC 2d 50, 53 (1970)(footnote omitted).

[27] One would not be totally naive in questioning whether the eventual three-to-five percent limitation was not as much a product of political compromise as a product of reasoned economic analysis.

[28] Of the three areas cited above, the first still stands as an area of FCC preemption, but well may be subject to successful attack; the second has been affirmed by the courts as a proper preemption area; and the third is no longer regulated by the Commission.

cable television probably can be removed quickly by Congressional legislation.[29]

The Commission long has been in doubt as to whether the existing Communications Act gives authority for comprehensive jurisdiction.[30] Concerned that it might not have statutory authority to regulate CATV, the FCC first sought specific authorization in 1959:

> [I]t appears to us that there is no question as to the power of Congress to regulate CATV's or give the Commission jurisdiction to do so, if it desires. But, as an administrative agency created by Congress, we are of course limited by the terms of the organic statute under which we were created, and must look to that statute to find the extent of our jurisdiction and authority.[31]

Measures to provide for the regulation of cable were introduced in the 86th Congress[32] and hearings were held in July 1959.[33] The Senate

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[29] But obviously, the mere fact that Congress might object is not ipso facto determinative of jurisdiction. In the case of cable, as well as any other means of communication, First Amendment considerations came into play; to use an outlandish example, for cable operators to be required to submit video tapes of originated programs to the FCC for licensing raises fundamental First Amendment questions. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Weaver v. Jordan, 411 P.2d 289 (Cal. 1966), cert. den., 385 U.S. 844 (1966). In dicta, the Eighth Circuit expressed doubt as to the constitutional validity of the mandatory access rules in Midwest Video II at 1055-57. Moreover, a statutory requirement of construction and dedication to the public also might be argued to be a violation of the operator's due process rights.

[30] See LeDuc, Cable Television and the FCC: A Crisis in Media Control, 88-95, 101-08, 145-49, 154-57; Hochberg, "A Step into the Regulatory Vacuum: Cable Television in the District of Columbia," 21 Cath. U.L. Rev. 63, 70-71.

[31] Inquiry into the Impact of Community Antenna Systems in Docket No. 12443, 26 FCC 403, 427 (1959). The Commission also included specific requests for legislation relating to rebroadcasting consent and local station carriage as they relate to CATV. See id. at 430, 438, and 441.

[32] S.1739, S.1741, S.1801, S.1886 and S.2303, 86th Cong., 1st Sess. (1959).

[33] Earlier hearings had been held in 1958. See LeDuc, note 30, supra, at 88-95.

Communications Subcommittee followed these on its own by introducing a measure which provided for cable licensing, as well as other protection for television stations.[34] The cable industry, at first, was divided on the measure but ultimately opposed it.[35] By throwing its full weight against the bill, the industry was able, by a one-vote margin, to have it recommitted.

Subsequently, the Commission sought general jurisdiction on numerous occasions.[36] In the words of one court, however, the FCC found itself "frustrated" in its legislative attempts.[37]

The Commission obviously would like its jurisdiction spelled out as clearly as Congress did in amending Section 224 in 1977.[38] That law requires the FCC to take jurisdiction over pole attachment controversies where states do not take jurisdiction; the Commission retains jurisdiction until a state body certifies that the state is regulating under the terms of the federal

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[34] S.2653, 86th Cong., 1st Sess. (1959).

[35] See Smith, "The Emergence of CATV: A Look at the Evolution of the Revolution," Proceedings of the IEEE, 967, 974 (1970). Part of the cable industry originally saw federal legislation as an antidote for state and local regulation. However, as early attempts moved toward legislation, the industry became concerned that federal regulation would likely become federal licensing. The measure was returned to committee to die by a one-vote margin on the Senate floor. See LeDuc, note 30, supra, at 88-111.

[36] See U.S. v. Southwestern Cable Co., 392 U.S. 157, 168-71 (1968). See also Midwest Video II at 1030-31; n. 9; Hochberg, note 2, supra, at 68-71.

During the period 1963-64, National Cable Television Association representatives attempted to block any state regulatory authority from exercising CATV jurisdiction by "constantly" urging the FCC to back such legislation. Comments of National Cable Television Association in FCC Docket No. 18892, December 4, 1970.

[37] Midwest Video II at 1030.

[38] See Public Law 95-234.

statute. At that time, federal jurisdiction over pole attachment questions ceases.[39]

In looking at an assertion of jurisdiction by the Commission, certainly that type of provision is jurisdictionally clearer than deciding whether the FCC is to rely on Sections 1, 2(a), 303(g), and 307(b), dealing with general FCC authority over broadcasting.[40]

C. Regulatory Preemption

The FCC's inability to obtain statutory guidance is long-standing, going back almost to the early days of cable regulation. The early regulatory scheme, however, saw the Commission taking the role subsequently taken by Congress -- a refusal to assert jurisdiction.

(a) Early days of preemption

During the "freeze" by the Federal Communications Commission on the grant of the new television station licenses for four years from 1948 to mid-1952,[41] cable television began to grow. The growth, however, was slow, although the Commission felt that the "freeze" was a "partial stimulus" to

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[39] While a question might have been raised as to what showing had to have been made by the state to take jurisdiction, the FCC has stated it will not attempt to "go behind" the certification. First Report and Order in in CC Docket No. 78-144, 43 Fed. Reg. 36086, ___, ___ FCC 2d ___, ___, 43 RR 2d 1163, 1181 (1978). Interested parties obviously could litigate the assumption of jurisdiction.

[40] See U.S. v. Midwest Video Corp., 406 U.S. 649, 654-67 (1972)(hereinafter "Midwest Video I").

[41] See Report and Order, FCC 48-2182, providing that "no new or pending applications for the construction of new television broadcast stations would be acted upon by the Commission." Sixth Report and Order, 1 RR 91:602 (1952).

the development of cable systems.[42] While there was some feeling that when new stations went on the air at the end of the "freeze", the need for cable would be eliminated, new local television stations simply ran into other service problems and cable continued a steady growth.[43] Notwithstanding allegations that the existence of cable systems was harming local television service, the Commission refused to take jurisdiction over cable. In 1954, a Fairmont, West Virginia, television station -- WJPB-TV -- complained to the FCC that a local cable system had gone on the air and wired up 30 percent of the market, while refusing to carry the local station. The Commission refused to take any action when asked by the station to assert jurisdiction.[44]

In 1956, the Commission was asked again to assert some sort of jurisdiction over cable television. A small group of radio and television operators sought to have the nearly 300 cable systems held to be common carriers or to have the Commission commence a proceeding which would eventually hold them to be common carriers. Specifically recognizing the burden of regulating cable systems as carriers,[45] the Commission decided (apparently for pragmatic reasons) that cable systems were not to be considered common carriers.[46] The Commission's stated rationale was that since cable subscribers did not have a choice of the signals to be transmitted over the cable

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[42] Interoffice Memorandum, Federal Communications Commission, March 25, 1952, reprinted in Regulation of Community Antenna Television, Hearings on H.R. 7715 before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., 99, 101 (1965).

[43] Staff of Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., Report on the Television Inquiry -- the Problem of Television Service for Smaller Communities, 6 (Comm. Print 1959).

[44] See Smith, note 35, supra, at 972.

[45] See LeDuc, note 30, supra, at 89-90.

[46] Id. at 89.

(that choice was determined by the system itself), CATV systems were not "ordinary" common carriers.[47]

A certain course was begun, however, since on May 22, 1958 -- only six weeks after the Frontier Broadcasting decision -- the Commission issued a Notice of Inquiry, looking toward comprehensive regulation of cable television.[48] Again, however, the Commission decided not to assert Title II common carrier jurisdiction, nor jurisdiction based on Title III broadcasting grounds.[49]

The Commission's halting, stumbling assertion of cable jurisdiction was thus set in motion, to be repeated for the next two decades, wherein the FCC considered jurisdiction and then backed off, asserted jurisdiction little by little, took comprehensive and plenary jurisdiction, had its jurisdictional assertion cut away by the courts, and finally began reversing its own ground.

(b) Assertions of jurisdiction

Beginning in 1962, the Commission began asserting piecemeal jurisdiction over cable systems:

• On February 14, 1962, the Commission refused to grant an application to install a common carrier microwave radio relay system to provide programming to a cable system in Thermopolis, Wyoming.[50] The only local

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[47] Frontier Broadcasting Co. v. J. E. Collier, 24 FCC 251, 254; 16 RR 1005 (1958).

[48] See Inquiry into the Impact of Community Antenna Systems in Docket No. 12443, 26 FCC 403, 404 (1959), referring to Notice of Inquiry, FCC 58-493.

[49] Id. at 427.

[50] Carter Mountain Transmission Corp., 32 FCC 2d 459 (1962), aff'd, Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

television station had claimed that it could have been destroyed by the importation of additional signals.

• In December 1962, in a Notice of Proposed Rulemaking in Docket No. 14895, the Commission asserted jurisdiction over cable systems serviced by Business Radio Service licensees.[51]

• On December 13, 1963, in Notice of Proposed Rulemaking in Docket No. 15233, the Commission proposed to regulate all microwave-fed cable systems.[52]

• On April 23, 1965, in the First Report and Order in Docket No. 15233, the Commission asserted jurisdiction over all microwave-fed cable systems.[53]

• In June 1965, the Commission began looking into asserting total jurisdiction over cable television by issuing a Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 15971.[54]

• In March 1966, the Commission asserted comprehensive jurisdiction over carriage, non-duplication, commencement of cable services and a number of procedural matters in the Second Report and Order in Docket No. 15971.[55]

Beginning with the Second Report and Order, the FCC began to assert more and more comprehensive jurisdiction over cable. There, regulations

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[51] 27 Fed. Reg. 12586 (1962).

[52] 28 Fed. Reg. 13789 (1963). This assertion of jurisdiction came after the District of Columbia Circuit affirmed the earlier Carter Mountain decision, note 50, supra.

[53] 30 Fed. Reg. 6038, 38 FCC 683 (1965). See Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) upholding these regulations.

[54] 30 Fed. Reg. 6078, 1 FCC 2d 453 (1965).

[55] 31 Fed. Reg. 4540, 2 FCC 2d 725, 6 RR 2d 171 (1966). This was affirmed by the Supreme Court in United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

were issued dealing with signal carriage and non-duplication, FCC jurisdiction and procedures, and filing requirements by cable systems.[56]

(c) Expansive preemption attempts

Taking its cue from an affirmation of its jurisdiction in United States v. Southwestern Cable Co.,[57] the FCC adopted regulations requiring systems to originate programming[58] and proposed to move forward on a number of other fronts -- a "retransmission consent" concept, requiring systems to obtain permission from the originating station before importing a distant signal;[59] a plan to substitute commercials on distant signals;[60] and (most importantly, for purposes of this study) the scope of allowable non-federal regulation.[61]

In Docket No. 18892, the Commission noted that it had been unable to obtain any legislative guidance. There had been, in the words of the FCC, "no legislative resolution of these [federal-state] issues...."[62] The Commission further expressed concern that localities might be precluded from assessing any franchise fees. Absent some indication by federal auth-

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[56] Second Report and Order in Docket No. 14895, 15233, and 15971, 31 Fed. Reg. 4540, 2 FCC 2d 725, 6 RR 2d 177 (1966).

[57] 392 U.S. 157 (1968). For a fuller discussion of the Southwestern decision, see text accompanying notes 94 - 98, infra.

[58] First Report and Order in Docket No. 18397, 34 Fed. Reg. 17650, 20 FCC 2d 201, 17 RR 2d 1570 (1969).

[59] Notice of Proposed Rulemaking in Docket No. 18397, 33 Fed. Reg. 19028, 15 FCC 2d 417 (1968).

[60] Second Further Notice of Proposed Rulemaking in Docket No. 18397-A, 35 Fed. Reg. 11045, 24 FCC 2d 580 (1970).

[61] Notice of Proposed Rulemaking in Docket No. 18892, 35 Fed. Reg. 11044, 25 FCC 2d 50 (1970).

[62] Ibid.

orities that franchise fees did not "burden" interstate commerce, the fees in one case cited by the FCC had been held to be unconstitutional.[63]

In recognizing non-federal regulation in a number of areas -- origination, franchisee selection, service areas and charges -- the FCC made apparent its feelings that the states and municipalities were operating only by the largesse of the federal agency:

> We note that we have left the...areas to local regulation on policy, rather than legal grounds.... Clearly if we have the authority to act on [Sections 2(a), 3(b), (d) and (3) and Section 301 of the Communications Act]..., that authority can be exercised whether or not there is a local regulating entity. The matter thus turns on policy, not legal, considerations.[64]

The Commission called for comments on what should be allowed as far as local regulation. Specific comments were sought as to whether a two percent franchise fee limit should be adopted.[65]

Some forty cities -- ranging from New York, Los Angeles and Chicago to Marysville, Michigan (population 5,610) -- filed comments, virtually all of them focusing on the two percent franchise fee limitation. Typical of the comments was that of Petoskey, Michigan, which said:

> The City of Petoskey wishes to comment only in regard to Item 8 of the proposed rule, that item or section which regulates the maximum amount that may be charged by municipalities as a franchise fee at two percent of

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[63] Wonderland Ventures, Inc. v. City of Sandusky, 423 F.2d 548 (6th Cir. 1970). See also, Community Antenna Television of Wichita, Inc. v. Wichita, 471 P.2d 360 (Kan. 1970). But see, Illinois Broadcasting Co. v. City of Decatur, 238 N.E. 2d 261 (Ill. 1968).

[64] See note 61, supra, at 51-52. See also text accompanying notes 25-26, supra.

[65] See note 61, supra, at 53. Implicit in the FCC's statement is the (preemptive?) recognition that franchises were to be allowed, thereby "overruling" the Wonderland Ventures decision. See note 63, supra.

> the gross revenues of the CATV system. The City of Petoskey is opposed to the inclusion of any maximum in the proposed ruling of the Commission.[66]

States and state regulatory authorities as such did not file in the proceeding, although their position vis-a-vis the cities was advanced by the filing of the National Association of Regulatory Utility Commissioners (NARUC). NARUC urged that regulation be left at the non-federal level, predicting that "there will be an increasing shift of regulatory authority from the local to the state levels."[67] The National Cable Television Association (NCTA), meanwhile, asked the FCC to step in and prevent more state regulation.[68]

The governments that filed uniformly opposed federal preemption, pointing out the FCC's weaknesses -- a lack of staff and no necessity of a uniform, nationwide approach; and local strengths -- familiarity with local needs and responsibility for physical facilities.[69] While most localities favored no federal limitation on franchise fees, there was uniform opposition to the Commission setting the standard at only two percent.

By early 1972, the Commission was ready to move forward in its comprehensive regulation of cable television, when it issued its Cable Television Report and Order asserting jurisdiction over virtually every major aspect

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[66] See Comments of City of Petoskey, Michigan, in Docket No. 18892, October 2, 1970.

[67] Comments of National Association of Regulatory Utility Commissioners in Docket No. 18892, October 8, 1970, at 14.

[68] Comments of National Cable Television Association in Docket No. 18892, December 4, 1970, at 15.

[69] See, e.g., Comments of National League of Cities; U.S. Conference of Mayors in Docket No. 18892, October 7, 1970.

of the CATV industry.[70] Among the areas regulated are: the right to provide service, signal carriage, network program duplication, syndicated program duplication, program origination requirements, pay-cable, access channels, and technical regulations.

In one area -- rights of the franchising authority -- the Commission adopted rules circumscribing the power of the local authority. Among the regulations adopted were the following:

- A franchise or authorization had to have been granted by a state or local authority;

- An examination of various franchisee qualifications had to have been made;

- The franchise had to have been granted in a public proceeding;

- Significant construction had to take place within a year of FCC authorization;

- The franchise and any renewal period had to be of a "reasonable duration";

- Rates had to be specified in the franchise or subject to approval and any rate changes had to be approved in a public proceeding;

- Complaint procedures had to be specified in the franchise;

- FCC rule modifications had to be incorporated into the franchise within a year of enactment; and

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[70] 37 Fed. Reg. 3252, 36 FCC 2d 143, 24 RR 2d 1501 (1972). A comprehensive discussion of the FCC's relationship with cable policy may be found in Richard O. Berner, Constraints on the Regulatory Process: A Case Study of Regulation of Cable Television, Cambridge, Ma.: Ballinger, 1976.

• Absent a special showing, the franchise fee could not exceed three percent of gross subscriber revenues; even with a special showing, the fee could not exceed five percent.[71]

There seems to be little doubt that the FCC felt its regulation could be pervasive. Nevertheless, the Commission appeared to express some reservations. A comprehensive assertion would have entailed federal licensing which the Commission had noted as an option in the Notice of Proposed Rulemaking in Docket No. 18892.[72] Those reservations, however, seem to have been based more on pragmatic, rather than legal, reasons since the Commission again left little doubt that it felt it could have exercised preemptive jurisdiction if it so desired:

> The comments advance persuasive arguments against federal licensing. We agree that conventional licensing would place an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters.... Under the circumstances, a deliberately structured dualism is indicated; the industry seems uniquely suited to this kind of creative federalism.[73] [Emphasis added]

There is ample room for argument that the FCC would have attempted to preempt total jurisdiction if it had sufficient manpower. Concurrent with the issuance of the Cable Television Report and Order, the FCC organized its Federal/State-Local Advisory Committee (FSLAC), whose purpose was to:

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[71] See former Section 76.31 of the Commission's Rules.

[72] See note 61, supra, at 11044, 25 FCC 2d at 52.

[73] See note 70, supra, at 3276, 36 FCC 2d at 207, 24 RR 2d at 1575.

> aid the Commission in its ongoing attempt to define an appropriate allocation of responsibilities in cable regulation by examining the regulatory roles which federal, state, and local governments might properly play.[74]

Numerous issues affecting local jurisdiction were raised, but the very first issue considered was which governmental entity should be empowered to select the franchisee. As the Majority Report concluded, "it was...for policy reasons that the FCC chose not to assert its quiescent but pervasive jurisdiction."[75] In any case, the FSLAC Majority Report recommended a "most local-level" of franchise granting.[76]

Despite the implicit warning soon to come in Midwest Video I,[77] the Commission's jurisdictional assertions continued to grow. The Commission was to make yet further incursions on the authority of the non-federal franchising entities. For example, in its Reconsideration of the Cable Television Report and Order,[78] the Commission mandated a 15-year franchise term.

In 1974, the Commission reached what was perhaps the high point of its jurisdictional assertion in the area of federal/state-local relations. The FCC opened six rulemaking proceedings affecting franchise grants.[79] The following questions were raised among the proposals: whether nationwide

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[74] See Final Report, Steering Committee of the FCC Cable Television Advisory Committee on Federal/State-Local Regulatory Relationships, Introduction and Background (1974).

[75] Id. at Majority Report at 8.

[76] Id. at Part I, p. 1. The FSLAC Minority Report, on the other hand, urged that the Majority position had fatal legal flaws in attempting to allocate jurisdiction within a state and that, from a policy standpoint, the Commission should recognize and approve the status quo. Id. at Part II.

[77] See text accompanying notes 105-110, infra.

[78] 37 Fed. Reg. 13847, 13862, 36 FCC 2d 326, 365, 25 RR 2d 1501, 1542 (1972).

[79] See Proposed Clarification of Rules in Docket Nos. 20018 - 20024, 39 Fed. Reg. 14289, 14292 - 300, 46 FCC 2d 175, 188-207, 29 RR 2d 1621, 1637-59 (1974).

franchisee selection procedures should be adopted and whether specific public proceedings should be designated;[80] the need for showings as to whether line extension policies were developed "knowledgeably and publicly",[81] the possibility of a minimum franchise term, i.e. five to seven years;[82] the possibility of specific provisions relating to franchise "expiration, cancellation, and continuation of service";[83] and the need for including federal provisions dealing with transfers.[84] Finally, the Commission said:

> ...[W]e expect that franchising authorities from this point on will include specific provisions in the franchise on what government official will be directly responsible for receiving and acting upon subscriber complaints.[85]

Only two of the proposals eventually were adopted -- the requirement of a local complaint official,[86] and the need for a public hearing where less than the full franchise area would be wired.[87]

(d) Jurisdictional pullback

Of greater significance in terms of Commission regulation, however, is that less than thirty months after reaching the high point of its jurisdic-

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[80] Docket No. 20019; id. at 14293, 46 FCC 2d at 191, 29 RR 2d at 1640.

[81] Docket No. 20020; id. at 14294, 46 FCC 2d at 193-94, 29 RR 2d at 1643.

[82] Docket No. 20021; id. at 14295, 46 FCC 2d at 195-96, 29 RR 2d at 1646-47.

[83] Docket No. 20022; id. at 14296, 46 FCC 2d at 198, 29 RR 2d at 1649.

[84] Docket No. 20023; id. at 14296, 46 FCC 2d at 198-99, 29 RR 2d at 1649.

[85] Docket No. 20024; id. at 14297, 46 FCC 2d at 200, 29 RR 2d at 1651.

[86] Report and Order in Docket No. 20024, 39 Fed. Reg. 44663, 50 FCC 43, 32 RR 2d 161 (1974).

[87] Report and Order in Docket No. 20020, 39 Fed. Reg. 44986, 50 FCC 2d 61, 32 RR 2d 336 (1974).

tional effort, the FCC virtually decided to get out of local franchising considerations.[88] In all non-federal matters except the franchise fee amounts, the Commission appeared to decide that its attempt at "creative federalism" was a flop. In its Report and Order, the FCC put it more genteelly:

> We have determined that there is insufficient need for any of the franchise standards presently found in §76.31(a) of the rules to warrant requiring their inclusion in cable operator's agreements with local authorities. All levels of government -- non-federal as well as federal -- share a concern for fair procedures, fulfillment of contractual obligations, consumer protection and public participation. Five years' experience has shown that cities and states are a proper first line of such concerns and are able to regulate accordingly -- usually with the added safeguard of local law. With this in mind, we encourage cable operators and franchising authorities to include in their franchise agreements terms covering the matters formerly embraced by §76.31(a), but we shall no longer require them by rule.[89]

The real question, however, is, why? Why would the Commission suddenly decide to get out of the preemption of facets of local franchising that it had assiduously begun seeking at the beginning of the decade?[90] The Notice of Proposed Rulemaking which raised the withdrawal possibility noted the problems generated by inconsistent franchises -- including delay and

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[88] See Notice of Proposed Rulemaking in Docket No. 21002, 41 Fed. Reg. 54506, 63 FCC 2d 3 (1976). It would not be inappropriate to suggest that the first official hints came within eight months of the jurisdictional high point. In its Notice of Proposed Rulemaking in Docket No. 20272, 39 Fed. Reg. 43580, 49 FCC 2d 1199 (1974), the Commission looked at "burdensome and excessive over-regulation." And in its Report and Order in the same Docket, 40 Fed. Reg. 34608, 54 FCC 2d 855, 34 RR 2d 1229 (1975), the Commission decided to begin "de-regulating" cable. The position of the FSLAC Minority (see note 76, supra) apparently was persuasive.

[89] 42 Fed. Reg. 52404, 52409, 66 FCC 2d 380, 391, 41 RR 2d 885, 897 (1977).

[90] See note 61, supra.

refusals by the franchising authority to amend local grants.[91] The Commission did note, however, that it had been subjected to criticism for asserting jurisdiction where federal standards were not necessary.[92]

It well may have been a wise political move for the Commission to withdraw from the franchise standard area at that time, since the jurisdictional assertion began to look weaker in light of judicial decisions. The question may have been raised in the collective FCC mind: Could these preemptive assertions have withstood an assault under the doctrine of United States v. Southwestern Cable Co.?[93] Were these matters "reasonably ancillary" to the Commission's broadcasting jurisdiction? Or, query, did the Commission simply conclude that the regulations were, on a practical level, unworkable?

D. Judicial Decisions

(a) Pre-1972 decisions

A challenge to the first comprehensive jurisdictional assertion reached the Supreme Court two years after the FCC first asserted broad jurisdiction over signal carriage in 1966.[94] The Court, in United States v. Southwestern Cable Co., focused on questions of which signals were to be carried and what

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[91] See note 88, supra, at 54508, 63 FCC 2d at 9.

[92] Ibid., 63 FCC 2d at 9. Staff Report, Subcommittee on Communications, House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., "Cable Television: Promise versus Regulatory Performance" (Subcommittee Print 1976).

[93] See note 36, supra.

[94] See text accompanying note 55, supra.

programming was to receive protection against duplication,[95] as well as other broadcast-related aspects of cable.[96] The court then noted that:

> The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.[97] [Emphasis added]

The Court then set out the test of the limits of the FCC's CATV jurisdiction:

> ...[T]he authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.[98] [Emphasis added]

The Court specifically did not go beyond that.

Two other cases involving the jurisdiction of the Commission were decided before the landmark Cable Television Report and Order of 1972. In the first, the D.C. Circuit affirmed the FCC's jurisdiction over the construction of CATV distribution facilities by telephone companies.[99] The FCC had held that Section 214 of the Communications Act covered facilities which were build within the boundaries of a single state, when the signals carried

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[95] See note 36, supra, at 163, 166, 168-69, and 179.

[96] Id. at 174-77.

[97] Id. at 177.

[98] Id. at 178. See also concurring opinion of Justice White, id. at 181-82.

[99] General Telephone Co. of California v. FCC, 413 F.2d 390 (D.C. Cir. 1969), cert. denied 90 S.Ct. 173, 178 (1969).

originated in another state. The court did not rely on the "reasonably ancillary" test that was to be later used so much; rather, it noted that intrastate construction of CATV facilities was but a part of "a unified system of communication", which "inserted" itself into the "indivisible stream" of interstate transmissions.[100]

In the second case, the Fifth Circuit also affirmed the FCC's jurisdiction.[101] Here, the Commission, noting that telephone companies often constructed facilities for their own subsidiaries as well as for competitors to those subsidiaries, issued regulations prohibiting CATV service by telephone companies in the telephone companies' own service areas.[102] For its jurisdictional underpinning, the Fifth Circuit relied on the D.C. Circuit's pervasive opinion in the earlier General Telephone case.[103] The Commission's powers were held to be "sufficiently elastic" to uphold jurisdiction.[104]

Both of these Court of Appeals cases upheld the FCC's jurisdiction in dealing with ownership aspects of CATV, which may or may not be "reasonably ancillary" to broadcasting. It may be important to note, however, that both of them preceded the all-pervasive assumption of jurisdiction of the 1972 Cable Television Report and Order, jurisdiction which has been upheld only in a limited line of cases subsequent to 1972.

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[100] Id. at 401.

[101] General Telephone Co. of the Southwest v. U.S., 449 F.2d 846 (5th Cir. 1971).

[102] See 47 C.F.R. §§63.254-57; §64.601.

[103] See note 99, supra.

[104] See note 101, supra, at 853.

(b) Post-1972 decisions upholding jurisdiction

Literally within weeks of the 1972 rules going into effect, the FCC's cable jurisdiction was again affirmed by the Supreme Court in Midwest Video I,[105] albeit on a factual situation which arose before the new rules. Even a cursory reading of this case, however, should be an indication that jurisdictional assertions by the FCC not related to broadcast programming may be upset -- as indeed they have been since then.

At issue was a requirement that any cable system with 3,500 subscribers originate programming on the system. The decision was as close as any Supreme Court decision can be. Four justices voted to uphold the FCC's regulation, four voted to overturn it, and one, Chief Justice Warren Burger, concurred that the FCC had authority -- but just barely. The Chief Justice's opinion is generally that cited to indicate the scope of the FCC's authority.

> Candor requires acknowledgement, 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.... [106]

But a reading of Justice Brennan's majority opinion shows that the test continued to be related to broadcast programming. The Court noted with approval that the effect of the FCC's rule was to increase program diversity and the public choice of programming,[107] goals within the FCC's television authority.

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[105] See note 40, supra.

[106] Id. at 676.

[107] Id. at 668.

The court added:

> The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitable diversified programming -- the same objective underlying regulations sustained in National Broadcasting Co. v. United States, ...as well as the local-carriage rule reviewed in Southwestern and subsequently upheld.[108]

For the Commission, the Supreme Court's decision was a Pyrrhic victory, at best. The mandatory origination rule -- stayed upon the adverse lower court decision[109] -- was never reinstituted and subsequently was withdrawn totally.[110]

Three years later, the FCC's jurisdiction was again affirmed, in significant part because the regulations involved related to broadcast-type programming. In American Civil Liberties Union v. FCC,[111] the court was faced with a demand that the Commission failed to impose common carrier-type regulations on access channels. In fact, the obligations imposed were more akin to broadcast-type regulations than common carrier. For example, the ACLU objected to cable operators not being limited to one channel of origination.

While the Ninth Circuit found jurisdiction, venue, and standing reasons for denying the appeal,[112] it also noted that it was guided by the Southwestern and Midwest Video I decisions. The refusal to adopt common-carrier-type regulations (and implicitly the concimitant broadcast-programming-type regulations) were "reasonably ancillary" under the two Supreme Court decisions.

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[108] Id. at 669.

[109] Midwest Video Corp. v. U.S., 441 F.2d 1322 (8th Cir. 1971).

[110] See Report and Order in Docket No. 19988, 39 Fed. Reg. 43002, 49 FCC 2d 1090, 32 RR 2d 123 (1974).

[111] 523 F.2d 1344 (9th Cir. 1975).

[112] Id. at 1346-48.

Following Midwest Video I and ACLU, there was no further support given for any Commission jurisdiction until the general jurisdiction of the FCC over pay-cable was subjected to attack in Home Box Office Inc. v. Federal Communications Commission.[113] While the net result of the decision was to overturn the existing pay-cable rules, there is considerable room for argument that the court would have upheld the regulations had they been based on an adequate record.

Admittedly, the D.C. Circuit expressed reservations about the jurisdictional assertion of the Commission. The court noted that the Midwest Video I plurality stated a test as to whether the rule in question would "further the achievement of long-established regulatory goals in the field of television broadcasting."[114] Absent statutory guidance,[115] the Commission had to show "a consistently held policy in the...regulation of broadcast television."[116]

The court pointed to language in the 1970 WHDH decision[117] to support its rationale on consistent policies. Given the facts of the pay-cable regulations, the court found that no long-standing policy of broadcast regulation was followed. Moreover, noting the long-standing and simmering battle between the Commission and the D.C. Circuit over program formats,[118] the

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[113] 567 F.2d 9 (1977).

[114] Id. at 27, citing note 40, supra. at 667-68.

[115] See text accompanying notes 29-40, infra.

[116] See note 113, supra, at 28.

[117] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

[118] See note 113, supra, at 29-32.

court found no long-standing format policy. Perhaps importantly, Judge McKinnon stated his position on this type of regulation:

> Judge McKinnon is of the view that the FCC's jurisdiction to regulate cable casting in the interests of the broadcasting industry is restricted in instances where the cable stations substantially rely on broadcast signals or their activities amount to unfair competition.[119]

(Further, the court found the record lacking, troublesome First Amendment questions, and fatal "ex parte" contacts.)

Notwithstanding the overwhelming jurisdiction-limiting nature of the opinion, there is very definite room for seeing positive jurisdictional aspects. In the first place, the court indicated that long-established broadcast goals could justify cable television regulations. So, for example, CATV technical regulations designed to preserve picture quality for viewers are probably "ancillary" enough to be upheld.[120] Secondly, the court noted that there was no record evidence of serious injury to broadcasting.[121] A showing of injury would therefore satisfy the requirement of HBO (and Southwestern).[122] Thirdly, the court recognized that in some "unique and popular" program circumstances, no record evidence was necessary and judicial notice could be taken if harm could be the basis of determining adequate television service.[123]

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[119] Id. at 28, n. *.

[120] See 47 C.F.R. §§76.601 - 76.617.

[121] See note 113, supra, at 29.

[122] See note 36, supra.

[123] See note 113, supra, at 31-32. The World Series, for example, was held to be sufficiently "unique and popular" to avoid the necessity of a factual inquiry.

Finally, the court's holding that the Commission regulations violated the First Amendment is replete with suggestions that the D.C. Circuit decision is not absolute.[124] The court noted that protecting the viewing rights of those not served by cable or too poor to pay for cable is not a concept intended to suppress free speech. Given that premise, the court applied the test in United States v. O'Brien,[125] which states that when regulations are held not to be related to the suppression of free speech, those regulations may be upheld if they

> further an important or substantial governmental interest; ...and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.... [126]

The court's use of O'Brien is ample evidence of a potential willingness to hold valid the cable programming restrictions; the record simply did not justify it.[127]

But HBO aside, no more apparent showing of an attempt to peg a federal preemption to programming is evidenced than by the Second Circuit's opinion in Brookhaven Cable TV v. Kelly.[128] Despite the FCC's assertion of jurisdiction in the area of pay-cable rates,[129] the State of New York attempted to take jurisdiction of pay rates, requiring franchise amendments and rate approvals. A group of cable systems, two trade associations and a supplier

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[124] Id. at 48-51.

[125] 391 U.S. 367 (1968).

[126] Id. at 377.

[127] See note 113, supra, at 50.

[128] 573 F.2d 765 (2d Cir. 1978). See text accompanying notes 19-20, supra.

[129] See note 79, supra, at 14297, 46 FCC 2d at 199-200, 29 RR 2d at 1651.

of pay programming sued the New York Commission, claiming that the FCC had preempted the area.

The Second Circuit agreed with the federal preemption argument. Citing the "reasonably ancillary test" of Southwestern and Midwest Video I, the court said that

> ...[T]he FCC may regulate cable TV if its regulation will further a goal which it is entitled to pursue in the broadcast area.[130]

The court then simply stated that a lack of price restraints "at every level is reasonably ancillary to the objective of increasing program diversity."[131] Moreover, said the court, this was less "intrusive" than the origination requirements of Midwest Video I.[132]

Without elaborating, the court was satisfied to note that the FCC in preempting had noted that state regulation of pay cable rates in all likelihood would have "a chilling effect on the anticipated development [of specialized services]."[133] What the court did not quote, however, was the rest of the FCC's position in its clarification statement:

> The same logic [of a chilling effect] applies to all other areas of rate regulation in cable, i.e., advertising, pay services, digital services, alarm systems, two-way experiments, etc. [134] [Emphasis added]

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[130] See note 128, supra, at 767.

[131] Ibid.

[132] Ibid.

[133] Id. at 768, citing Clarification, note 79, supra, at 14297, 46 FCC 2d at 199-200, 29 RR 2d at 1651.

[134] Clarification, ibid. But see text accompanying notes 136-142.

The sole distinction between what the Commission has asserted and what the courts have upheld appears to lie in the difference between broadcast-type programming and other cable services.

In every one of the courts' decisions since the adoption of the Cable Television Report and Order, broadcast programming -- or the total absence thereof -- has been the crucial element in upholding or rejecting the Commission's jurisdiction. From the standpoint of the Southwestern test -- "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting"[135] -- obviously broadcast programming is the easiest and most threshhold test. It almost goes without saying, however, that the Commission would be hard-pressed to justify jurisdiction as being "reasonably ancillary", if the exercise of that jurisdiction in the broadcast area itself could not be supported.[136] Given its use, obvious questions may be raised about the survival of other provisions of the FCC's regulations.

(c) Post-1972 decisions denying jurisdiction

Two decisions since the 1972 Cable Television Report and Order have held that the Commission exceeded its authority in attempting to assert jurisdiction over various aspects of cable.

In the first, National Association of Regulatory Utility Commissioners v. Federal Communications Commission,[137] the court was faced with regulations requiring development of, among other things, non-video two-way communica-

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[135] See note 36, supra, at 178.

[136] So, for example, if the Commission could not regulate concentrations of of media control in broadcasting, could it so regulate in cable?

[137] 533 F.2d 601 (D.C. Cir. 1976).

tions. The court noted that, while the 1972 Cable Television Report and Order was somewhat ambiguous, in the 1974 Clarification [138] the Commission

> made reference to the preemption of all regulation of the leased access bandwidth and, more particularly, of regulation of any two-way, intrastate, non-video communications which might be carried via the cable system.[139]

The Commission found it necessary, said the court, to argue that cable had to be treated as an "organic whole," thus bringing CATV under comprehensive FCC jurisdiction under Section 2(a) of the Communications Act and the Southwestern and Midwest Video I precedents.

The court rejected the Commission's preemption of any state jurisdiction on two basic grounds: two-way non-video communications was common carriage and intrastate in nature [140] (notwithstanding a lack of actual evidence), and a lack of "reasonable ancillariness" to broadcasting.[141] The court specifically distinguished Midwest Video I origination programming (so very like the Southwestern-type "offerings of the national networks and local broadcast stations")[142] from the sterile computer-to-computer talk of non-video two-way communications. No contrast could have been more stark.

(The court appeared to be further persuaded by the vacuum that apparently would have existed in regulation, since the FCC was preempting state regulation but itself did not intend to regulate.[143])

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[138] See note 79, supra.

[139] See note 137, supra, at 606.

[140] Id. at 609-11.

[141] Id. at 611-17.

[142] Id. at 616.

[143] Ibid.

A much closer question arose in the 1978 opinion of the Eighth Circuit in Midwest Video II.[144] The court's opinion expressly -- and with a vengeance[145] -- overturned the FCC's mandatory access, channel capacity and equipment availability regulations.

The court conceivably could have upheld at least the access portion of the FCC's regulations (and perhaps the rest as well) as being "reasonably ancillary" to broadcasting.[146] Indeed many access programs are more innovative (and, in the minds of some, "better" television) than conventional broadcasting. Certainly, in concept, access programming encourages diversity. Requiring access to be given to the media allows a multiplicity of community voices and ideas to be heard, potentially much greater than a television station tying into a national network. Furthermore, a prospective use of at least one of the access channels mandated was for pay-cable programming. This kind of channel usage probably would be superior from the standpoint of diversity of program fare -- to say nothing of its usual lack of commercial advertising -- since viewers would be paying for it.[147]

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[144] Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978). The FCC and two other parties have successfully sought certiorari by the Supreme Court. 47 Law Week 3187 (Oct. 3, 1978).

[145] See text accompanying note 3, supra.

[146] The court made clear, however, that access, channel capacity and equipment availability were integrally linked and were not "argued separately" in the appeal. See note 144, supra, at 1035, n. 21.

[147] Of the first major interactive ("two-way") pay experiment, Newsweek Magazine said:

> ...QUBE offers the most varied range of program options ever piped into a living room. Some of its 30 channels are set aside only for kiddie fare, religious shows, sports and courses in everything from anthropology to backgammon. Other channels bring in opera, first-run movies, special community-oriented series and such soft-core porn as "Swinging Stewardesses".

Newsweek Magazine, July 3, 1978, at 64.

Quite possibly, the Eighth Circuit could have used the programming argument to uphold the FCC's regulations. The court chose instead to shred the argument, holding that the Commission never claimed nor showed the slightest relationship.[148] The court analogized the posture of the cable systems here to common carriers, contrasting this with the program decisions which would have to be made under the origination standards of Midwest Video I. Simply, said the court, the Commission's regulations are not "reasonably ancillary" to any approved regulatory power of the Commission.

(This is not to say, of course, that this was the sole basis for the decision. The court stated that the Communications Act itself did not confer jurisdiction, nor did the FCC's objectives. As if these were not enough, "the Commission's ends do not justify its means [and]...the means are forbidden within the Commission's statutory jurisdiction."[149] Moreover, in dicta, the court raised constitutional questions involving freedom of speech and due process and the sufficiency of the record for the actions taken.[150])

As the Eighth Circuit said,

> ...[T]he present case involves only the jurisdiction of the Commission to issue its federal access and equipment rule. The only effect of our opinion on the election

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[148] It is interesting to note that the same Eighth Circuit had likewise held a lack of FCC jurisdiction, only to be reversed by the Supreme Court in Midwest Video I. See note 109, supra.

[149] See note 144, supra, at 1035.

[150] Id. at 1052-63.

The temptation of looking to the 1978 Midwest Video II decision for interpretation in questions of federal preemption of non-federal regulation should be avoided. The Eighth Circuit apparently was willing to live with the possibility of a vacuum that the District of Columbia Circuit was unwilling to live with in NARUC. See text accompanying note 143, supra.

of local franchising authorities, to require or waive access requirements in the light of community needs and interests, is to free those authorities from the Commission's restrictions....[151]

[151] See note 144, supra, at 1033, n. 17.

III. THE FUTURE OF PREEMPTION

A two-pronged attack on aspects of preemption is underway -- both from the courts and from the Commission.[152] Although the latter has been stated in terms of "deregulation",[153] it may be a product of the former: the Commission indeed may be reading the court decisions and reacting by modifying its rules before a successful challenge.

It would seem safe to say that if the Supreme Court upholds the FCC jurisdiction challenged in Midwest Video II -- again reversing the lower court -- the new (self-limited) jurisdiction of the FCC over cable will be secure. But it is not safe to assume that the granting review will lead to this kind of Supreme Court decision. Equally (or perhaps more) likely would be a carefully drawn Supreme Court decision affirming the Court of Appeals decision, but continuing to hold FCC jurisdiction over other aspects of cable.

The likely question therefore is, which rule would likely be next challenged? And the equally likely answer is Section 76.31's franchise fee limitation of three percent (or five percent with a special showing). The FCC took some small steps in modifying the regulation in late 1977 when it expanded the rate base on which a local franchisor could collect. The Commission said:

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[152] Indeed, it well may be said to be a "three-pronged attack", given the introduction of H.R. 13015, which would specifically prohibit federal regulation of cable. See News Release, House Subcommittee on Communications, "Highlights of Communications Act of 1978," June 7, 1978.

[153] See note 89, supra, at 52409, 66 FCC 2d at 393, 41 RR 2d at 889. See also Broadcasting Magazine, December 6, 1976, at 21:

> FCC Chairman Richard E. Wiley...said that further cable de-regulation in the franchise area could give greater power to state and local authorities.

> Because we feel that basic fairness requires us to allow franchisors access to pay cable revenues to defray costs which arise in some measure from oversight of pay service, and because we are convinced that an expanded fee base will not adversely affect the further development of cable television services, we are persuaded that justification no longer exists to exclude pay cable and other auxiliary service revenues from the computation. Therefore, we are expanding the base of computation of franchise fees to include gross revenues from all cable services. Taking into account our discussion of the franchise fee limit, ...the new franchise fee standard will be as follows: 3% (up to 5% if justified) of gross revenues from all cable services.[154]

In maintaining that its jurisdiction continued, the Commission took note to cite that Midwest Video I provided the basis. It stated:

> Since the promise of cable's abundance and diversity of services is integrally linked to its financial viability, we believe the fee limitation serves the goal of diversity and thus is within the scope of our authority.[155]

Somewhere along the line, a city or state will object to being limited to three percent,[156] or a cable system will object to having its pay revenues subjected to the franchise fee and the matter will be litigated. Indeed, how the court may view the franchise fee regulations as being directly involved in matters "reasonably ancillary" to broadcasting -- read "programming" -- may be the test.

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[154] Report and Order in Docket No. 21002, 66 FCC 2d 380, 402-05, 41 RR 2d 885, 885, 909 (1977)(footnote omitted).

[155] Id. at 398, 41 RR 2d at 904.

[156] Cf., New York State Commission on Cable Television v. FCC, 571 F.2d 95 (2d Cir. 1978), where the New York Commission took the position that grandfathered systems could be taxed at a higher rate. In a narrowly written opinion, the court upheld the FCC, terming the question involved "an inadvertant gap" applying only to pre-1972 systems. Id. at 99. Supreme Court review was denied on October 3, 1978. 47 Law Week 3197.

Franchise fee regulation is the easy answer to the likely question. It also may be the sole area where federal preemption is at odds with a state or local jurisdictional assertion, as was the case in Brookhaven or, as was suggested by the court, could be the case in NARUC.

In other circumstances which might be challenged -- equal employment opportunity? registration?[157] MATV?[158] syndicated exclusivity? sports blackouts? -- non-federal authorities would seem an unlikely substitute for federal regulators, thereby creating the kind of regulatory vacuum briefly recognized in Midwest Video II.

While it remains to be seen whether this vacuum is to be abhorred, one thing does appear to be certain (or at least as certain as things can be in cable regulation): like Humpty Dumpty, the shell of comprehensive federal regulation won't be put together again.

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[157] In September 1978, the Commission announced that it was replacing its requirement for Certificates of Compliance with a system of registration. The net effect, said the Commission, was to "make more efficient the initiation of new cable services." News Release, FCC Rep. No. 14435, September 28, 1978. See Report and Order in CT Docket No. 78-206, FCC 78-690, ___ FCC 2d ___, ___ RR 2d ___ (1978).

[158] In September 1978, the FCC asserted total jurisdiction over master antenna systems (MATV's) served by Multipoint Distribution Services (MDS). See Orth-O-Vision, Inc., ___ FCC 2d ___, 44 RR 2d 329 (1978). This development may be compared to the Commission's initial assertion of jurisdiction over cable television; see text accompanying notes 51-53, supra.