In the

Supreme Court of the United States

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, Petitioners,	)	
vs.	)	No. 71-506
MIDWEST VIDEO CORPORATION, Respondent.	)	

Washington, D. C.
April 19, 1972

Pages 1 thru 45

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, Petitioners,	:	No. 71-506
v.	:	
MIDWEST VIDEO CORPORATION, Respondent.	:	

Washington, D. C.

Wednesday, April 19, 1972

The above-entitled matter came on for argument at 11:06 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioners.

HARRY M. PLOTKIN, ESQ., 1815 H Street, N. W., Washington, D. C. 20006, for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-506, United States against Midwest Video Corporation.

Mr. Wallace, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

In this case, upon the challenge of the respondent, which is an operator of cable television systems in Missouri, New Mexico, and Texas, the Court of Appeals for the Eighth Circuit held invalid a rule of the Federal Communications Commission which provides that a cable television system having 3500 or more subscribers may not in the absence of waiver of the rule by the Commission--it is not stated in the rule but it has become clear in subsequent reports--may not distribute the signals of television broadcast stations unless it "also operates to a significant extent as a local outlet by cable casting" and by having available "facilities for local production and presentation of programs other than automated services."

Cable casting simply means the providing of programming on the system without the use of broadcast signals. Most cable television service does originate as

broadcast programming that the system then brings in through its antennas. Cable casting would be programming that it provides itself rather than from broadcast services. The background of the rule is this. In June of 1968 this Court in the Southwestern Cable Company decision, 392 U. S., upheld the FCC's authority to stay cable transmission of distant broadcast signals into a community pending a hearing, the situation there involving the 100 largest television markets. The Court held in that case that cable television systems engage in interstate communication by wire or radio within the meaning of Section 2(a) of the Communications Act and that the systems are therefore subject to the Commission's regulatory jurisdiction at least to the extent that the Commission's regulation is reasonably ancillary, in the words of the Court, to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.

With uncertainties about the Commission's jurisdiction in regulatory authority over cable television thus dispelled, at least to this extent, which I will argue is basically all we need here, the Commission has undertaken a major effort to integrate the rapidly burdeoning cable system into the national communications systems in ways that will be consistent with and in furtherance of the public policy objectives of the Communications Act.

Since the decision in Southwestern, the Commission has so far devoted more than three years of intensive study to cable television in a series of rulemaking proceedings which began in December of 1968 with the notice of rulemaking reprinted in the appendix which resulted in the rules at issue here, and that notice announced that the Commission would explore "how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public with particular immediate reference to CATV technology and potential services."

Q I take it there is nothing expressed in the act that says that cablecasting as such is subject to the Commission's regulation. Let's assume, which isn't true, that a cablecaster carried no broadcast signals, he just originated programs. Is there something in the act--

MR. WALLACE: There is nothing in the act on that subject.

Q It would have to be a common carrier by wire to be subject, I take it?

MR. WALLACE: We need to reach that issue. There is nothing in the act on that subject. If it's still the communication by wire, there might be interstate aspects to it.

Q The Commission does have jurisdiction over

interstate communications by wire?

MR. WALLACE: Yes, it does.

Q If there are common carriers?

MR. WALLACE: Well, under Southwestern we don't think that that's limited to common carriers. But this case no more than Southwestern requires--

Q If there was some real statutory authority, obvious statutory authority over just wire communications, we wouldn't have this argument.

MR. WALLACE: Presumably the Court of Appeals would have decided the case differently. I agree with Your Honor--

Q The Commission would have decided it differently too.

MR. WALLACE: Undoubtedly. The act, as you know, was enacted in 1934 and has not been amended on this subject. The Commission is proceeding as best it can.

Q Has there been any amendment in this area since cable television emerged as a real--

MR. WALLACE: Not at all, Your Honor. In Southwestern Cable, the Court reviewed the attempts to amend the act that up to that time had occurred in Congress and noted that none of them resulted in the adoption of any legislation and since that time there has not even been a bill considered in committee on this subject, since the Southwestern decision. But we think there is some significance

in the close scrutiny that Congress has been giving to the development of the Commission's rulemaking proceedings in this subject.

The Commission has submitted several written reports to Congress on its cable television rulemaking endeavors during the period since Southwestern to the requisite congressional committees, mostly the communications subcommittees of the two commerce committees. And members of the Commission have at times been quite closely questioned about these efforts at committee hearings. While this is certainly not dispositive of the case, we believe that it's significant, because of this close scrutiny, that there has so far been no substantial indication of any congressional dissatisfaction with the way the Commission has been performing its task in this area.

Q Has it been a--well, it's the ordinary rule-making function, but has it been a kind of cooperative effort trying to reach an accommodation among the various competing interests?

MR. WALLACE: The Commission has devoted a great deal of time and effort to that, covering various subjects in the course of these rulemaking proceedings. I can broadly characterize them as the carriage of television broadcast signals by cable systems and the use of cable television channels for the distribution of non-broadcast programming,

the main one at issue here, but also minimum technical standards for cable television systems, including minimum channel requirements, two-way transmission capability, and separate neighborhood program origination centers, and the whole question of the appropriate distribution of regulatory jurisdiction between federal and state and local levels of government, and the question of limitation on local franchise fees paid by cable systems. And in the course of these proceedings over the past three years, more than 700 comments have been received from various industries, civic and academic groups, and there were two lengthy rounds of oral presentations and panel discussions held by the Commission, involving more than 200 participants, one round in February, 1969 before the orders at issue here were adopted, and another round in March of 1971. Altogether ten full days were spent on these hearings and panel discussions. And following the 1971 consideration, the Commission in February of 1972 adopted a much more comprehensive set of rules on this subject than the rules at issue here. We have lodged ten copies of these with the Court in this case.

In addition to the reference materials that are cited in the brief on the subject, there is a very lengthy and comprehensive article on the subject coming out in the forthcoming issue, the April issue, of the Notre Dame Lawyer which should be brought to the Court's attention, an article

by Professor Stephen Barnett of the University of California Law School, which discusses very comprehensively the new rules and also the issues involved in the question of the Commission's jurisdiction.

Q And the so-called new rules are these, as of this February?

MR. WALLACE: That is correct.

You'll find after the initial part of it, which is the report and order discussing them, on page 3278, if you have it with you there, there is an index to the rules themselves, which gives you some idea of the scope of them.

I might add that while Professor Barnett does take issue on policy grounds with some of the conclusions the Commission has reached, he does say that in his view there is jurisdiction.

The 1969 rules challenged in this case have three general aspects, to get back to the rules at issue here. And these were summarized--this case is only under the 1969 rules, which had three general aspects summarized in Commissioner Bartley's concurring statement at the time of the adoption of the rule. That is in the appendix to the petition. They covered petition. On pages 55 and 56. At the bottom of page 55, Commissioner Bartley very briefly summarized what was involved in the rules that were challenged in this case. One is the provision the cable system may originate programs

without limitation as to number of channels. And beginning on January 1st any system with 3500 or more subscribers is required to originate programs to a significant extent or else it is forbidden to carry broadcasting.

And then his B and C apply to the program originated, the cablecasting programs. One was provisions that they may sell advertising with respect to such programs to be presented only at natural breaks or intermissions in the programs. And C is this programming that they originate, this cablecasting is required generally to comply with the equal opportunity and fairness doctrine provisions and sponsorship identification provisions of the Communications Act and of the rules.

The respondent here challenged all three aspects. The Court of Appeals held that the program origination requirement is invalid and then refused to pass on the validity of the remaining rules on the ground that the respondent lacks standing to challenge them since it did not intend to originate any programming once the origination requirement was struck down.

So, the only question before this Court is the validity of the origination or cablecasting requirement. The respondent correctly points out that no cablecasting was involved in the Southwestern case. And I have already mentioned that the rule at issue here applies only to systems that

carry broadcast signals, not to the presently non-existent possibility of a system that does nothing but cablecasting. So, there is no need for the Court in this case to reach any question of the Commission's jurisdiction over cablecasting as it stands alone.

Q Will you tell me again what cablecasting is?

MR. WALLACE: That is programming over the cable that does not involve any broadcast signals or any broadcast originating programs--

Q Wholly originated then.

MR. WALLACE: Wholly originated by the cablecaster, although it may not necessarily be local programming. It can be programming that's supplied to him from elsewhere, including networking possibilities here. But it would not be programming that originates through radio signals that are being broadcast to other viewers. It could be programming that is sent to him by radio signals that are not really broadcast signals that go to the public.

Q That no independent TV sets can receive.

MR. WALLACE: That is correct, sir.

Q Then the origination doesn't really have controlling impact here, does it? It could originate in a network in New York and be delivered in Omaha, Nebraska by cable, could it not?

MR. WALLACE: That is a possibility. The rule

contemplates that some of this origination requirement could be met by networking or other interconnected programming, although there is a requirement that there be local facilities available.

Q But the primary emphasis is to encourage local production?

MR. WALLACE: That is correct, Your Honor. But there is also the possibility of this networking, including the use of satellites, which has been discussed in the course of these rulemaking proceedings as a possible way of networking cablecasting. It's not the primary purpose of the rule, but a substantial part of the cable system's obligations could be fulfilled by use of these services, and it's one consideration that we think should be taken into account with respect to the Commission's authority here, although it's not the basic, the heart of the Commission's rationale here.

All of the programs, whether broadcast originated or not, are supplied by cable systems as they exist today to their subscribers over the same cable. And from the standpoint of the viewer turning the dial from one channel to another, cablecasting offered by the system is for all practical purposes undifferentiated from the other services being offered and indeed from broadcast services that he receives. For this reason we think it fairly clear that under

the ancillary standard, reasonably ancillary standard of Southwestern Cable, the Commission must have some authority to regulate cablecasting service; because if the system were free to ignore its cablecasting, the fairness, equal opportunity sponsorship identification requirements that otherwise existed on the set, their overall effect would be quite seriously undermined and there is also the problem of the possible use of pay cablecasting. This would be a per program or per service fee rather than just the subscription for hooking into the cable. And the concerns that the Commission has had about the siphoning off through pay television of programming that is now available free to viewers could very well be undermined if pay cablecasting could come in and perform the same siphoning off of programming the Commission were powerless to regulate.

Q Is all cable television pay television?

MR. WALLACE: Not the kind that I'm talking about.

Q It comes into your home by wire.

MR. WALLACE: There is a subscription fee.

Q It's a pay television then.

MR. WALLACE: In that sense. But now I'm talking about the additional element of a per service or per program fee, that you can't get the particular program unless you pay a particular fee for it such as we have with pay broadcast television.

Q I noticed that Judge Gibson was somewhat exercised about the problems of advertising. Is there advertising on cable television?

MR. WALLACE: Advertising--there isn't with respect to the broadcast programming that is carried.

Q But not on those--

MR. WALLACE: It is now--they just carry the advertising that is already put on the air by the broadcaster.

Q If they pick it up from a network or some other station and then run it by cable into the private home, they take it as it is.

MR. WALLACE: As it is, and they don't interfere with the advertising that is on.

Q But the cable television as such does not introduce advertising on the wire; is that right?

MR. WALLACE: In their cablecasting operations the Commission has authorized them to introduce advertising, but only at natural breaks in the programming. They are not authorized to interrupt the programming. And those systems that are now engaging in cablecasting do have advertising on their own originated programming.

Q Does that mean that viewers are going to pay a fee to get advertising piped into their homes and televisions?

MR. WALLACE: They all do operate with subscribers' fees. But, of course, to the extent that they're programming

costs can be defrayed through advertising, they are then able to reduce subscription fees, and the Commission considered these matters and decided to authorize advertising to that limited extent with cablecasting.

Q Does that include political advertising?

MR. WALLACE: Well, they have the option to carry it just as broadcasters do.

Q Is there anything to stop the cable television company that operates in three counties of a state from during the month of October carrying nothing but political advertising?

MR. WALLACE: There is nothing to stop them if they choose to limit their advertising that way. They do have the fairness doctrine requirements and equal opportunity requirements to comply with in the Commission's view and under the Commission's rules, if the Commission has authority to apply them. And, of course, we contend that they do. But the question here is whether the Commission had authority to apply the origination requirement to cablecasters, to cable systems, that would prefer not to do any cablecasting. That is the issue here. And while we do not concede that the reasonably ancillary standard of Southwestern sets the outer limit of the Commission's authority with respect to cable television, our position is that that standard is met with respect to the origination

requirement also, which brings me now to the rationale of the Commission, which is at the heart of this requirement that they have imposed.

This Court in Southwestern recognized the legitimacy of the Commission's concern that local broadcast service not be destroyed or foreclosed by unregulated importation of distant broadcast signals on cable systems, and there are two reasons for this concern. One is the importance to the public of programming that deals with local issues of public importance which can only reasonably be anticipated on local service. And the other reason is the very practical problem that cable systems do not serve many persons in their area who are served by local broadcasting, both because some of these persons cannot or will not pay the subscription fees and because it is prohibitively expensive to extend the cable to those who are in rural areas or other sparsely populated areas.

The development of cablecasting on these systems, however, offers in the Commission's view compensating opportunities for service to the community that cannot otherwise be made available, both because it overcomes the physical limitations of the broadcast spectrum on program diversity and because it offers new possibilities for specialized, local service.

For example, if you have a system that brings New

York City signals into a small community in Pennsylvania, as we do, or you could just as well use a system bringing Denver signals into small communities in Colorado or in Wyoming, as we have, you have an illustration of the sort of thing that I mean. It may be that the ability of the local broadcasters to continue serviing the small community and other small communities in the area will be threatened by the importation of these signals, and perhaps other communities will also have their own cable systems. But it is also true that the cable systems which now--now they have up to 20 channels on the cable--can provide many services to the subscribers in this local community that really can't, as a practical matter, be performed by broadcasters because they serve only a very local community.

It's quite possible for the two candidates for mayor to have a debate on one of the cablecasting channels or a panel discussion to be held on local school board problems or other matters of particular local concern. It's even possible for small merchants who want only a local audience to advertise to, to have available to them facilities that really are not available through broadcasting.

Q There is no grandfather clause here?

MR. WALLACE: There are some grandfather provisions involved but they are not at issue in the present case.

Q There may be plenty of reasons for this, but

is it your submission in terms of power that because the cablecaster does use broadcast signals, that gives the FCC power to order him or to control the rest of his program or to supervise the content of the rest of his programs?

MR. WALLACE: Our submission is that the power derives basically from the fact that these systems do use broadcast signals and what the Commission has concluded here is that the impairment or the threat, the possible threat here to television service that results from the Commission's authorization of the use of the radio signals, that is, the sustenance of these systems is offset, is sufficiently compensated for by the new services to the community the cablecasting can provide so that it's only in light of both aspects of the operation that the Commission is willing to go ahead and authorize the services to the extent that they have to use radio signals.

Q Where you have a voluntary cablecaster--and I suppose are there are some--

MR. WALLACE: There are, yes.

Q --a voluntary cablecaster originating programs but also carrying broadcast signals, I take it you would say automatically that the FCC has power to apply the fairness doctrine right across the board. Assume they had 20 channels and they filled them all up and not only with broadcast signals but with origination. Do you think you could reach the

originating program, the fairness of the originating programs, just because of the use of some broadcast signals?

MR. WALLACE: The Commission's rule does apply. In that case it's largely because of the impact on the viewer. To him the differentiation of whether it's coming in as cablecasting or as broadcasting is not all that apparent as he flips from one station to another.

Q That may be true, but what about the Commission's power and authority?

MR. WALLACE: If the fairness doctrine is to operate effectively or if the equal opportunity provisions are to operate effectively, what is the Commission to do if the cablecasting is all going to feature people from one party? Should the Commission then say that in compensation for that that the broadcasters must weight their presentations in favor of the other party. It seems to the Commission that the idea is to get an overall effect that's fair through the television set.

Q Assume the non-existent cablecaster who doesn't use broadcast signals and assume that the Commission had power over that broadcaster to license him or that cablecaster. Would you think the fairness doctrine would have the same basis constitutionally as--

MR. WALLACE: The Commission has not attempted to apply it that far, and that would present a much more

difficult question. But at least the viewer there would tend to be more aware that he's listening only to someone who is coming in with a cablecasting operation. As it is now, he is served by a single cable that presents a mixture of broadcast originated programming where these protections apply, and the other--he's not very aware of which he is getting at any given moment.

Q Do you think the Fortnightly Corporation decision has any relevance to the issues here?

MR. WALLACE: I think it has relevance in this respect. Of course, it only decided whether there is a copyright infringement. But it does indicate--it seems to me that it goes somewhat to the reasonableness of the Commission's rule, and I am obviously not going to have time to discuss that issue at any length. I think it's well developed in the course of the appendix here, the consideration that the Commission gave to financial arguments resulting ultimately in the waiver that they provided. But the fact is broadcasters who do have to pay for networking in other programs that they receive and who do not receive any fees from their subscribers are all required by the Commission to provide local service of a public interest nature. When it comes to the reasonableness of the rule, what the Commission has done here is to say the cablecasters, who now have the capacity to provide additional

kinds of local service that are not available through broadcasting should be required to do the same sort of thing when they have the financial capacity to do so, and the Commission has been very cautious on the question of the financial capacity rather than just exist in a parasitic relationship to broadcasting.

Q Mr. Wallace, at that point we do have this demarcation of 3500 subscribers, do we not?

MR. WALLACE: That is correct.

Q I suppose my question is, Is there anything arbitrary about the 3500 mark?

MR. WALLACE: It was developed in the course of very lengthy considerations that are rehearsed quite a bit in the appendix to the petition, if I may just refer you to the relevant pages. First is pages 38 through 45 of the appendix in which the Commission originally arrived at that figure on the basis of detailed information that was submitted to it and especially noting that more than 70 percent of the cablecasters now in existence of those systems now cablecasting have less than 3500 subscribers and also in light of the flexibility of their rules, they are not required in order to meet this rule to engage in a high-cost operation. The chart on page 40 of the appendix to the petition indicates that it's possible to get down to what's called a small monochrome system or a minimum monochrome system.

It is much less costly for those who don't really have the financial resources to do better. And then if I may add references to pages 58 and 59 where the Commission considered this further on motion for reconsideration. And then finally on pages 66 and 67 of the appendix to the petition in which the Commission set up procedures for waiver and said that any system with less than 10,000 subscribers, when it applies for a waiver, will get an automatic stay until the waiver situation is clarified, until the waiver decision is made.

The Commission has been very cautious on the question of financial capacity and burden here.

Q As I read Judge Gibson's recurring opinion, at least, he doesn't question FCC power in the broadest sense. I note in his opinion he uses the phrase "at this time at least" perhaps three times in his opinion, and he addresses himself to the particular order so that this question really doesn't go to power but to the discretion of the Commission in exercising pervasive power at this particular time and in the particular way.

MR. WALLACE: If I may say so, Your Honor, it reads to me like a dissenting opinion of a Commissioner to this report and order, rather than an opinion on review.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

MR. WALLACE: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Mr. Plotkin.

ORAL ARGUMENT OF HARRY M. PLOTKIN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. PLOTKIN: Mr. Chief Justice, and may it please the Court:

Essentially a very simple issue is involved here, not the very complex issue that Mr. Wallace refers to, because most of the things that he talks about are either rules and regulations that have been adopted since this case was before the court of the law and as to which the administrative process has not yet even been completed and the other aspect of which is what happens with voluntary origination. The rules and regulations of the Commission were not passed upon by the court of the law before this Court.

What's involved here is a simple requirement of the Commission that says to a CATV system, "If you want to stay in business as a CATV system, you've got to originate programs. You've got to become a broadcast station, in effect. If you refuse to do that, you've got to cease being a CATV system."

And I think it might be helpful if I just backed up a little bit and gave a little bit of history of CATV so as to show how it fills in with respect to what the Commission has done in this case.

CATV started when television broadcast stations

were not able to fill in and provide service to the entire service area, principally communities located in valleys where there are mountains in between the television antenna and the community; whereas the television signal might extend for miles beyond this particular community, there on the bottom they were unable to receive the television signals.

So, individual entrepreneurs undertook to put an antenna on top of the mountain where the signal is available, catch it, bring it down by cable into the community and then to distribute it. It started off originally people doing it for themselves and then making it available to their neighbors and they suddenly realize that when their neighbors came around, that this was a sort of service that everybody wanted to have and it became a business, that they would charge people for the opportunity of being able to get television service that otherwise was not available. While the rates for this service tend to vary throughout the United States, mostly they're now between a low of four and ahigh of six dollars per month for this service.

As the institution developed, what happened was in some communities they did have their own television stations, but maybe only had one or two. By means of CATV, sometimes by bringin in the signals by a high antenna or sometimes by microwave, you were able to bring in the three networks and maybe independent stations. So that whereas people could get

some free television in their communities from the one or two stations there, they were willing to pay this four to six dollars a month for the ability to be able to get three, four, five, or six signals, which were distributed over the same cable.

Initially the Federal Communications Commission paid no attention to this phenomenon; neither did the broadcasting stations. Quite to the contrary, the broadcast stations were very happy with what CATV was doing because it was really filling out the service area in a way that, if geography and terrain had not intervened, the signal would be available. And obviously the more people who were able to receive the signal, the better for the broadcast station, because the broadcast station was able to sell advertising on the basis of its circulation.

But as this started to proliferate and the Commission even said initially that it had no jurisdiction over the subject matter--but as it started to proliferate and as the importation of signals tended to create an economic problem for some of the existing television stations, because obviously if you're the only television station in town with no CATV, you have a captive audience; people either listen to you or don't listen to anyone at all. But when CATV brought in signals from two, three, or four stations, it fractionated the audience. People were given a program choice.

This is what the law and the policy of our government demands, but obviously the local broadcaster was unhappy because he was losing his monopoly. So, they began to complain to the Commission about this process, and the Commission undertook to regulate CATV systems to the extent that they imported signals. They adopted basically two types of rules and regulations on the subject. One was a rule and regulation that said that a CATV system must carry all local systems.

In other words, if the signal is locally available in the community, the CATV system must put it on its system. This seems self-evident, but at least at the outset when CATV systems got started and when capacity on the CATV system was rather limited, the local station was not a particularly attractive commodity and the CATV system would bring in signals from outside that were more salable and the local station therefore would tend to have difficulty in getting an audience once a person was on a cable; the local station wasn't on the cable. That subscriber would have difficulty in getting a local station.

So, the Commission said as a minimum matter you must carry all local signals so as to make sure that the local station is not prejudiced.

Secondly, the Commission said that we will restrict the importation of distant signals, since distant signals come into the market and tend to fractionate the audience.

It might cause a problem so far as the local station is concerned. We will restrict it to make sure that you don't overdo it. We will undertake to strike a balance so as to make sure that you are able to bring in enough signals so that when added to the local signals people get adequate service. By that they generally meant that they are able to get service at least from the three networks. But beyond that they wouldn't permit it.

That was challenged, and ultimately this Court in Southwestern did sustain the authority of the Commission to adopt such rules and regulations because these rules and regulations were ancillary to the Commission's authority with respect to broadcasting. CATV systems, the Commission held and this Court agreed, are engaged in communication by wire or radio within the meaning on the air. And while they are not broacast stations themselves, they are an instrumentality, a medium--

Q That's because they are carrying broadcast signals?

MR. PLOTKIN: That's because they're carrying broadcast signals, that's right.

Q Even though at the tail end they are carrying them by wire?

MR. PLOTKIN: That's right. They are really performing no different function in that respect than you do

in your own home when you put an antenna on top of your roof. You have a wire coming down from the antenna into your set. This is obviously a much more sophisticated wire. But you are doing the same thing. They were also capturing the signal on the antenna and distributing over a long wire to many people.

Q Did Southwestern uphold the power of the Commission to force the cable TV's to carry things they didn't want to?

MR. PLOTKIN: No. That wasn't even involved. Quite the contrary, when--

Q What about the order to carry local stations.

MR. PLOTKIN: To carry what?

Q That the cable operators had to carry all local stations even though they didn't want to.

MR. PLOTKIN: Yes, that was what was involved there; the Commission said that it's part of our authority--

Q I know, but was that involved in Southwestern?

MR. PLOTKIN: The rule was involved in that case.

Q It was upheld?

MR. PLOTKIN: That particular one wasn't challenged but in another case which Midwest had brought in the Eighth Circuit where that rule was challenged, the Eighth Circuit did uphold that regulation and so the courts have upheld--

Q Do you challenge that as well?

MR. PLOTKIN: Yes.

Q If your position were sustained, would you say the Commission couldn't force the cable TV people to carry all local stations?

MR. PLOTKIN: That's the position we took several years ago, and we were not able to persuade the courts that that was correct. The reason we took that, just for a little history, was this is a reception service and the Commission only had jurisdiction over transmission service. The courts have agreed with the commission on that and said you can adopt rules and regulations--

Q But I just wondered if your position were sustained, would it also invalidate that rule?

MR. PLOTKIN: No. In this case, not at all. Not only would it not invalidate that rule, but it wouldn't invalidate the rules and regulations that the Commission has adopted that say that if you voluntarily originate, you have to comply with the fairness doctrine, you have to comply with the lottery law, with all the other rules and regulations with respect to this. There are difficult legal questions I think that Your Honor was adverting to in questioning Mr. Wallace as to whether there is not constitutional queasiness about that, but that's not involved here.

Q What is the collision, if any, with the state systems of regulation?

MR. PLOTKIN: The states--the Commission is undertaking in many areas to preempt the area of state regulation. The states are fighting that.

Q Is that involved in this case?

MR. PLOTKIN: The State of Illinois has filed a brief amicus in this Court in which they assert that it is involved. I don't think it is involved myself, and I don't think that the government feels that it's involved. But the states at least see where it's leading to and getting into this problem early. I don't think this particular rule and regulation does involve the divisions of authority between the federal and state authorities. We think that the power that compels someone to go into a business that he doesn't want to, the state would like that power--

Q What I'm getting at, does any state have regulations covering origination?

MR. PLOTKIN: Some of the municipalities--you have to get a franchise from a municipality to operate a CATV system because your wires cross over alleys and streets. Some of those franchises require the CATV operator to originate programs.

Q They would fall under this regulation?

MR. PLOTKIN: Not automatically, because we think that what's involved here is an absence of statutory authority with constitutional overtones, but we don't think

you've reached a constitutional problem because there is an absence of statutory authority. But the constitutional overtones argument is involved; the same constitutional limitations would be applicable in municipalities as applicable to the federal government. But that is not involved here because I think we don't reach that; the Commission has not been given this authority by Congress. Whether Congress could give it the authority is not entirely a clear question and would depend entirely on the type of statute that Congress drafted, the type of findings they made as to whether they could--what would be involved. But that's not involved here. We think it very clear that Congress has not given the FCC authority with respect to that.

What Congress did give the Commission authority so far as reception activities are concerned is that you can adopt rules and regulations rather reasonably insulated to your regulation of broadcast stations. And, for example, with respect to your mandatory carriage of all local signals, since the Commission in Section 303(a) and 303(h) of the Communications Act provides that the Commission has the authority to classify radio stations and to prescribe the areas to be served by them, well, obviously it's ancillary to their jurisdiction, says the court, for the Commission to require a local CATV system to carry local signals; because if they don't, the area that the Commission has prescribed

for a broadcast station is cut off. By the same token, when the Commission says that you shall not import distant signals beyond where they are intended to be carried--for example, if you're operating a system in Casper, Wyoming, and you are trying to import a signal from Denver, Colorado, it's obviously extending that signal beyond the area which the Commission prescribed that station is to serve. The Commission under certain circumstances did permit those signals to be imported but only for the purpose of making sure that the people in Riverton, Wyoming have enough reception services.

So, that is the theory upon which the Commission upheld authority in the Southwestern case because it was reasonably ancillary to broadcast jurisdiction over television stations.

Q In some of the maintainous areas out west they can't get television without this.

MR. PLOTKIN: That's right. That's right. And this is why this does perform a very important public interest function. And when they do perform their function of interstate communication by wire or radio, they are subject to the jurisdiction that Congress has given to the Commission, to make sure that it carries out the policies of regulating broadcast station and is not inconsistent therewith.

A CATV system in its essence is a very, very

simple matter. It erects an antenna, cables come down and distribute it to the people who pay four to six dollars a month for that service. The problem was relatively simple, the personnel involved were relatively few in number and unsophisticated personnel; people who string cables and maintain cables, who hook up television receivers; and a small billing department that goes on and bills the people four to six dollars a month and collects it.

Now, the Commission comes along and says CATV operates in many small comunities that don't have their own television station. Wouldn't it be nice if these had television stations? And, therefore, the Commission said that if you're going to stay in business, since you're using broadcast signals, if you're going to stay in the business of providing broadcast stations, we want to--not only want to, demand--that if you have 3500 or more subscribers, that you must also become a broadcast station, and that's what cablecasting means. You must become a broadcast station. You must originate your own programs. You must have facilities available for local programs and you must originate it.

This is an entirely different business activity from what CATV is involved in.

Q Do you say that the Commission could never require that development it's now reaching for here?

MR. PLOTKIN: Under the statute that Congress adopted, they do not have the statutory authority. That is clear.

Q Under any circumstances.

MR. PLOTKIN: Under any of the present statutes. Under present statutes they're not.

I should point out to Your Honor that in a somewhat related field, to wit, when television receivers were first being marketed, they were being marketed with VHF channels only even though there was both VHF and UHF channels, the television receivers were being marketed with VHF channels only. And the Commission argued that television was not getting off the ground so far as UHF was concerned. The Commission went to Congress to get a statute passed that said that if you manufacture television receivers, you must make sure that they have all the channels. The Commission felt the need of going to Congress and getting some specific statutory authority. Desirable as the objective was, they felt powerless to do anything about it without getting it from the national Congress. The need to go to Congress to get authority in this field is very, very clear, in the reception field, where they have--where they had to get a statute, Section 303, passed which specifically authorizes the Commission to prevent in shipment in interstate commerce a television receiver unless it carries both VHF and UHF so

that the entire spectrum can be utilized.

What the FCC is telling to a CATV system is you must become a broadcaster. Not only must you have this simple equipment up there for distributing signals, you've got to go out and buy cameras, you've got to go out and buy microphones, you've got to hire people who create programs. We don't create programs as a CATV system. We're a passive distributor of programs. We are really performing the function of distributing the signals that are dedicated to the public; we are making them available to the people. It's a simple, dedicated function. We're not creative people in the sense of being able to create a program. They said we have to buy new equipment, the television cameras to project an image, sophisticated people who can create programs. To the extent that copyright programs are involved, we've got to go out and get copyrights on all those. There is no doubt that when we originate a program involving copyrighted material, we must get a copyright license. Nobody can tell me we can do it without a copyright license.

Not only that, we submit ourselves to a whole new area of regulation of the Commission. We've got to learn about equal opportunity, volumes and volumes of Commission regulations that they have adopted dealing with broadcasting we've got to learn about. We're not challenging that if we do it voluntarily. But we're saying this is an entirely

different business activity from what's involved in--when we dedicated our property really to being a CATV operator. The Commission now comes to say, "Fine, you're a CATV operator. But we now want you to enter into an entirely different business activity from you yourself undertook to do."

That's what's involved when you take origination. The Commission in effect says that if you're located in a small community, even where there is no other television station involved so you're not having an impact on them, and if you have 5000 subscribers, important as your service is of bringing television service to those people who might not get it otherwise--

Q Let's assume there is a licensed TV station in a town and the operator or owner prefers to just be a transmitter, network a hundred percent; doesn't the Commission have power to tell him he has to put on the air a certain amount of local program and originate some program?

MR. PLOTKIN: The Commission says to him, "You can't operate a broadcast station without a license, and the license requires you to operate in the public interest. When you came to us and said you want the station to operate in the public interest, then they say"--

Q Doesn't the Commission now say to the cable-caster, "If you want to use broadcast signals, you have to get a little piece of paper from us"? Don't they have to get

permission? The Commission says to them, "If you want to use these broadcast signals, you've got to carry them into houses, a certain balance of program."

MR. PLOTKIN: That's what they're saying.

Q What's the difference between the two situations?

MR. PLOTKIN: The difference between the two situations, in effect they're saying, "If you want to carry broadcast signals, you must become something additional to that. You must become a broadcaster."

Q I know, but in the example I gave you a man says, "All I need is some equipment and I just transmit, automatic. I don't need a lot of people. I don't need to produce programs. You're forcing me into another business of producing. I don't want to produce anything."

MR. CHIEF JUSTICE BURGER: Do you want to answer that after lunch?

MR. PLOTKIN: Yes.

[After the luncheon recess the session continued as follows.]

MR. CHIEF JUSTICE BURGER: Mr. Plotkin, you may continue.

MR. PLOTKIN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: You have about ten minutes remaining of your time.

MR. PLOTKIN: If you remember the question that Mr. Justice White asked, What is the nature of the undertaking of the Commission's jurisdiction? And I'd like to address myself to the quintessence of the question that we use broadcast signals, because there's an implication--not an implication but a direct statement of the Commission--that there is a benefit conferred since we use broadcast signals. But basically this is not a parasitic or exploitation relationship. It's a symbiotic relationship. Broadcast signals, when they're transmitted over the air, are worthless unless there is something on the other end to receive them and make use of it. We are just as much a part of it, not as a recipient of a benefit but as part of the symbiotic process, as it were. And we're no different than the local dealer that makes television sets to make them available to the people so that they can receive the broadcast. Obviously if no one is making broadcasts, there would be no market for sets.

But, by the same token, if no one were making sets, there would be no purpose in transmitting signals over the air. It's a duality of the process.

To tell us that just because we utilize broadcast signals in a manner in which they are intended to be utilized and in a manner in which, unless we did something with them they wouldn't be useful at all, that therefore we

should now undertake to become a broadcast station in effect is to be able to tell the manufacturer of television receivers or to sell television receivers, "Since you are making use of broadcast signals, you ought to do something. You ought to go and open a broadcast station in your town."

We're undertaking part of the process. The Commission has certain jurisdiction over one part of the process and another type of jurisdiction over the other part of the process. Nowhere has Congress given the Commission the power to say that if you do part of the process you also must do another part of the process.

It's like in the case of Frost & Frost where we cited in effect--where the State of California told this gentleman, "If you want to use our roads, you've got to be not just a private contractor; you must be a common carrier for hire." And the Supreme Court said, "No, you can make reasonable regulations relating to the use of the road. You may even forbid the use of the road. But you can't say that if you utilize the road, if you at the same time say that since you're utilizing the road, you become a common carrier even though that's not what you intended to dedicate your property to."

Q Isn't the Commission saying here, Mr. Plotkin, that in order to perform and fulfill your total public function, you must do these additional things?

MR. PLOTKIN: That's what they're trying to say, and I'm not saying that it's an unworthy thing that they're trying to do. But in effect they are telling us who only want to bring in--to manufacture and sell receivers, to install receivers, since we are performing that function, we ought to do something else.

Q You are doing a little more than installing receivers. You're operating a system, the last stage of which is installing a receiver.

MR. PLOTKIN: That's right. If Congress had said that this whole business of installing as a new business, that if you install and so forth, that as part of that there ought to be certain responsibilities to it, that could be another thing. But so far as our function is concerned--and as this Court pointed out in Fortnightly, true from a copyright point of view--what we do is perform the reception part of this and not the transmission part. It's an entirely different activity that they're asking us to do. It's not like a broadcast station where the man who enters into operating the broadcast station must operate in the public interest.

The analogy, as I say, if you're going to be a CATV system, you're going to be a CATV system, which means that you're going to carry the local signals; it means that you are going to carry them in such a way as not to degrade them.

But you must meet certain technical standards in your operation of a CATV function. We have no problem. That's the business we're in. The Commission can lay down rules and regulations that if we enter the CATV business, we must do it in the appropriate manner, and that's what Southwestern was all about.

Q And in the public interest.

MR. PLOTKIN: In the public interest related to the reception and as ancillary to the broadcast function. I don't see how it's ancillary to the broadcast function to tell us that we must become a broadcast station in effect in a way that might yield benefits to the public. It does not help the broadcast station in any event to have us become a competitor by originating programs. The whole theory of regulation even in the broadcast field--those of us who come from small towns who don't have any broadcast station would love to have had broadcast stations. The Commission has never had the power to say to someone that you've got to go in and operate a broadcast station in that particular town. They say if you want to operate a station in that town, you've got to live up to certain rules and regulations. But the affirmative requirement that tells him that he must operate a broadcast station is really what's involved here. It's imposing a duty on a difference of kind, not just of degree, not just definition. They can tell us how to operate a CATV

business, the quintessence of a CATV system. But when they say beyond that you now must undertake to operate in addition a broadcast station, the correlative of this would be in the area before there was a multi-channel war, let us say, when people were operating either VHF or UHF television stations and the Commission said, "Television is not getting its maximum potential for the simple reason that there aren't enough either cheap receivers out or there aren't enough receivers outstanding that are capable of receiving UHF. And, therefore, as a condition of operating your television station, we insist that you go into the manufacturing business and manufacture receivers so that people will be able to receive their signals."

Not only didn't the Commission undertake to do that with respect to broadcasters, as I mentioned earlier, even with respect to manufacturers who are manufacturing receivers; it took a specific enactment of Congress to enable the Commission to be able to tell the manufacturer that in order to engage in this business, your receiver must carry all channels and not just the channels that you want to put on.

When the Commission adopted its rules and regulations which said that you can't have the luxury of carrying only distant signals, if you're going to be a CATV system, you must carry local signals, that was enabling them to regulate the business that we have done to perform in a

reception function. If they say that the signal must have a certain quality to make sure that the public gets the same quality of signal on the set as being transmitted by the station, that also is part of it. But to say in addition that we must become a broadcast station is in effect the analogy that we cited in our brief, like the distributor of the New York Times in Washington, for example, is performing a function, he is taking advantage of a newspaper function. If some local authority said that in return for that privilege, we don't think there are enough local newspapers in town, we think that you ought to publish a local newspaper, this is what the Commission is doing.

We are not arguing with the desirability of the function. What we're saying is under our system of regulation, that you cannot be compelled to dedicate your property to a business that you don't choose, that when you enter a business you are subject to rules and regulations; and if we voluntarily originate, so far as this case is concerned, we can't originate and fail to comply with the same fairness, equal opportunity, and other law as does a broadcast station.

Q I thought the basic question here was whether or not this order of the Commission was within its statutory authority, not whether or not it was good or bad.

MR. PLOTKIN: That's right. It is. And that's why

I say we are not arguing that the line should be a 3500 or 6000 or 10,000. We are not arguing that. But we're arguing it's not within the statutory jurisdiction to compel us to do this.

I do want to mention one further fact. It's not crucial to the case, but Mr. Justice Douglas had asked whether there are any grandfather rights with respect to this. The grandfather rights are not applicable here. This is applicable to all CATV systems no matter when they started. The grandfather rights that the Commission recognized in this field pertained to the situation that you're permitted to continue to carry the broadcast signals that you did before. But no grandfather protection has been called into this thing. We don't think that's crucial because we think the statutory jurisdiction is lacking for the new system as well as old systems. But I didn't want the record to be vague on that point.

In summary, the position that we have taken is that it's a matter of statutory authority the Commission is authorized to regulate broadcast stations. They are authorized to regulate CATV systems only to the extent that it's reasonably ancillary to broadcast functions. And that relates to the type of rules and regulations as to the carriage of broadcast signals. We do not argue, because it's not involved, as to whether if we're going to take voluntary

origination that we are not subject to the same rules and regulations as are applicable to broadcast stations. That is not before the Court. We are not contesting this so far as this record is concerned. We do say, though, that we should not be compelled to enter into a brand new, entirely different kind of business as a condition of performing the function of making signals available that are dedicated to the public by taking their signals and putting them to the use for which the dedication was contemplated.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Plotkin. Thank you, Mr. Wallace. The case is submitted.

[Whereupon, at 1:10 o'clock p.m. the case was submitted.]

- - -