In the

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,

Petitioner,

v. No. 72-948

UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

Washington, D. C.

December 3, 1973

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v.	:	No. 72-948
UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION, Respondents.	:	

Washington, D. C.
Monday, December 3, 1973

The above-entitled matter came on for argument at 10:03 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
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STUART F. FELDSTEIN, ESQ., 918 - 16th Street, N. W., Washington, D. C. 20006; for the Petitioner

EDWARD R. KORMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; for the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 72-948, National Cable Television v. United States and Federal Communications Commission.

Mr. Feldstein, you may proceed whenever you are ready.

ORAL ARGUMENT OF STUART F. FELDSTEIN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case this morning arises from an appeal from the Fifth Circuit Court of Appeals opinion upholding the fee schedule of the Federal Communications Commission as it applies to the CATV industry and, in particular, that portion of the fee schedule which is related to annual fees on a per subscriber basis.

In general, the facts are as follows:

In 1952, as a rider to the Appropriations Act, Title V was appended. This title gives the Federal Communications Commission and all other so situated agencies the power to enact fees to collect some of the costs of regulation which they incur.

As a part of this Act, the Budget Bureau, under the President's Office, was directed to perpetrate some kinds of standards for the collection of the fees. The operative

document in this case, which is appended in the Appendix, is Budget Bureau Circular A-25, which was last amended in 1959, so that is the circular we are working with under these fees.

Under these two pieces of authority, in 1963 the Federal Communications Commission first enacted fees. These fees were enacted in Docket 14507, and they were based on applications for licenses and other kinds of filings made in front of the FCC. These fees collected approximately 25 percent of the budget of the Federal Communications Commission.

There were appeals from these fees which, incidentally, did not apply to the CATV industry because CATV was not at that time regulated by the Federal Communications Commission.

The Seventh Circuit, in a case called Aeronautical Radio, Inc. v. Federal Communications Commission, and later this Supreme Court, affirmed the FCC's fees, and in so doing stated that Title V of the 1952 Appropriations Act enabled the FCC to collect these filing fees.

In 1970, the Commission decided to revise its fee schedules, so they filed in February of 1970 a notice of proposed rulemaking. This notice of proposed rulemaking proposed to do three or four things. It proposed to raise the filing fees, it proposed to add CATV for the first time, including filing fees, since they had now taken jurisdiction over CATV as far back as 1955 and 1956, and annual fees were added. In particular for CATV, the annual fees were to collect some 90 to

95 percent of the fees which the FCC decided it wished to collect from the CATV industry. These annual fees which were adopted later in 1970 were done on a per-subscriber basis, 30 cents per subscriber. A CATV system obtains the vast bulk of its revenue from subscribing homes which it hooks up to its system, and it is usually expressed, the size of a system is expressed in the number of subscribers. The FCC therefore stated its annual fee is on a basis of a per subscriber fee, thus 30 cents.

Parenthetically, as is noted in our brief, the 1972 still outstanding rulemaking proposes to raise these fees from 30 cents per subscriber to 40 cents.

Q Somewhere in the briefs or perhaps in the Appendix I saw some figure as to the total cost to the Commission for the people engaged in the regulatory work relating to television. Do you recall what that figure is, just approximately?

MR. FELDSTEIN: Yes, the activity costs are on page 31 of the Appendix, and it gives the cost as $1,145,400 or 4.6 percent of the FCC's budget. Now, these costs incidentally are both direct costs of the Cable Bureau and attributable costs such things as the Field Engineering Bureau and the Commissioners' offices, which cannot be attributed lock, stock and barrel to one activity but are spread as a percentage across, so you have direct costs and then you have indirect

costs.

Q Is it fair to say that if cable television disappeared from the face of the earth for some reason or other, that most of that $1 million-plus would be out of their budget?

MR. FELDSTEIN: I would presume so, yes.

Several parties appealed the Commission's report and order of July 1970, and the first appeal was filed in the Fifth Circuit, so all appeals were transferred there, and in the Clay case, which is the decision before you, in 1972 the FCC was upheld in all particulars.

The CATV industry's appeal was based on the annual fee, and the allegations were that the annual fee was not related to the statutory criteria of the Appropriations Act and had misapplied the criteria stated in Budget Bureau Circular A-25.

Now, in more detail, the authority to collect fees comes from Title V, and this is reprinted on page 151 of the Appendix, and in that section they state that "It is the sense of the Congress that any" -- and it lists several things, these types of activities done by an agency -- "shall be self-sustaining to the full extent possible," and then it states "subject to such policies as the President may prescribe," which is the authority for Budget Bureau Circular A-25, and then it goes on to say, about two-thirds of the way down that statute, and these are the operative criteria that the fees

must be "fair and equitable taking into consideration," one, "direct and indirect cost to the Government," two, "value to the recipient," three, "public policy or interest served, and" -- four -- "other pertinent facts."

Q Mr. Feldstein, I think the parties are agreed that the authority to assess these fees focuses in this particular statute nowhere else, this is it.

MR. FELDSTEIN: That is correct. The companion case has some arguments about stuff in the Federal Power Commission Act, but there is no authority in the Federal Communications Act, with one small example which has nothing to do with CATV, so we are discussing this particular statute.

Budget Bureau Circular A-25, which begins on page 142 of the Appendix, interprets this statute and lays out for the federal agencies how they are to go about setting fees.

The first important statement is on page 142 of the Appendix, under section 2, Coverage, where it states in the second line, "the provisions of this Circular cover all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large."

Then on page 143, all of section 3(a) states the criteria, the most important of which are set out right in the top of the page where it states, under "General Policy," "A reasonable charge, as described below, should be made to" one, "each identifiable recipient," two, "for a measurable

unit or amount of Government service or property from which he," three, "derives a special benefit."

So the identifiable recipient, measurable unit of service, and special benefit criteria are what I believe I submit that we should be looking for in the promulgation of these FCC fees.

Q Mr. Feldstein, do you think that the Bureau of the Budget Circular covers the Federal Communications Commission?

MR. FELDSTEIN: I do, yes, sir.

The assumption has been made that it did. This question was not handled in the court below, and the Congress in the hearings which are cited by the government in 1969, which urged the agencies to go forward, were urging the Commission to go forward under this, and the Federal Communications Commission was one of the examples that were used in the original legislative history.

Now, under "Special Services" on page 143 of the Appendix, several things are listed.

Q Let's assume the Federal Communications Commission wrote back to the Budget Bureau and said "your construction of the Act is very interesting, but we have a different view and we prefer our own view." The Bureau of the Budget has no direct authority over the Commission I guess, does it?

MR. FELDSTEIN: No, but in the process of budgets, in

the process of promulgating forms, in the process of many things that the Commission does, you must go through the Bureau of the Budget. For example, when the Commission --

Q Well, I understand that, but how about my question? Could it say "you wouldn't approve of this particular type of fee, apparently, but we think it is fully consistent with the Act and we are going to follow it." There is nothing the Bureau of the Budget could do about it, is there?

MR. FEIDSTEIN: I think that the Act states that you must follow the criteria that are set down by the President, thus the Act states that subject to such policies the President may prescribe --

Q What are you reading now?

MR. FELDSTEIN: I am reading in the middle of Title V which is found on page 151 of the Appendix. And it is pursuant to this phrase that Budget Bureau Circular A-25 was promulgated by the President's Bureau of the Budget.

Q Even so, I don't suppose the Bureau of the Budget could itself -- whatever it said would have to be authorized by the Act or consistent with it, I suppose?

MR. FELDSTEIN: That is correct. That is correct.

Q Mr. Feldstein, that part you are reading from there on page 151, the policies as the President may prescribe, is preceded by the language "which, in the case of agencies in the executive branch, shall be as uniform as practicable and

subject to such policies as the President may prescribe." Doesn't that suggest that that is perhaps a more limited category of agencies than would be covered by the Act itself?

MR. FELDSTEIN: The government, I believe, has suggested this in one paragraph in its brief. But I believe that the legislative history of the Act substantiates the view that it was intended that such guidelines would be set down for all agencies which were both congressional and executive departments, and as such the guidelines in Budget Bureau A-25 have -- the agencies that have promulgated fees have attempted to follow these, no matter which category they had been in, and this was the area which was looked at in fact by the courts in the Aeronautical Radio case.

Q Going back to Mr. Justice White's question about the posture of the Budget Bureau's Circular, I suppose it is a fact that all of the agencies must put their budgets through the Bureau of the Budget and that historically it has been a coordinating agency and because of its authority to shape and trim the budgets of the agencies, it has considerable leverage, does it not?

MR. FELDSTEIN: That is correct, yes.

Q Whether this -- Congress could, of course, increase a budget, but the Budget Bureau has initially a great deal of authority in the way of enforcement here, do they not?

MR. FELDSTEIN: Yes. Yes. Thus, when the Commission

goes to the Bureau of the Budget with its budget, difficulties which OMB has are hammered out, thus the Commission's budget may be decreased or increased by the Bureau of the Budget before it ever sees the appropriate Appropriations Committees in Congress.

Q The agency may not generally ask for something which the Bureau of the Budget and OMB has declined to approve, is that not correct?

MR. FELDSTEIN: That is correct.

The criteria in the Budget Bureau Circular are then followed on page 143 of the Appendix by a listing of the kinds of special services for which fees are authorized to be collected. Thus, in 1(a), (b) and (c), there are examples, receiving patents, crop insurance, license to carry on a specific business, certificates of necessity and convenience; and (b) safety inspections of craft, et cetera.

We submit that the common thread in all of these examples is that a particular identifiable entity has received an identifiable benefit. The legislative history of the Act, I believe, bears this out. Thus, in the Senate reports, which are quoted at some length on pages 22 through 26 of the NCTA reply brief, you will find language to that effect, likewise the sole floor comments, since there was very limited floor debate on that, by Representative Yates, printed on page 25 and 26 of our reply brief, talk about getting fees back for a

portion of the operations, talks about applications or certificates of public convenience and necessity being paid for by the person who applied for it.

So that it is our feeling that the legislative history supports the interpretation of the Act which we are giving and which we feel that the Budget Bureau gave in Circular A-25.

Now, in Aeronautical Radio, what was before that court, the Supreme Court and the Seventh Circuit, were the questions under specific filing fees. And unless there be any doubt of that, on page 33 of NCTA's brief, opening brief, we quoted from the Commission's report and order at that time, where the Commission was adopting filing fees and stated that they were obtaining to the fullest extent possible fees for services which bestow special privileges and services upon certain individuals who may apply for those privileges and services.

So certainly what the FCC was doing at that time was decidedly limited to the voluntary filing for special privileges.

Then in the New England Power case, which is the companion case to this one, the court there was faced with a similar interpretation as to what the FCC is attempting to ask this Court to interpret the Budget Bureau Circular and the statute as, and in that case it was rejected. And I will get into that one a bit more.

These then are the authorities which are prevailing

for the justification of the FCC's fees and the limits that we feel are placed on them.

Now, going down in the argument, the criteria, in terms of special benefit, we have aruged in our brief, and the government has argued back and forth as to whether the FCC's regulation of CATV has provided any special benefits to the CATV industry. It is our allegation that the FCC's regulation has been bad for our industry, that it has had a very deleterious effect, and that in fact in the years under review here, from 1968 to 1972, which cover all of the years of the fees that are under review today, there was in fact a freeze on CATV growth.

Up until 1966, or '65, rather, there was a rather unlimited growth on CATV, it was limited by its own constraints and limited by local law but not by the FCC. Starting in 1965, the FCC began to regulate quite heavily and their 1966 second report and order, which was reviewed by this Court in U.S. v. Southwestern, that particular report and order did not work out well, and there is plenty of documentation to that effect in the briefs and in the FCC's own reports and orders and notice of proposed rulemaking proposing to change their rules.

In December of 1968, all growth of CATV in the larger markets was frozen. Several attempts to unfreeze this situation went for naught and, finally, in February of 1972, long after the fees in question were enacted and long after the

appeal from the fee schedule was taken, the FCC adopted some new rules in 1972.

The FCC has attempted to bring these 1972 rules into play in this case. I very strongly submit that whatever the 1972 rules do or do not do for the CATV industry, they were not the rules and not the regulations which were in effect at the time that these fees were promulgated, nor were they in effect for the two and a half years in which these fees were collected and that which cover the period from the promulgation of the fees in 1970 until the new rules in 1972.

Now, the Commission has stated that even in 1970, at the time that these fees were promulgated, there was much to say for the FCC's regulation that would give a special benefit to the CATV industry. Thus they state that we had to have authorization or permission or they could have stopped us, however you wish to phrase it, for the carriage of signals, especially distant signals.

They also state that the phone company, the General Telephone case, in which they put phone companies out of the CATV retailing business in their service areas, was such as to give us open entry and eliminate a potentially anticompetitive threat.

I say to you that the New England Power rationale for this, without even arguing about whether this was good or bad for us, the New England Power rationale is the proper rationale,

page D8 and D9 of the Appendix D to our petition for certiorari.

Q Is that the Court of Appeals decision?

MR. FELDSTEIN: That is the -- yes, that is correct.

This question of economic climate in regulation generally benefiting the entire industry is dealt with at some length in a long paragraph on page D8 and D9 of this opinion which, to repeat, is appended as Appendix D to our petition for a writ of certiorari, where the court states: "The creation of an economic climate is not a special service nor is a particular pipeline or gas company, substitute CATV system, the special beneficiary of such a climate any more than any other CATV system or the consumer in general."

Skipping then to the last portion of the paragraph, "The Commission's inadequate response that the identifiable recipient is the whole industry assumes that each company receives a benefit directly proportional to revenue," which is the case in our situation, where the fee is being collected proportional to revenue because they are collecting it per subscriber.

There is far more to regulation than simply what the FCC was doing and in fact is doing. They have played down to a considerable extent the franchising in state regulatory activities which go on. No matter what the FCC says, there is no CATV system in a town until the community authorizes the operation of the CATV system.

The Commission's statement that the valuable benefit received from the authorization to carry signals is strange in light of the fact that this Court in Fort Nightly held that there is no monetary liability for the carriage of signals for a CATV system under the copyright law, and thus we submit that not only are the FCC's regulations, at least those empowered in 1970, those in force in 1970, not of benefit to the entire industry, but that there is far more to the regulation of cable television than that which the FCC did in 1970 and in fact which they do now.

Q Are you saying that there is some benefit to the cable television industry when telephone companies were taken out of the play, out of the picture as competitors?

MR. FELDSTEIN: Yes, to a certain extent, that was true. It certainly wasn't true for those CATV systems which were owned by telephone companies, nor was it true for those areas where the telephone company posed no threat. But, yes, generally speaking, the CATV industry welcomed, certainly NCTA was an intervenor on the side of the Commission in the defense of the rules which put the telephone companies out of the business in their particular area.

However, even assuming, going on then to the next argument, even assuming that some of the their regulation can be stated to be of some benefit to the entire industry, and I would hope that any regulatory agency's regulations would at

least be of some benefit to the industries which it is regulating.

The statute, as interpreted by the Budget Bureau, call for an identifiable recipient, thus you call for a special service to a particular company. The crux of this entire case, I believe, is the FCC's and the government's statement that where you benefit the entire industry, you can recover the regulatory costs for that on a pro rata basis.

The examples given in the Budget Bureau's Circular A-25, as I quoted from page 143 of the Appendix, would not lead you to conclude that. They talk about receiving a patent, crop insurance, license to carry on a specific business, an airman's certificate, et cetera. In other words, something is gotten by an individual from his government. He is not simply a member of an industry which is being regulated, and that is the key. That is the key to this case, and that is the key which the Court of Appeals in the District of Columbia saw in its interpretation of Title V, where it stated that, no matter what kind of benefiting you were doing as an agency to the entire industry, that was not sufficient. That was public interest, that was consumer in general, that was entire industry, that is not what is meant by Title V and is not what is meant by the Budget Bureau Circular A-25.

Thus, what I am saying is that there is no relation between the fee and the services, and this is in two ways. A

particular CATV system may have no dealings with the FCC during the year at all and still get charged the same fees as the same size CATV system which had considerable dealings with the FCC. And, furthermore, even if both of my hypothetical systems had dealings with the FCC, the number of subscribers, which is the key to the annual fee, is totally unrelated to the work done for that particular system. Thus, what the Commission is doing here is taxing the entire industry to recoup the entire cost of its regulatory program.

If that were to be the law, there would be no practical limit on the amount of fees that the FCC could collect so long as they could obtain a higher budget for their CATV regulation.

If there are no further questions, I would like to reserve the remainder of my time for reply.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Feldstein.

Mr. Korman?

ORAL ARGUMENT OF EDWARD R. KORMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The Department of Justice appears here today on behalf of the United States and the Federal Communications Commission to urge affirmance of the unanimous decision of the United States Court of Appeals for the Fifth Circuit which

sustained the Federal Communications Commission's construction of an act of Congress, Title V of the Independent Offices Appropriations Act of 1952.

The issue presented here is whether the activities undertaken by the Commission with regard to the CATV industry come within the categories prescribed in Title V of the Act and therefore compel the Commission to impose an annual fee of 30 cents per subscriber per month to be paid by each CATV system in order to reimburse the taxpayers of the United States for the costs incurred in sustaining these activities. These costs exceeded $1 million in 1970-71, and will exceed $3 million in the coming fiscal year.

The amount of the fee as calculated initially came to something in the neighborhood of one-half of one percent of the gross revenues of the CATV industry.

A number of cases involving the CATV industry have come before this Court in recent years, and there is really little need to discuss here the nature of that industry or its phenomenal growth into a $500 million a year business serving some seven million subscribers. That $500 million a year figure is almost double that of only four years ago.

Essentially, as the Chief Justice stated in his concurring opinion in the Midwest Video case, CATV systems exploit existing broadcast signals to which they make no contribution by plucking them from the air and transmitting them over

cables generally strung over telephone poles to subscribers who are hooked into the system and who pay generally speaking a monthly fee in the neighborhood of $5 to $6 a month.

Now, the implications for such a rapidly growing system through the carriage of broadcast signals placed the CATV's activities clearly within the ambit of the regulatory jurisdiction of the Commission, which is charged by Congress in section 151 of Title 47 to make available to all the people of the United States a rapid, efficient nationwide and world-wide radio communications service, with adequate facilities at reasonable charges.

Petitioner here charges -- challenges the annual fees imposed by the Commission on several grounds. And before getting into them I would like to speak for a moment to the Bureau of the Budget's circular that has been referred to by petitioner.

First, that is not and does not purport to be "an interpretation" of Title V. It simply is what it says it is, namely some general policies for developing an equitable and uniform system of charges. The Bureau of the Budget circular was adopted pursuant to the statement in Title V of the Act which says that in cases -- in the case of agencies in the Executive Branch, the fee shall be as uniform as practicable and subject to such policies as the President may prescribe for agencies in the Executive Branch, which the Federal

Communications Commission clearly is not.

And, as a matter of fact, the Bureau circular itself is addressed to heads of executive agencies and establishments. Moreover, it is quite true, as the Chief Justice pointed out, that the Bureau of the Budget does have extensive leverage which it can use even with respect to an independent regulatory agency.

But it should also be pointed out that the Bureau of the Budget is fully aware of what the Federal Communications Commission has done every year. It has been advised at the end of every year precisely what the Commission is doing. Indeed, it was at the urging in part of the Bureau of the Budget, now the Office of Management and Budget, that the Commission acted to substantially increase its fee schedule. So that the Commission is not bound by the particular language of the Bureau of the Budget circular. If it was bound by it, it would seem that the determination of the Executive Branch, which I represent here as well, that the Commission has complied with those guidelines should be sufficient. This is not a regulation, doesn't have the force and effect of statute; it is merely policy guidelines.

Q Was this Circular A-25 in fact addressed to the Federal Communications Commission? Was the Commission, in other words, one of the addressees?

MR. KORMAN: Well, the address of the notice, as it

appears in the Appendix --

Q Is to the heads of executive departments and establishments, and I wondered if that --

MR. KORMAN: It may very well have been, I am not certain.

Q -- I wondered if that did or did not include the Federal Communications Commission.

MR. KORMAN: I am not certain of whether they were actually on the mailing list. I would think they probably should be, even though they are not technically bound simply because it is not a bad idea for them to try and formulate their policies consistently with other agencies of the Executive Branch if they feel they can do so consistent with their obligations under the statute. I mean we are not -- and the Commission, of course, looked at these guidelines and attempted to follow them, and we believe they have in formulating the annual fee.

Q I take it that your point or a point that you made is that the Commission is not an executive department and/or establishment.

MR. KORMAN: That is correct, but nevertheless --

Q And further that the statute, Title V, requires uniformity to the extent practicable only with respect to agencies in the Executive Branch.

MR. KORMAN: That is correct but, nevertheless, as a

matter of policy, I am not suggesting that it would be undesirable. Well, I think generally it is a good thing to have a uniform set of schedules --

Q Is symmetry just good for its own sake?

MR. KORMAN: Well --

Q Should you treat things alike that are different? Is that wise and desirable?

MR. KORMAN: No. I mean the Federal Communications Commission, as far as the general public is concerned, and as far as the industry subject to regulation, it is a small matter to them whether technically the Federal Communications Commission is viewed as part of the Executive Branch or whether it is viewed as a creature of Congress and an independent regulatory agency, and it would seem desirable that where you have, at least in the eyes of the public, the view that it is simply part of the government, that agencies that appear to be part of the government act in a manner that is consistent provided that the particular agency feels that it can act that way and still adhere to the mandate which Congress has given it.

Now, petitioner challenges the annual fee on two grounds. First, it contends -- let me say one more thing. We are not suggesting that we are in any way conceding that we haven't complied with this Bureau of the Budget circular. I just want to put our position in proper perspective in that many of the words and standards that have been suggested by the

petitioner, applying key words like identifiable and officiary, measurable unit of government service, all of those things do not appear in the statute. And as petitioner conceded in response to Mr. Justice Blackmun's question, the question presented here, and it is presented in the first question of the petition for certiorari, turns on a construction of the Act and not the Bureau of the Budget circular.

Now, first it is petitioner's contention that the Commission's function is to serve the public interest, and that they do not receive any benefits from regulation. Indeed, they claim that the overall effect of the Commission's regulation has affirmatively hindered their economic growth.

Second, they claim that even if the CATV industry does receive benefits, the Commission erred in the manner in which it applied the criteria in Title V in calculating the fee. We submit that both of these claims were properly rejected by the Court of Appeals.

First, with respect to the petitioner's initial claim, we believe that the issue here does not depend on whether the CATV industry as a whole benefited or was harmed because or as a result of Commission regulation. It seems to us that everyone who enters a business which is effected with a public interest must of necessity expect to be regulated, and regulation means being told to do things that you don't like as well as things that you would like to undertake. They must expect

to be told that all of their activities must be conducted in a manner subordinate to the public interest, whether they like it or not.

Yet the language of Title V clearly suggests that those subject to regulation pay the costs of that regulation, and at least several instances which are relevant to this particular case.

This is clearly shown by the references to charges for the cost of issuing licenses, permits, certificates or similar things of value. Now, the only reason one needs a license to do anything is because, as a regulatory program which requires you to get the license, and yet Congress said after the fullest extent possible the agency should recover the cost of issuing that license, permit, certificate or other thing of value.

Moreover, it is equally clear that Congress intended that regulatory agencies not only be reimbursed "to the fullest extent possible for the cost of issuing these licenses," but that they also recover costs incurred in activities which confer benefits which are special, that is benefits which the regulated industry would not receive but for the fact that they were being regulated by the Commission.

And it is our submission that the Commission's regulation of the CATV industry implicates both aspects of this Act. In the first place, since 1972, Commission regulations

have required all CATV stations to obtain certificates of compliance. That is, the Commission has adopted regulations with respect to the franchising of CATV stations which divide responsibility between the local community and the Federal Communications Commission.

Essentially, what the Commission does is set out broad guidelines which have to be followed by the local agency, local authority in issuing its certificates.

Q Well, that is not true. A franchise is not a license in any sense of the word, is it?

MR. KORMAN: Well, in the sense --

Q I mean, it is not equivalent in other words to a radio or television broadcasting --

MR. KORMAN: Well, they couldn't operate without it. Now, I don't know --

Q Well, that doesn't answer the question, does it?

MR. KORMAN: Well, the statute uses words which are not limited to license. It says license, certificate, permit, other thing of value.

Q Well, that doesn't answer the question either.

MR. KORMAN: Well, it is certainly not the same as a broadcast license.

Q It is not a license, is it? It is called a license, and it isn't a license, and there is no other authority, is there, to license?

MR. KORMAN: Well, it is called a certificate of compliance without which they couldn't engage in this activity. Now, whether that comes within a dictionary definition of a license, it is certainly the equivalent of it, and I think the language of the statute is so worded as to indicate that the Congress intended that that ought to be covered. Without it, they couldn't operate. Of course, without -- in a sense, there is joint franchising authority here, because without local authority the FCC, the CATV station couldn't string up its cables, but all that authority is is to string up its cables. They still have to get the Commission's approval to carry the signals over the wires.

Now, I am not going to say that technically under some definition of license that this is clearly a license, but this is one of those statutes that is worded in a way in which Congress used every conceivable synonym --

Q You mean that could apply?

MR. KORMAN: Yes, that could possibly think of to indicate the breadth of what it was --

Q In any event, the filing fees, the so-called filing fees as such are not in issue here, are they?

MR. KORMAN: No, they are not really -- they don't begin to recover it to the fullest extent possible, the real cost of these proceedings. I think the filing fee for a certificate of compliance is $35 which merely covers the

mechanics of issuance. The real cost of the hearings, maintaining staff and carefully reviewing the certificates or constantly monitoring the industry.

Q How do you consider that the phrase "to the full extent possible," does it mean the same thing as the "fullest extent possible"?

MR. KORMAN: Yes, and --

Q I never heard the phrase "to the full extent possible." Have you? Anywhere else?

MR. KORMAN: I haven't thought about whether I heard it before. I don't have any recollection of ever hearing it before.

Q Are you suggesting that the certificate of compliance is to be equated with a certificate of public convenience and necessity, for example?

MR. KORMAN: Yes, and there are substantial benefits, let me say, that accrue as a result of the issuance of this certificate.

Q Mr. Korman, would the Commission turn down an application from a proposed CATV applicant by reason of the fact that he duplicated the area covered by someone already having a certificate, or would it leave that up to the local franchiser decision?

MR. KORMAN: I would think it would leave that up to the local franchising authority. Let me say that one of the

reasons there isn't the kind of monopoly protection in a sense that televisions get, it is because, as a practical matter, the local CATV system has a natural monopoly. That is, once it is established and has gone through strining up the wire, it generally has an agreement with the telephone company for use of the cables, it charges $5 a month and it has its subscribers and the start-up costs for going into the CATV business are very substantial, and it is not generally the fact that there are more than one CATV system operating in an individual area.

Nevertheless, the Commission has undertaken action to limit competition for the benefit of the CATV industry at the request of the CATV industry. It has gotten the telephone companies, for example, out of the CATV business at the request of the CATV industry, at the request of this particular petitioner here, who told the Court of Appeals, in asking to intervene in support of the Commission's regulation, that the regulation was essential to the existence of an independent CATV industry.

Q Did the action of the Commission getting telephone companies out of the business occur during this period that we are talking about, this four-year period?

MR. KORMAN: Yes, it did.

Q And are you charging the telephone companies for that service, putting them out of business?

MR. KORMAN: No, we are not charging them for putting

them out of business.

Q Well, are you -- these charges would be levied against, wouldn't they, the telephone companies so long as they were in business during this period?

MR. KORMAN: Well, they were in business for an interim period, but these petitioners here purport not to represent those companies. They are --

Q Well, they represent the industry, don't they?

MR. KORMAN: Well, they represent the independent CATV industry. They weren't representing the telephone --

Q Well, in any event, those fees are in issue here, aren't they? The fees are charged against everybody. That is what is before us here, isn't it?

MR. KORMAN: Well, we haven't raised any kind of standing issue but, of course, they have standing to raise the claims of their members. Now, if the telephone companies want to come in here and complain about the fee, I suppose they are perfectly free to do so.

Q These fees are charged against those companies --

MR. KORMAN: Yes.

Q -- whom you put out of business?

MR. KORMAN: Who will be going out of business but, since they are in business for years in which they are paying the fee, they are still benefiting from Commission regulation.

Q Quite a benefit.

MR. KORMAN: Well --

Q Are you suggesting that it is inherent in any regulatory agency that it giveth and that it taketh away, but that either act is part of the regulatory process, is it not?

MR. KORMAN: That is correct. What we are saying is that regulation, when you go into business that is affected with the public interest, you have to expect to be told to do things you don't like. What we are charging for, in a sense, is for giving benefits that you wouldn't get but for the fact that you were regulated, and they wouldn't be able to get, for example, an order from an agency of the government putting the television broadcast industry out of the CATV business, getting newspapers out of the CATV business, getting telephone companies out of the CATV business. It is impossible to say that the members of the CATV industry that this petitioner represents have not benefited substantially and do not continue to benefit substantially from that kind of activity. And there is more.

For example -- and this might have some relevance with respect to the telephone companies -- the Commission's rules with regard to franchising place a limit on the fees that can be charged by the local municipalities. That fee has averaged, according to one study, an average of 8 percent of the gross receipts. What the Commission has said is you can't charge that kind of a fee. The only thing you can charge

within the guidelines is a fee between 3 percent, if you want to go over that you have to show that it is necessary to sustain the cost of regulation. So that in effect what the Commission has said is the localities can only charge fees which can reimburse them for regulation.

So here we have, in return for a fee of one-half of one percent of their gross revenues, we are cutting down the average fee they pay to municipalities and localities from 8 percent a year average to something around 3 or 4 percent, which is a substantial benefit and was done also at the suggestion of the CATV industry.

Q Congress, I suppose, could have passed legislation, specific legislation requiring exactly the same thing, that is imposing maximum fees on franchises for --

MR. KORMAN: That's true.

Q Could Congress send the beneficiaries of that legislation a bill, do you suppose for its service to them?

MR. KORMAN: Well, Congress sends all of us a bill for the services --

Q Well, specifically. Specifically, say we benefited you specifically by seeing to it that no municipality or county or local government charges more than X percent for its franchise, now please send in to every Congressman or to the Congress $10,000 apiece.

MR. KORMAN: I must say that, standing up here, I

find it difficult to think of a provision of the Constitution that it would violate. I suppose that, with some more thought, I might be able to think of a problem that would arise. But that is not the situation here. What Congress is here saying and --

Q There are all sorts of special legislation in Congress, in fact there is hardly a law that Congress passes that doesn't benefit an identifiable group. Isn't that correct?

MR. KORMAN: Well, that is true. Of course, every program undertaken pursuant to any act of Congress is intended to benefit the public generally.

Q And it is all in the public interest by hypothesis.

MR. KORMAN: That's right. But if you accept that reasoning, and that was the reasoning of the Court of Appeals, then Title V means nothing, because there isn't a single program that isn't enacted principally to serve the public.

Q By hypothesis, by definition.

MR. KORMAN: That's right. And as a matter of fact, although there has been substantial reliance on the Court of Appeals holding in the New England case, in which the court, without really citing any specific reference to the scriptures, found that it was something fundamentally wrong with charging a fee where the purpose of the program is to benefit the public.

Q Mr. Korman, how far do you carry your line of argument? Can the Department of Agriculture, if it raises crop

support prices bill the farmers for the increased benefit they get from the added crop support prices?

MR. KORMAN: Well, I would think that to the extent that there is a substantial benefit that accrues to the farmer, and to the extent that there is a cost in administering the program, that it probably could. I don't know that Congress really enacted legislation with that particular executive program in mind, although it is quite clear that they enacted Title V with the Federal Communications Commission precisely in its mind in recognizing the benefits that accrue to those who are subject to the jurisdiction of the Federal Communications Commission as a result of the regulation which is afforded by the Commission.

It was quite clear that Representative Yates specifically mentioned the Federal Communications Commission, as did others, because it is the most obvious one in which the regulated industries derive substantial benefit as a result of the franchises and permits that they get.

Now, there has been some reference to the regulation before 1972 and post-1972. Now, I don't understand that the petitioner challenges, nor did I understand that the action of the Court of Appeals really was related only to two years. The Commission's rule and fee applies in 1970, '71, '72, '73, '74, and it is not really relevant, as we view it, what year particular Commission activities undertaken. And as a matter of

fact, although we are accused of going outside the record and improperly bringing in post-1972 activities, the petitioner, at page 23 of his brief, states that he was the first one to do it. He says "NCTA recited to the Fifth Circuit the adverse effects of the Commission's CATV regulation, prior to, during and subsequent to the promulgation of the annual fee schedule at issue."

Now, petitioners also challenge the method by which the Commission calculated the fees. Now, they don't challenge per se the concept of an annual fee, but they seem to be saying that this annual fee does not really reflect value to the recipient, which is one of the categories which the Commission must take into account along with the public interest to be served and the amount of the cost of the public of furnishing the benefit, that this couldn't possibly reflect value to the recipient because in any one year a number of CATV industries don't actually come to the Commission for anything specifically. And it seems to us that this argument ignores the fact that the value to the recipient, for example, of a FCC rule or regulation does not simply benefit him in a single year that it is issued. License is not limited to the year in which it is issued, and the other substantial benefits which have arisen, such as the elimination of competition, have value which go beyond the year that it is issued.

On the other hand, the Commission can't operate on an ad hoc basis, putting out an ad for lawyers every time an

application for a certificate comes in, or any time the NCTA comes running to it for help from competition which it can't cope with on its own. A full-time staff is required to develop the expertise necessary and to be available to those who come to it for assistance.

And so that the mere fact that in any given year a CATV company doesn't come to the Commission for anything does not necessarily mean that the Commission has failed to take into account value to the recipient in formulating an annual fee.

Moreover, since the entire industry benefits from that regulation, and since it is clear, for example -- and I don't think it would be disputed -- that the Commission could calculate one filing fee which would really be substantial, not $35, and charge it against one company. What the Commission has done here is decide it would be more equitable to spread the costs a bit, particularly for smaller CATV companies, by making the amount contingent on gross revenues which reflects more equitably the real value that is derived from engaging in this particular business. And the Court of Appeals unanimously affirmed the Commission's determination that these fees were fair and equitable and, as we view it, that is simply almost a discretionary determination which even before the Court of Appeals the Commission's evaluation was entitled to great weight.

And for these reasons, if there are no further questions, we would ask that the judgment of the Court of Appeals

be affirmed.

Thank you.

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

Mr. Feldstein, do you have anything further?

REBUTTAL ARGUMENT OF STUART F. FELDSTEIN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FELDSTEIN: First, I wanted to state that in terms of the Budget Bureau Circular A-25, not only do I feel that the legislative history, specifically Representative Yates' remarks, placed the FCC under it, but the FCC has assumed that it is under it because it named its reliance on Budget Bureau Circular A-25 in its notice of proposed rulemaking, in Docket 18802, which are the fees under consideration here, in their report and order, and in the 1972 notice in Docket 19658, which is the proposal to raise the fees. So I believe --

Q But you still have the question of whether or not the Commission must observe the circular, or whether its regulations should be judged not under the circular but under the statute, directly under the statute.

MR. FELDSTEIN: All right. I recognize --

Q Let's assume for a moment that there never had been a circular.

MR. FELDSTEIN: All right. Then we can go right then to the statute and allege that equally under the statute the same is true, thus under the statute it talks about -- and it

lists a whole bunch of things at the top of the statute -- it must be to or for any person, and then in parenthesis it gives examples of persons, partnership, corporation, group, association, but never does it say industry. And in so interpreting that, the Bureau of the Budget and other agencies, until this time, have likewise interpreted it as meaning a specific service given to a particular individual; thus, even the statute, when it says, it lists particular benefits at the top of the statute, and then it says to or for any person, is likewise instructing an agency to deal on the fee matter in that same regard as the Bureau of the Budget has given guidelines as to how to carry that out.

Now, in talking about what benefits we get, the government has again talked about all of the 1972 and post-1972 regulations which it has bestowed upon the CATV industry. I submit that the fees and the appeal that are under consideration here predate the 1972 rules. I would reserve my opportunity to argue in another appeal that the 1972 rules likewise do not benefit the CATV industry in the manner which is alleged that they do so. However, these are not the rules which we must apply these fees to.

Now, in terms of the statute, where it talks about taking into consideration value to the recipient as one of the three statutory criteria, there again the Commission has absolutely failed. It is a pure cost allocation, absolutely a pure

cost allocation. The Commission talked about all kinds of documents that it had, and this is why we brought our freedom of information suit to this Court's attention. The Commission said it had all kinds of documents and things on value to the recipient. One of the three statutory criteria --

Q You have already conceded quite a few benefits to the industry and to individual members of the industry in terms of being spared the competition of telephone companies who could have taken over the entire industry, lock, stock and barrel, and several other items.

MR. FELDSTEIN: What I am stating in that regard is that let us assume that that is a benefit which the entire industry enjoys; a benefit of a regulation to the entire industry and not an identifiable CATV system is not sufficient. Because what the government can do in that case then is to equate regulation with benefit, and then equate the cost of regulation with the fees that it can recover, lock, stock and barrel, from the CATV industry. And I do not think that Title V authorizes that kind of an equation.

Q How much value was it to the CATV to get the phone company out of the business?

MR. FELDSTEIN: Well, the value --

Q In dollars and cents. You don't know, do you?

MR. FELDSTEIN: No, I do not. There were about, at the time of that regulation, there were about perhaps 2,000 or

a little more CATV systems in operation. There were approximately 35 or 40, maybe a bit more, existing --

Q And they were increasing every day, weren't they? If they weren't, why did you intervene in the suit, if they weren't hurting? They were hurting, weren't they?

MR. FELDSTEIN: To an extent they were hurting, but certainly some people did not --

Q And this agency got rid of your hurt.

MR. FELDSTEIN: That's right. But if we want to equate that, we can say that -- we can put on one side of the ledger those things which helped us with those things that hurt us, and I don't think that that kind of equating is what Title Vi had in mind.

Q I don't think Title V or anything else had that in mind. I think TItle V says where you set up something that is for your benefit, which you use when you want to use it and is there so that it can be ready full-blown to use when you want to use it, you pay for it. Is that what Title V says?

MR. FELDSTEIN: I disagree. I do not feel that Title V enables a federal agency to collect its entire cost of regulation of an industry just because it feels that that regulation is needed, whether or not the industry desires that particular piece of regulation, because --

Q Whether or not the industry, on that balance, benefits.

MR. FELDSTEIN: That is correct.

Q That is not really essentially your argument, either. You can concede a benefit to the industry, but your basic point is that the charge can't be based on industry-wide benefit, isn't it?

MR. FELDSTEIN: Precisely.

Q The question is whether this sets up kind of a Blue Cross system or not, whether or not you can pay every year even though you don't go to the hospital, and what you pay for is the existence of the hospital facilities that are available to you when you do get sick.

MR. FELDSTEIN: It is my feeling that this title then only enables an agency to promulgate fees that relate to services which a particular payer of fees receives in a given year.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Feldstein. Thank you, Mr. Korman. The case is submitted.

[Whereupon, at 11:02 o'clock a.m., the case was submitted.]

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