ORIGINAL

In the

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER	)	
V.	)	
MIDWEST VIDEO CORPORATION ET AL	)	
AND	)	
AMERICAN CIVIL LIBERTIES UNION, PETITIONER	)	
V.	)	
FEDERAL COMMUNICATIONS COMMISSION ET AL	)	No. 77-1575
AND	)	
NATIONAL BLACK MEDIA COALITION ET AL, PETITIONERS	)	No. 77-1648
V.	)	
MIDWEST VIDEO CORPORATION ET AL	)	No. 77-1662

Washington, D. C.
January 10, 1979

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FEDERAL COMMUNICATIONS COMMISSION, Petitioner	
v.	No. 77-1575
MIDWEST VIDEO CORPORATION ET AL	
and	
AMERICAN CIVIL LIBERTIES UNION, Petitioner	
v.	No. 77-1648
FEDERAL COMMUNICATIONS COMMISSION ET AL	
and	
NATIONAL BLACK MEDIA COALITION ET AL, Petitioners	
v.	No. 77-1662
MIDWEST VIDEO CORPORATION ET AL	

Wednesday, January 10, 1979
Washington, D. C.

The above-entitled matter came on for argument at 10:36 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.
For Federal Communications Commission et al

GEORGE H. SHAPIRO, ESQ., Arent, Fox, Kintner, Plotkin & Kahn, 1815 H Street, N.W., Washington, D.C. 20006
For Midwest Video Corporation

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 combined cases No. 77-1575 and 77-1662, Federal Communications Commission and American Civil Liberties Union, National Black Media Coalition, Midwest Video Corporation et al.

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

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF FEDERAL COMMUNICATIONS COMMISSION et al

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

This case presents statutory and constitutional challenges under the First and Fifth Amendments to three related sets of rules of the Federal Communications Commission relating to cable television requiring certain defined cable systems in one rule to have the capacity by 1986 to provide at least 20 channels of service to their subscribers.

In another rule, to provide access to certain of those channels, if demand exists, access to third parties and if there is sufficient activated channel capacity and in the third set of rules, to have available and make available certain equipment and facilities to those parties and for those purposes.

I will summarize briefly the rules and then discuss later pertinent details as they relate to portions of the argument.

Channel capacity rules I think were really adequately summarized in what I said already. By 1986 20 channels should be available to their subscribers.

The access rules apply to four categories of third parties who will have access to the extent there is available capacity for their access. The public, educational authorities, local governments and paying lessors for those systems that were already in operation by June 21st, 1976, there is basically no obligation to bump any established programming other than automated time and weather service which is a sort of ticker tape kind of informational programming.

For systems constructed thereafter or for new capacity that is added to existing systems, there is a requirement that at least one channel be available for access by these groups but to the extent that the demand does not require more than one channel it can be a composite channel for access.

The third category of rules, the equipment availability rules, are basically designed to see to it that the equipment is there so that the people with the access rights will have some way of coming into the studio and having their programming broadcast.

The Court of Appeals treated the rules together rather than separately and struck down all of them under the Act but also expressed the view quite firmly that the rules

would in any event violate the Constitution so that in our view, if the Court agrees with our contentions that the rules are authorized by the Act, it should go ahead and address the constitutional issues since the result of a remand would be foreordained in the case.

And the statutory question should not really be considered in isolation in the constitutional contention in any event.

Now, more than ten years ago in the United States against Southwestern Cable Company, this Court established that Section 2A of the Communications Act does confer jurisdiction on the Commission over cable television.

QUESTION: Yes, before you go into that, let us go back just a moment, Mr. Wallace. Why do you suppose the Court of Appeals addressed the constitutional question if it found that what the Commission did was not authorized by the Act?

MR. WALLACE: Well, as Judge Webster pointed out in his concurring opinion, there was no need to do so but two of the judges chose to do so and the questions were argued to the court and perhaps it was to make clear what would happen if this court should disagree with the Court of Appeals on the statutory issue as it did in the last Midwest video case, disagree with the same Court of Appeals' interpretation of the Commission's statutory jurisdiction.

QUESTION: You mean it is a typical alternative ground for decision?

MR. WALLACE: Well, they refrain from calling it an alternative holding but they made quite clear their view that the rules do violate the First Amendment and suggested strongly that they would violate the Fifth Amendment as well.

They did refrain from stating explicitly there was an alternative holding effect. They stated that the holding was based entirely on statutory grounds.

QUESTION: Do you think that, or did they indicate in your view that their statutory holding was influenced by their constitutional views? Sometimes, you know, because of constitutional difficulties, one feels compelled to construe a statute a certain way.

MR. WALLACE: It is really hard for me to answer that question. I don't think the opinion is all that clear on the extent to which the constitutional view influenced the statutory holding. I can't really speak for the Court on that.

In any event, the southwestern case thus established the basic statutory authority on the face of the Act, at least so long as the regulations adopted by the Commission are, as this Court put it, "reasonably ancillary to its jurisdiction over broadcasting."

Then almost seven years ago now in what we refer to as "Midwest Video I" in the briefs, this Court held that

that statutory authority extends to rules requiring cable systems and to put the holding in somewhat generic terms used by the plurality opinion, the rules requiring the systems affirmatively to promote the statutory provisions of the Act such as increasing outlets for community expression and providing more programming choices for the public.

Now, to a large extent --

QUESTION: It is rather difficult to describe that as a holding, is it not, in view of the fact of the Chief Justice's concurrence in the result.

MR. WALLACE: Yes, but there was a judgment of the Court. There was a holding that the rules were valid.

QUESTION: Upholding a particular set of rules but the reasoning for upholding them cannot really be attributed to the Court.

MR. WALLACE: Well, I understand that but on the other hand there was no disagreement in any of the opinions with that proposition and this is, I think, an accurate generic categorization of the rules that were at issue before the Court and it was the Commission's own description of the rules and the basis for its authority.

Now, I grant you there is no opinion of the Court and we are quite aware of that. Nonetheless, in Midwest Video I, the Court had before it many similar questions to the statutory questions that are now before the Court. The rules

there did have an equipment availability component that really is basically the same as the present equipment availability rule. It was put there as part of the -- and it is referred to explicitly by the Court. It was part of the origination of programming requirement and the Court was ruling against the background of the rules that had been involved in the Southwestern Cable Company case in which a plurality of the court against that had been correctly upheld subsequently by several courts of appeals, namely, rules that required certain signal carriage, mandatory access, if you want to use that word, mandatory carriage is usually used in that context of local television programming by the cable system so we are talking, the access component in the sense of mandatory carriage is something that has been familiar since the beginning, since the outset of the Commission's regulation of cable television and was precisely what was before the Court in Southwestern Cable.

QUESTION: Are you saying that mandatory access was necessary to the decision of the Court in Southwest Cable?

MR. WALLACE: No, the Court merely held that the Commission had jurisdiction to promulgate rules on this subject. It did not uphold the validity of the rules but subsequent Court of Appeals decisions did and four Justices in the plurality opinion in Midwest Video said that those cases were correctly decided. That was and still, you know, the regulation still exists but that was the beginning of Commission

regulation more than 10 years ago now, in 1966 of cable television. It was to require that local broadcast programs be carried on the cable and to prohibit duplication of network programming carried by local stations and distant signal stations. That was the first thing that the Commission did in this field, was to prescribe certain carriage requirements.

Now, it was not access by the public. It was access by broadcasters but the word access is not inappropriate in this context.

Moreover, it was quite clear to this Court in Midwest Video I that the origination requirement and the equipment availability requirements before the Court at that time were tied in with rules then being developed and which had been adopted by the Commission prior to this Court's decision in Midwest Video that it would grant rights of access to this equipment and they also adopted channel capacity rules along with those prior to this Court's decision.

All of that was made quite clear to the Court and as a matter of fact, the discussions during the argument in that case were that kind of programming that was foreseen and there were several references in the plurality opinion background in these rules which make this quite clear.

On page 653 of Volume 406 U.S. in footnote 5 the plurality opinion quotes the Commission as saying one of the purposes of the origination requirement is to ensure that

cable casting equipment will be available for use by others originating on common carrier channels.

On the next page, page 654, there is also a quotation with approval from tentative conclusions of earlier notice of rule-making that the proposed rules"Also reflect our view --" this is quoting the Commission -- "That a multipurpose CATV operation combing carriage of broadcast signals with program origination and common carrier services might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created.

QUESTION: Mr. Wallace, do you think in this case these rules you are describing that the Commission has imposed on cable telecasters would be permissible for it to impose on broadcasters?

MR. WALLACE: Well, the Court suggested in the Democratic National Committee case, CBS against the Democratic National Committee that narrowly-defined access requirements might be valid in broadcasting. There is no practical way that these rules could be imposed on broadcasting because of the different physical constraints that are involved. A cablecaster has simultaneous cable running to his subscribers and can do his own programming on the great majority of them while still complying with these rules whereas the broadcaster only has the one frequency assigned to him and to the extent

that he is required to permit anyone else to have access to it he relinquishes his opportunity to broadcast at all on it.

QUESTION: Why could not the Commission just say, "You broadcast for ten hours a day and let other people broadcase for four hours a day"?

MR. WALLACE: Well, that would be an analagous requirement but it would not be the same requirement. I mean, you asked me if they could impose the same requirement and my answer was that it could not be done as a practical matter.

It would have to be a requirement adapted to the special physical situation of broadcasters and the Commission has been concerned about the fact that it requires interruption of the broadcasters' right to be on the air at all, if such a requirement is imposed, in contrast to what was adopted here which was basically a requirement that unused capacity be put to this kind of community use and that in rebuilding that would normally take place during the next ten-year period in new building that sufficient capacity be built in so that there would be basically this kind of excess capacity.

Granted, a cable television operator might argue that he would prefer to put it to some different use at some kind in the future but we are not talking about disruption of established programming services or established pay services. We are talking about using this technology for new additional opportunities.

QUESTION: But is it not correct that the rule applies even if there is no unused capacity, even if there was a full -- if the licensee --

MR. WALLACE: The rule applies but with the qualifications that I mentioned that no established programming is to be bumped under this rule, no established programming in effect on June 21st, 1976 other than automated time and weather programming.

QUESTION: No but if in the next year or two they do get enough material that they would like to put on they are restricted as to what each one can.

MR. WALLACE: That is right, unless they want to build an additional capacity. They could build in 60 or 80 channels if they wanted to and provide converters to their subscribers and the rule would not require any more of it to be devoted to access than if they have a 20-channel system.

QUESTION: Following up on Mr. Justice Rehnquist's question about other licensees, is not there a similarity between these rules and the prime time rules that say only three out of the four hours of prime time can be used for network television?

MR. WALLACE: Well, there is a similarity in the kind of constitutional argument being made here. There are familiar rules. The prime time rule is a good example in which licensees and those authorized to use the broadcast

signal are required to adjust the categories programming that they can carry and in some cases to provide the access broadcasters.

For example, there is the personal attack rule where they have to provide access for a response to personal attacks. There is also a statutory requirement that candidates for political office be allowed broadcast time so that the generic category of regulation is a familiar one, yes and in many respects the category of regulation which was upheld unanimously in the court by the Red Lion case.

QUESTION: Do you think Congress could impose these rules on a newspaper?

MR. WALLACE: Well, I think that is very dubious. There is a way of arguing the distinction of the Miami Herald against Tornillo case because the obligations here are unrelated to the content of anything previously published, which was not true in the Tornillo case. There the obligations came into effect only because of what the newspaper had published and the Court expressed solicitude for the chilling effect on such a discussion by the newspaper that the rules might entail.

QUESTION: Well, isn't there something more fundamental and namely that broadcasting and its related elements are regulated. Newspapers cannot be, up to now.

MR. WALLACE: Well, of course. I think basically that is the difference, that if one might move to the First

Amendment question here which is really what has been raised, I think the whole contention of the Respondent here about journalistic discretion is really quite overdrawn when you look at the kind of enterprise we are talking about here.

Basically it is an enterprise that is carrying and retransmitting the product of others without even the opportunity for the kind of editing that a newspaper can do when it uses wire service stories. It is just retransmitted as a package. That is their basic enterprise.

The dissenting opinion in Midwest Video I described their enterprise as having no more content over what is transmitted on the wire than does a telephone company and --

QUESTION: But is that quite right? Do not they have the judgment as to which materials will be selected and which sources of material will be used?

MR. WALLACE: Of course they do have some --

QUESTION: And is that not an editorial judgment?

MR. WALLACE: Of course. There is editorial judgment and we do not intend that they do not have First Amendment protection --

QUESTION: So the analogy of the telephone company you really do not rely on.

MR. WALLACE: It was not my analogy and we do not rely on it. No, but there are similarities to the telephone company and similarities to broadcasters, similarities to the

print media, similarities to common carriers and to other public utility companies, all of which, we argue in our brief, have to be taken into account in looking at the First Amendment contention and in addition to the basic point about the nature of the enterprise, the familiar signal carriage requirements that I talked about before show that there has never been in this field a premise of unfettered editorial judgment about what can or must be carried among the programming offered.

QUESTION: Mr. Wallace, could you clear up one detail for me? If the public access channel is not sufficient to take care of the demand for public access materials, how does the cable television company decide which applicant to satisfy? Is there any regulation on that? Or is it first-come, first-serve or do they exercise editorial jusgment?

MR. WALLACE: The regulation says that the cable company should adopt procedures, rules for itself to show how it will handle requests on a first-come, first-serve basis.

This anticipates that people do not have to be given the particular time slot that they request, that scheduling can be done to use the capacity, that black-out time can be used on other channels when time is available and so forth and if the demand gets large enough and there is available a second channel, then that, too, should be made available, up to four channels if they are available.

But the experience so far has been that a composite

channel pretty much is able to cover it.

There are, as the Commission indicated, quite explicitly in these rules details to be worked out, refinements to be made. This is a very dynamic field. The Commission has been giving it sustained attention now for more than ten years. It has changed direction considerably since the last time we were in this Court with respect to cable rules. It gave up the origination requirement in response to commentaries and experience. It concluded that that would be unduly burdensome on systems that did not want to themselves undertake to originate programming and really using the access requirement largely as a substitution to serve the same kinds of community purposes and needs that the origination requirement was designed for and it has cut back a great deal on the time table for the channel capacity requirement and on the extent to which channels have to be made available for access.

The basic difference is between the rules that existed in 1972 at the time of Midwest I, not all of which were before the Court and the present rule is that the burdens on the cable systems have been alleviated. The changes basically were designed to alleviate burdens that were imposed and the main burden that was imposed was the origination rule and it was the burden of having to become a programmer and to produce your own programming which these people had not necessarily undertaken to do in setting up what basically started as

community antenna television systems that the four dissenting justices in Midwest I found objectionable in that case and found to extent beyond the Commission's proper regulatory authority to commandeer someone who had undertaken merely to carry the products of others into producing his own products and transmitting them and the Commission's new rules really meet that objection by coming back with those that choose not to get into the business of producing their own programs just to --

QUESTION: Mr. Wallace --

MR. WALLACE: -- stay with their familiar business of carrying the products of others.

QUESTION: Mr. Wallace, could I ask you, does the Commission have rules with respect to the acquisition or ownership of cable systems by broadcasters or by the networks?

MR. WALLACE: I am not aware of them if they do but I have a nod here that they do but I cannot inform you of their content.

I think I will reserve the balance of my time, thank you.

MR. CHIEF JUSTICE BURGER: Mr. Shapiro.

QUESTION: Mr. Shapiro, could you at some point answer that question I just asked?

MR. SHAPIRO: I certainly will, Your Honor.

QUESTION: Thank you.

ORAL ARGUMENT OF GEORGE H. SHAPIRO, ESQ.

ON BEHALF OF MIDWEST VIDEO CORPORATION

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

Perhaps I should begin by answering Mr. Justice White's question. The FCC does have rules which prohobit broadcast stations from owning cable television systems within the service areas of the broadcast station, the grade B contours of the imaginary line that extends --

QUESTION: But not in other markets?

MR. SHAPIRO: Not in other markets.

In light of -- before getting to the legal arguments that I would like to make, I would like to take a few minutes to discuss some of the specifics of the rules and their impact on cable systems because Midwest Video's perception of how those rules affect it is quite different from that described by Mr. Wallace.

It is true that commencing on the effective date of the rules, cable systems are required to dedicate one full channel to use by the public for educational, governmental public and least-access uses. This requirement alone involves generally one-twelfth to one-twentieth of the assets of the company and we do not regard that as an insubstantial requirement but the rules actually require much more than that.

The rules themselves specify that four separate

dedicated access channels will be provided. It is under a qualification to the rule which indicates that if there is not immediate demand for all four of those channels, then cable systems may, until the demand develops, combine different types of access programming on one channel.

Now, what type of demand requires the activation of another channel? It is a very minimal type of demand. The rules specify that the cable system must activate an additional access channel if existing channels are in use during 80 per cent of the weekdays, Monday through Friday, for 80 per cent of the time during any consecutive three-hour stretch for six weeks, six consecutive weeks.

If you apply a little mathematics to that, what it means is that less than two and a half hours of access use per day on the cable channel four days a week for six weeks requires the activation of an additional access channel if the system has the activative channel capacity so while there are demand usage requirements, all of the momentum of the rules is to encourage the implementation of more and more channels as only minimal usage requirements are met and those requirements do not end when four channels are activated.

They continue ad infinitum as I said before up to the activated channel capacity of the cable system.

QUESTION: Mr. Shapiro, perhaps my colleagues do not share my ignorance of cable television, but what is

involved in activating a new channel for a cable tv operation?

MR. SHAPIRO: Well, Your Honor, cable system channels are -- a television set is only able to receive normally 12 channels of VHF transmission. In order to add new channels, a cable system has to -- most cable systems have essentially 12 channels, at least 12 channels.

To add additional channels, a cable system has to do one of two things. He may be able to put in a converter which will take signals coming down the cable at frequencies the television set will not receive and convert them to frequencies the set will receive. This will give him extra channels.

He may have to replace his old cable which may not be able to carry more than 12 channels with other cable with larger capacity or he may string a second cable but basically, channels are added in incremental blocks.

Initially, a system will have 12 channels. The next incremental block tends to run another eight channels or so up to 20 and so forth.

All right, the access rules also require cable systems to adopt their own rules requiring that the use of their channels be provided on a first-come, non-discriminatory basis and prohibiting the cable system from exercising any program content control over the channels.

QUESTION: Mr. Shapiro, perhaps I should not ask

this kind of questions like Mr. Justice Rehnquist. Does this converter that would increase capacity from 12 to 20, is that something that goes on sets or is that something that goes on the cable system?

MR. SHAPIRO: Normally it goes on the set, Your Honor. It is a little box that fits on top of a set and there is evidence in the record it costs about --

QUESTION: But how does the system itself get capacity increased from 12 to 20?

MR. SHAPIRO: Well, this depends on when the system -- modern systems have the capacity to deliver 20 or more channels if converters exist.

QUESTION: I see. I see.

MR. SHAPIRO: There is evidence in the record that the cost of converters -- I believe the figure was something like $40 per converter -- that only takes cable systems up to a total of about -- somewhere between 20 and 30 channels. It is not the unlimited 60 or 80 type channels that you see in some descriptions of cables.

The access rules also require cable systems to provide one channel for public use without any charge and to provide time for educational and local government use for a period of five years without any charge. No commercials can be presented on the public, local, governmental or -- excuse me, the public, governmental or educational access channels.

Cable systems must install studio and origination equipment for the presentation of public access programs. No charge can be made for the use of a studio and equipment for public access programs not exceeding five minutes in length.

And charges for longer public access programs must be reasonable and consistent with the goal of affording a low-cost means of television access.

Moreover, if public access users produce their own programs, cable systems cannot charge for the use of the play-back equipment necessary or for the time of the system personnel required to operate the equipment, even if the access user wishes to run the programs outside of the normal business hours of the cable system.

New cable systems must be installed with a minimum channel capacity of 20 channels and the technical capability for non-voice two-way return communications. Existing systems have until 1986 to meet these requirements.

Now, these requirements have a severe impact on the ability of cable systems to select and present programming to their subscribers. There is an abundance of programming available to cable systems to fill their channels. This programming has been described in some detail at pages 10 through 18 of Midwest Video's brief.

QUESTION: Mr. Shapiro, is there any barrier that you can suggest? If the Commission issued a traditional

broadcast license to a tv or a radio, not a cable, tv or broadcast license --

MR. SHAPIRO: Yes, Your Honor.

QUESTION: On condition that they dedicate 25 per cent of the operating time to public educational programs selected by some described method? Any barrier to that?

MR. SHAPIRO: Well, Your Honor, I thought that this Court's decision in CBS versus Democratic National Committee was a barrier to that. I thought that Section 3-H of the Communications Act --

QUESTION: Did not that go to the specific content rather than the allocation? After all, the air space is owned by the public.

MR. SHAPIRO: Well, let me --

QUESTION: Could not the Commission condition it generally that way?

MR. SHAPIRO: Let me be sure I understand your question, Your Honor. Are you asking whether the FCC can require a broadcast station to provide a certain category of programming during a certain percentage of its time without dictating the --

QUESTION: Content.

MR. SHAPIRO: Without leaving the content of that programming to the broadcast station. I believe that is a very close question. I think --

QUESTION: Let us back it up. Could Congress authorize the Commission to do that? Let's assume the Commission does not have the power, could Congress authorize that kind of --

MR. SHAPIRO: I believe they could.

I was describing the programming choices that are available to cable operators to fill their channels. Aside from broadcast signals which they are required to carry, there is available to cable systems the programming of independent educational specialty television stations, pay television-type programming consisting mainly of movies and sports events, religious programming --

QUESTION: Is that the sort of thing we get on Nantucket from Atlanta, Georgia now?

MR. SHAPIRO: What you get on Nantucket from Atlanta, Georgia, Your Honor, is probably an independent signal of a television station which is distributed by satellite.

QUESTION: I see.

MR. SHAPIRO: There are other types of sports programming. I have described in the brief a sports package of events from Madison Square Garden which is not a retransmission --

QUESTION: Satellite.

MR. SHAPIRO: No it is distributed by satellite, Your Honor but it is not the retransmission of a broadcast

signal. It is programming sold directly to cable systems without going -- and not simply carriage of a broadcast.

QUESTION: But sold by a common carrier, I gather, not by the station?

MR. SHAPIRO: No, Your Honor, it is sold by a joint venture of Madison Square Garden and a cable company which distributes the programming.

QUESTION: Well, is that a broadcaster, then?

MR. SHAPIRO: No, it is not a broadcaster.

QUESTION: Unregulated, then?

MR. SHAPIRO: Well, Your Honor, it is originated programming. There are no regulations that are applicable to it. This is essential to the point which I am trying to make which is that there is today a considerable amount of programming distributed by cable system to cable systems created for cable systems which cable systems may choose to carry or not to carry and pay for them --

QUESTION: That they do not originate and neither does the broadcaster. They just hire.

MR. SHAPIRO: Well, the cable system is not originated in the same sense as a broadcast station which carries a network program does not originate.

QUESTION: It does not prepare.

MR. SHAPIRO: It does not prepare. That is correct, Your Honor. And there are numerous types of programming of

this kind that the access rules impair the ability of the cable operator to pick and choose between. In fact, the question arose when Mr. Wallace was speaking about whether cable systems ever edit any of this type of programming. We have cited some language in our brief from the FCC's report and order adopting Equal Employment Opportunity rules where the FCC cites some examples of cable operators specifically doing some editing of the programming that is distributed to them and which they receive by satellite.

I would like also to make it clear, Mr. Wallace has indicated that there would be no bumping of programming if a cable system is presenting certain type of programming and an access demand arose and there was no vacant channel for access. He has indicated that there would be no bumping I believe that is true for programs that were not carried prior to -- or that were being carried prior to the effective date of these rules in 1976.

Much of the programming which I have been describing and which has been described in our brief has become available for cable systems since 1976 and what the Commission says is that it is our intention that established cable cast services provided by cable system operators will not be automatically displaced but if there are conflicts between channel users we are prepared to consider each such situation individually on its merits.

This means that a cable system whose channels are full and an access channel demand arises has to go to the FCC and the FCC then has to consider, whether it be the Madison Square Garden programming or religious programming delivered by satellite or whether it be movies, the FCC has to sit as a super program director and make a judgment about whether this access use is a more valuable use than the use that the cable operator has been making of the channel.

Well, I think that this has given sufficient background as to some of the reasons why Midwest Video and other companies in the industry are concerned about these rules.

I would like to pass on for the moment now to the jurisdictional argument and why we think that these rules clearly do exceed the Commission's jurisdiction.

I would like to also note, a question was raised earlier in the argument as to why the Eighth Circuit discussed constitutional issues and whether there was -- in the Appendix on page 65 the Court specifically states that the First Amendment overtones and other constitutional considerations present in the 1976 report are such as to reinforce our conclusions on the jurisdictional issue.

I think it is traditional that courts do, at least it is not unusual for courts to look at constitutional issues because it may influence their views on the jurisdiction so that they may not be required to reach a constitutional decision.

Turning to jurisdiction, this Court in both Midwest I and Southwestern held that the FCC has authority under Section 2A of the Communications Act to regulate cable systems. No question about that. That is not in issue but Section 2A in and of itself does not specify any objectives for which the FCC's regulatory authority can be exercised.

Now, 2A alone, without reference to something in the Act, we believe would be an unlawful delegation by Congress to the FCC to legislate as it pleases and in the rules before this Court in Midwest I, the plurality opinion upheld the rules because it looked carefully at the statutory provisions and the goals which the Commission indicated it would seek to implement in adopting the mandatory origination rules and it concluded that the mandatory origination rule met those goals.

QUESTION: Which goals?

MR. SHAPIRO: Well, the Commission -- they were the goals of increasing the outlets of community expression and providing diversified programming.

QUESTION: So it was connected with the broadcast.

MR. SHAPIRO: It was connected to the Commission's broadcast regulatory goals. It was in the broadcast goals of the Act that the Commission found the limits which it used to test the authority of the FCC.

QUESTION: Are those goals specified in any way in the Act?

MR. SHAPIRO: Well, the Court found them in Section I. It found them in Section 303G which authorizes the Commission to take action to further the larger and more effective use of radio in the public interest and it found them in Section 307B which authorizes the Commission to allocate radio facilities on a fair, efficient and equitable basis.

QUESTION: So you do not read the plurality in Midwest I as authorizing the Commission to simply set goals quite apart from the statutory framework?

MR. SHAPIRO: No, I think that is just to the contrary, Your Honor. Even the plurality opinion is specifically tied to testing the FCC's action against statutory goals. That was a very close decision. There was not a majority. It was only plurality.

QUESTION: That there was a judgment, yes.

MR. SHAPIRO: There was a judgment. We think that the rules now before this Court go far beyond anything that was contemplated in Midwest I. We think so for two reasons.

First of all, the rules of Midwest I were not contrary to any established goal of broadcast regulation. The Court found that they met specified goals.

Here we find that -- we believe that this Court's opinion in CBS versus Democratic National Committee established the fact that the preservation of the goals of private journalism and editorial control are fundamental to broadcast

regulations. The Court pointed out and Congress specifically dealt with and firmly rejected the argument that broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.

In responding to arguments that the First Amendment required individual access to broadcast facilities, the Court referred to the erosion of journalistic discretion and the transfer of control over treatment of public issues for licensees who were accountable for broadcast performance.

The government's principal answer to this is that the access goal is that we are arguing about mutually-inconsistent goals and that while it concedes that this goal of editorial control and discretion may exist, the Commission has selected other goals and that it is within the Commission's discretion to select and choose between goals.

We think that the answer to this is that in the very decisions which were reviewed by this Court in the CBS case in dealing with Section 3H and its relationship to the goal of editorial judgment and control by broadcasters, the FCC itself did not treat this goal as one to be placed in the balance with other perhaps conflicting goals.

The FCC's opinion treated Section 3H as a statutory prescription and the FCC held that broadcasters were not required to sell time to individuals or groups to comment on public issues. It was this determination of the FCC that the

Court upheld in the CBS case. So if that is the FCC's policy as applied to broadcasters and it is a statutory policy that the FCC regards as paramount, we have difficulty seeing how if the Commission must look to broadcast regulatory goals for its authority to regulate cable television, how it can jettison that goal as applied to the cable systems.

We think that this Court's decision in the CBS versus DNC case is also quite consistent with that approach.

But there is another reason why we think that these rules far exceed these jurisdictions. Section 3H of the Act specifies that a person engaged in radio broadcasting shall not, insofar as such person is engaged, deemed a common carrier.

In Midwest Video I, the FCC's actions were not contrary to any specified means of regulation in the Act and therefore the subject of regulatory means was not discussed but Section 3H prohibits the FCC from utilizing common carrier means to achieve broadcast goals.

We think that any other conclusion -- and for that reason we do not think that -- we think that the FCC is also limited in the means that it can apply to cable systems. Perhaps they need not be the exact same means but to permit the FCC to apply a means specifically which withheld from them in the broadcasting area gives -- we believe is contrary to the provisions of the Act and we think that there are very good reasons for taking this position.

Any other conclusion would blend two types of regulations that are mutually inconsistent and they would leave the FCC's exercise of jurisdiction over cable systems subject to no meaningful standards.

Some examples. We have already discussed the fact that editorial jugment and control are basic to broadcast regulation but they are the antithesis of common carrier regulation. Common carrier regulation is based upon total lack of control by the owner of the facilities.

In order to ensure that broadcasters do not practice racial discrimination in their programming judgment and in the related ascertainment of community needs to be served by their programming, the FCC can adopt equal employment opportunity rules applicable to broadcasters.

We think that this Court's decision in NAACP versus Federal Power Commission makes it clear that most regulatory statutes governing common carrier operations will not support the adoption of equal employment opportunity rules.

Government is generally forbidden from imposing common carrier or public utility obligations on a business unless it permits the business to earn a fair rate of return. And the hallmark of common carrier regulation is generally detailed rate regulation.

Broadcasting, on the other hand, is a field of free competition without rate regulation. The FCC does not

regulate most cable television rates and it forbids any government entity from regulating rates for pay tv services that cable systems provide.

QUESTION: Do you think Congress has given them the authority to do it if they decided that was in the public interest?

MR. SHAPIRO: The Congress has given the FCC authority to --

QUESTION: Has it given?

MR. SHAPIRO: To do what? To regulate --

QUESTION: To regulate.

MR. SHAPIRO: Cable systems as common carriers.

QUESTION: No, to regulate rates, just to that extent.

MR. SHAPIRO: Of broadcasters, Your Honor?

QUESTION: No.

MR. SHAPIRO: Or cable systems?

QUESTION: Cable.

MR. SHAPIRO: To the extent that the -- the position thus far, Your Honor, the Court's recognition of the jurisdiction of the FCC is based upon -- has been based on broadcast regulatory authority.

Broadcasting is a field of free competition. The FCC does not regulate rates in the broadcasting --

QUESTION: Could it?

MR. SHAPIRO: Hmn?

QUESTION: Could it? Does it have the legal authority?

MR. SHAPIRO: I do not think it could under the existing statute.

QUESTION: But I take it from that you concede Congress could confer that power on the Commission?

MR. SHAPIRO: To regulate broadcasting rates?

Your Honor, it would raise the question of whether broadcasting was the type of business affected with a public interest that was appropriate for a form of utility regulation. For purposes of our jurisdictional argument I think that is right but it is not a subject that I have looked at closely.

All right, there are other differences between common carrier and broadcast regulation. The Court of Appeals referred to another one in terms of the need. The FCC requires a strong showing of need for common carrier facilities before it permits parties to build facilities. If the FCC can choose one day from its broadcast authority and another day from common carrier -- utilize common carrier means which is designed to achieve completely different ends and completely different goals the next day, the discretion that is left in the FCC to pick from two contradictory schemes of regulations would leave its exercise of jurisdiction over cable television virtually without limit so for those reasons we believe that the Court

below should be affirmed on these matters of the FCC's jurisdiction.

I see that I only have a few minutes and I would like to speak briefly about the First Amendment. Obviously, the subject of editorial control and the function of editors as I have discussed it in the jurisdictional context is equally relevant in the First Amendment context.

This Court in the Miami Herald versus Tornillo accorded constitutional First Amendment status to the function of editors and it is extremely important.

QUESTION: Well, the First Amendment gave it to them, did it not? This Court?

MR. SHAPIRO: Excuse me, Your Honor? I did not hear you.

QUESTION: I would have thought the First and Fourteenth Amendments would have given it to them rather than this Court .

MR. SHAPIRO: Perhaps I should say recognized rather than gave.

We believe that cable systems for purposes of First Amendment analysis are considerably more like newspapers than like broadcast stations. This is a view which not only the Eighth Circuit below has taken but the home box office, the D.C. Circuit and the home box office situation took a similar position.

There are of course differences between a cable system and a newspaper but in many respects they are the same. Someone must subscribe to the services in order to receive that service so you must make an affirmative decision and pay someone.

Both offer multiple services. They have a basic type of service that people usually buy them for but they seek fiercely additional subscribers based on other services.

With a newspaper, its basic service is news but it gets readers because of its sports page and its comic strips and its society page.

With a cable system, its basic service is retransmission of television signals but it offers paid movies and it offers religion and it offers sports and will soon be offering various types of public affairs programs.

The function of a cable system is very analagous in terms of First Amendment analysis, distribution of information to the public, to that of a newspaper.

QUESTION: You think, then, what you are saying now you do not think is inconsistent with what you said, the way you answered the Chief Justice with respect to a broadcaster being required to allocate 25 per cent of its broadcast time to public service programs. Do you think it is because of the difference between broadcasters and cables and newspapers, I guess.

MR. SHAPIRO: Yes, different regulation has always been applicable to broadcasters than to other media.

QUESTION: Because of spectrum limitations?

MR. SHAPIRO: Because primarily of spectrum limitation. There have been other types of differences --

QUESTION: And you suggest, Mr. Shapiro, that spectrum limitations do not apply to cable?

MR. SHAPIRO: Spectrum limitations do not apply to cable, that is correct.

QUESTION: Any more than newspaper.

QUESTION: What public resources does cable television use?

MR. SHAPIRO: To the extent that it uses any, Your Honor, it uses its rights of way to string cables over public easements, streets, highways.

QUESTION: When you say public easements, do you mean easements owned by the Federal Government?

MR. SHAPIRO: Normally these are easements owned by states or municipalities.

QUESTION: You mean, easements over property zones?

MR. SHAPIRO: Easements over property.

QUESTION: Or under.

MR. SHAPIRO: Or under.

QUESTION: But the limitations on them are more, on being able to get them are more economic than anything else?

MR. SHAPIRO: That is precisely our point, Your Honor and in the Miami Herald versus Tornillo, this Court held that economic restraints did not --

QUESTION: Is it not true, Mr. Shapiro, that as a practical matter, any one local market is apt to be served by only one cable system because of these problems of physical installation and the like?

MR. SHAPIRO: Your Honor, that is true in by far the bulk of the instances, just as it is true that there is only one newspaper in --

QUESTION: It is economic.

MR. SHAPIRO: -- by far the bulk of the markets. There are some with two -- Midwest Video happens to operate in two communities where there are two. It is not the rule. It is a very small percentage of the cases but it does happen.

Thank you. My time has expired.

MR. CHIEF JUSTICE BURGER: Mr. Wallace, do you have anything further?

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

MR. WALLACE: Yes, Mr. Chief Justice.

These rules apply only to cable systems that are using a public resource, namely, television broadcast signals. On their face, the rules start off --

QUESTION: Why do you call those a public resource?

MR. WALLACE: Well, they have been treated as such

in the history of regulation under the Communications Act. Even if one would quarrel with the terminology, the factual point I want to make is that the rules apply only to cable systems which retransmit television broadcast signals so that basically what the Chief Justice had to say in his concurring opinion in Midwest Video I applies when he said it has been elaborated more by himself in prior opinions and by others but he said the essence of the matter is that when they, the cable system, interrupt the signal, the broadcast signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission to serve the public interest goals that are specified in the Communications Act and which are the very same goals that were involved in the rules that were upheld by the court judgment in Midwest I, the difference in the goals being served by the rules.

QUESTION: Mr. Wallace --

MR. WALLACE: They are substitutes for those rules. Yes?

QUESTION: Would the Government take the position that there was power to promulgate these rules if they were not limited to systems that retransmit a television station?

MR. WALLACE: Well, I think there would be because even in the instances of other kinds of programming that Mr. Shapiro referred to, programming beamed to and from satellites, those are beamed on microwave transmissions that are

regulated under Title II of the Communications Act. There is a use of signals there. It is not signals from the television broadcast spectrum but there are signals from the public airwaves that are regulated by the Federal Communications Commission.

We are not dealing with a medium that is divorced in important aspects of its activities from the radio spectrum.

Now, I would like to say a word about section 3H which appears in full in the Appendix to the Commission's petition on page 210. It is section 153H of Title 47 and you will notice that all that is there when you read it in context is the definition section of the Act defining who is a common carrier and it is by way of a caveat that just because someone engages in radio broadcasting does not mean that he is a common carrier subject to all of the tariff-filing regulations and dedicating all of his facilities to common carriage and the rest of it that otherwise would follow from this definition, even if he did allow some others to use his facilities.

Now, to the extent that this expresses a policy that the Commission is to follow in the means that it utilizes in conducting its other regulatory activities, it certainly is far from an absolute prohibition. It is merely something to be taken into account along with other policies expressed in the Act and it is entirely consistent with the suggestion made in this Court's opinion in CBS against the Democratic National

Committee that limited kinds of access obligations are consistent with the Communications Act and might be imposed on broadcasting if they were carefully drawn and concluded to be in the public interest by the --

QUESTION: Such as the right of reply for a price?

MR. WALLACE: That is an example and certainly there is no further limitation on cable television which is not even referred to in this section 153H.

Now, finally, I would like to say that Congress has been very aware of the Commission's activities in this area in recent years. As I say, the Commission has been making a ten-year sustained effort.

Not only is this reported regularly to Congress in annual reports and appropriations, hearings and the like, but there has been recent legislative activity in Congress which shows a continuing awareness of it. We have cited on page 34 of our brief in a footnote a recent public law which specifically refers to cable operators as those over whom the Commission has continuing jurisdiction and the law actually says that the forfeiture penalties of the Act are to be applied not only for failure to comply with licenses as we quote there but also for failure to comply with the rules and the Senate Committee Report, which is Report Number 95-580 of the 95th Congress First Session refers to this Court's decisions in Southwestern Cable and Midwest I so that the admonitions of the Chief

Justice's concurring opinion that Congress has been relying and keeping a watchful eye on the Commission's activities in this field and can be counted on to step in if it disagrees with what the Commission is doing and if responses to the changing dynamics of this industry and as it again has experienced in this field are even more pertinent here after seven more years of experience and adjustment by the Commission.

QUESTION: Mr. Wallace, you spoke quite glowingly on two occasions in your response of the Chief Justice's concurrence in Midwest Video. In his opinion in Columbia Broadcasting versus Democratic Committee at page 107 of 412 he refers to the fact that in the Act of 1934, Congress rejected a proposal that would have posed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues.

If that cannot be required of broadcasters, do you think it can nonetheless be required of cable broadcasters like the Commission?

MR. WALLACE: Well, I do not concede that it cannot be required of broadcasters because the very same opinion points out that limited access rules might be properly required of broadcasters notwithstanding inferences that can be drawn from the failure of Congress to enact an explicit requirement.

Congress nevertheless gave the Commission authority to further public interest goals that Congress specified in

ways that should seem appropriate as experience with the industry develops and as needs become apparent that Congress was not at that point willing to anticipate and I do not think that any more than that opinion entirely indicates that the mere fact that that provision was not adopted at the outset and that the Commission is without authority because the opinion says the contrary.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:40 o'clock a.m. the case was submitted.]