

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-298 & 81-799

TITLE COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, Petitioner
v. SUE GOTTFRIED ET AL: and FEDERAL COMMUNICATIONS
COMMISSION, Petitioner v. SUE GOTTFRIED ET AL.

PLACE Washington, D. C.

DATE October 12, 1982

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COMMUNITY TELEVISION OF SOUTHERN :

4 CALIFORNIA, :

5 Petitioner, :

6 v. : No. 81-298

7 SUE GOTTFRIED ET AL.; and :

8 FEDERAL COMMUNICATIONS COMMISSION, :

9 Petitioner, :

10 v. : No. 81-799

11 SUE GOTTFRIED ET AL. :

12 - - - - -x

13 Washington, D.C.

14 Tuesday, October 12, 1982

15 The above-entitled matter came on for oral

16 argument before the Supreme Court of the United States

17 at 11:29 o'clock a.m.

18 APPEARANCES:

19 EDGAR F. CZARRA, JR., ESQ., Washington, D.C.; on behalf

20 of Petitioner in 81-298.

21 SAMUEL A. ALITO, JR., ESQ., Office of the Solicitor

22 General, Department of Justice, Washington, D.C.; on

23 behalf of Petitioner in 81-799.

24 CHARLES M. FIRESTONE, ESQ., Los Angeles, California; on

25 behalf of Respondents in both cases.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Community Television against Gottfried.

4 Mr. Czarra, I think you may begin whenever you
5 are ready.

6 ORAL ARGUMENT OF EDGAR F. CZARRA, JR., ESQ.,
7 ON BEHALF OF THE PETITIONER IN 81-298

8 MR. CZARRA: Mr. Chief Justice, and may it
9 please the Court, this statutory construction case
10 involves television programs for the deaf. Some
11 background will establish the context for the specific
12 facts and the narrow legal issue that is before the
13 Court.

14 Without visual aids, most deaf persons cannot
15 understand the sound part of television. Government
16 agencies and broadcasters have been working for more
17 than a decade on ways to provide the deaf with suitable
18 access to the sound part of television. Until early
19 1980, there were essentially two kinds of special visual
20 aids that could help the deaf. One was sign language
21 interpretation. The other was so-called open captions.

22 While helpful to the deaf, both are visible on
23 all television sets. Because they are distracting and
24 block part of the visual picture, both impact adversely
25 on television service for the non-deaf majority.

1 Competing technologies to produce captions visible only
2 to the deaf reached the developmental stage in the early
3 1970's, and have been evolving. This is so-called
4 closed captioning. One system reached the marketplace
5 in 1980. The other is not as far along, but it may
6 offer more benefits in the long run.

7 Basically, both involve transmission of
8 specially encoded signals that will produce captions
9 only on television sets that have special decoding
10 mechanisms.

11 Producing captions that fit the visual action
12 is a sophisticated process involving skilled personnel
13 and special equipment. It is far more complex than
14 flashing a tornado warning across the bottom of the
15 screen. Some programs are not suited to captions at
16 all, and caption is expensive, about \$2,500 an hour, and
17 public television's historic budget crunch has grown
18 much worse lately.

19 Despite these difficult problems, great
20 strides have been made. Due to a combination of
21 available approaches, deaf viewers throughout the
22 country today have access to the sound part of many
23 hours of television each week on both commercial and
24 public stations.

25 Now, this case comes to the Court on a record

1 that covers KCET's 1974 to 1977 license term. This was
2 long before closed captioning was in being.
3 Nevertheless, KCET had presented nearly 1,000 programs
4 with special visual aids during that license term. The
5 Respondents requested the FCC to deny KCET's license
6 renewal. They claimed that KCET's programs for the deaf
7 were not enough, and had not been presented in peak
8 viewing hours.

9 Respondents focused on the comparatively new
10 Section 504 of the Rehabilitation Act of 1973, that
11 prohibits discrimination against handicapped persons by
12 recipients of federal financial assistance. Respondents
13 requested the FCC to use its license renewal processes
14 to force KCET to provide more of the special services
15 they believe that Section 504 required.

16 Three points made by the FCC in denying
17 Respondents' complaint merit emphasis here. First, the
18 FCC found that KCET had offered special broadcasts for
19 the deaf, and had not abused its discretion in
20 scheduling them. The only specific claims of KCET
21 shortcomings were thus found baseless.

22 Second, the FCC reviewed the many steps it had
23 taken under the general public interest standard of the
24 Communications Act concerning television for the deaf,
25 and some of these predated enactment of Section 504.

1 Third, the FCC concluded that it lacked
2 Section 504 enforcement duties, because it did not
3 dispense public funds. The FCC deferred to the funding
4 agencies to decide complaints of Section 504 violations,
5 but the FCC made very clear that any finding of a
6 Section 504 violation by KCET would be given weight.

7 Meanwhile, the Respondents went elsewhere.
8 They filed a complaint against KCET at what is now the
9 Department of Education, one of the funding agencies.
10 They also brought a class action against KCET in
11 District Court. Both complaints charged Section 504
12 discrimination, and both were eventually resolved in
13 KCET's favor.

14 The Respondents then appealed the FCC's denial
15 of their complaint. A panel of the D.C. Circuit,
16 speaking through Judge Wright, with Judge McGowan
17 dissenting, reversed the FCC. Its decision ignored the
18 extensive record evidence of KCET's service to the deaf,
19 as well as the FCC's conclusions about it. We ask this
20 Court to reverse the D.C. Circuit.

21 The sole basis for the D.C. Circuit's decision
22 was its belief that Section 504 expressed such a strong
23 national policy in favor of the deaf that the FCC had to
24 read the public interest standard in the Communications
25 Act as if it incorporated the policy of Section 504.

1 The FCC thus was ordered independently to decide KCET's
2 Section 504 compliance as part of the license renewal
3 proceedings at the FCC.

4 The narrow issue this Court agreed to review
5 is whether that novel incorporation theory is a legally
6 correct interpretation of the intent of Congress. We
7 say it is not.

8 The mandatory incorporation theory is at war
9 with this Court's holding that the FCC has very broad
10 discretion to decide the scope of the public interest
11 standard. We have found no holding by this Court
12 suggesting that the FCC must automatically read into the
13 public interest standard policies expressed by the
14 Congress in other statutes.

15 The FCC is not required to incorporate the
16 policy of another law unless the Congress directs it.
17 Of course, the FCC may and often does consider the
18 policies of other statutes when it determines the scope
19 of the public interest standard in the Communications
20 Act, but that is an initial judgment that the Congress
21 entrusted to the FCC.

22 The FCC exhibited leadership concerning
23 television for the deaf. The Court of Appeals acted as
24 if the FCC had done nothing.

25 QUESTION: Mr. Czarra, do you have any idea

1 whether the FCC at the license renewal stage would take
2 into consideration the fact, if there were a fact, that
3 a licensee had been found to be guilty of an unfair
4 labor practice?

5 MR. CZARRA: Yes, it would. The FCC takes
6 into account findings by other agencies or courts of
7 violations of law by its licensees.

8 QUESTION: What would it do if it found that a
9 licensee had committed an unfair labor practice?

10 MR. CZARRA: It would depend on the
11 circumstances. I don't recall immediately a case about
12 an unfair labor practice, but they would look to see to
13 what extent that judicial or other agency finding
14 indicated a character trait on the part of the licensee
15 that suggested it undeserving to be licensed.

16 QUESTION: What if an intervenor in a license
17 renewal proceeding, if that is what you call them,
18 someone objecting to the license renewal, said, I think
19 this station has been guilty of an unfair labor
20 practice. It is true, the NLRB has never passed on it.
21 Would the FCC undertake to determine that for itself?

22 MR. CZARRA: Well, I think the FCC initially
23 would look at the nature of the allegations, how well
24 they were supported by specific facts, affidavits, and
25 so on, but I suspect that the most that the FCC would do

1 in that situation is simply wait to see what one of the
2 enforcement agencies would do.

3 QUESTION: Do you think if -- assume the
4 unfair labor practice had been adjudicated by the NLRB,
5 or that it hadn't, but the intervenor called the FCC's
6 attention to an adjudicated unfair labor and an alleged
7 unadjudicated one. Could the FCC say, sorry, that is
8 irrelevant?

9 MR. CZARRA: I don't think that they would say
10 that it was irrelevant.

11 QUESTION: I didn't ask that. Could they say
12 it legally? Must they -- must they take into account
13 this failure of a licensee to live up to the
14 requirements of another law? Must they take that into
15 account?

16 MR. CZARRA: No, I think it depends on the
17 nature of the law.

18 QUESTION: What about this case, then? Didn't
19 the FCC say that the licensee's conduct under Section
20 504 is irrelevant?

21 MR. CZARRA: No, they did not. They said that
22 they were going to wait until --

23 QUESTION: Irrelevant to the license renewal
24 proceedings.

25 MR. CZARRA: No, they said it was relevant,

1 and that they would take into account any adjudication
2 by a responsible agency that there had been
3 discrimination or violation of Section 504.

4 QUESTION: But until some other agency acted
5 on it, it was irrelevant?

6 MR. CZARRA: Well, I am stumbling over the
7 word "irrelevant."

8 QUESTION: Well, anyway, they would not take
9 evidence as to what the station's conduct was with
10 respect to 504 --

11 MR. CZARRA: Well, they had --

12 QUESTION: -- as long as there had been no
13 adjudication by some other agency.

14 MR. CZARRA: But they had evidence before it
15 of what the station was doing in terms of service to the
16 deaf, and it decided that apart from a specific finding
17 by a funding agency that there was some problem under
18 504, that the Commission under its view of the public
19 interest standard found no shortcoming. It noted
20 specifically in its opinion that the station had been
21 providing programs for the deaf. It noted specifically
22 that there was a controversy over the scheduling of
23 those programs, but consistent with its historic views
24 on scheduling questions, said, no problem, as far as the
25 public interest standard is concerned.

1 For eight or nine years before the Commission
2 acted on the Respondent's complaints here, and beginning
3 well before enactment of Section 504, the FCC had been
4 focusing on the question of television for the deaf. It
5 did not advocate its responsibilities in proceeding as
6 it did, for it balanced the conflicting interests of the
7 deaf and the hearing audiences. It studied the evolving
8 technology.

9 QUESTION: Mr. Czarra, did the FCC take any
10 new action after the adoption of Section 504, or was its
11 policy already fixed? Did it reconsider it and
12 determine that what it had already done met the
13 requirements of 504 to the extent that it was relevant?

14 MR. CZARRA: As far as the published opinions
15 go, Justice O'Connor, there is no indication that they
16 specifically took into account a statute called Section
17 504.

18 QUESTION: It never mentioned it by number or
19 name?

20 MR. CZARRA: Not as far as I recall, but after
21 its enactment it did on several occasions before it
22 resolved this case deal with the subject of television
23 service for the deaf. It was authorizing experiments on
24 this new captioning technology. After those had
25 progressed, it actually authorized regular operations

1 with the new technology, and it was continuing to
2 observe the problem, study the question, and it
3 continued, though, to pronounce its decision that it did
4 not feel that under all of the circumstances things were
5 far enough along to warrant a mandatory obligation by
6 television stations to do any particular thing for the
7 deaf, though it encouraged them to do what they could.

8 QUESTION: If we were to determine that the
9 Act, Section 504, is relevant to the purposes and things
10 which the FCC has to decide in some way, I take it it is
11 your position that the FCC has taken action and has
12 applied the principles embodied in 504.

13 MR. CZARRA: Precisely. I think that the FCC
14 was out in front of the Congress and in front of the
15 national policy in terms of television for the deaf, for
16 it started to deal with this question in 1970, three
17 years before there was such a thing as the
18 Rehabilitation Act.

19 QUESTION: Did the holding of the Court of
20 Appeals impose any special burdens on the agency other
21 than to require it to make tracks, so to speak,
22 indicating its consideration of the section?

23 MR. CZARRA: Well, I think the Court of
24 Appeals' opinion is somewhat ambiguous. On the one
25 hand, there is language that says, now, we are leaving

1 this up to you, FCC. You fill in the interstices of
2 this requirement. But by the same token, there was
3 language in the opinion that says, we expect you to do
4 something about this now. We expect stations to do
5 this, and in the light of the record where KCET had
6 shown that it had done extensive things, one can only
7 wonder if the Court of Appeals wasn't saying that we are
8 requiring you, FCC, to order these stations to take some
9 kinds of affirmative action that they have not taken up
10 until now.

11 QUESTION: What if evidence is offered that
12 out of the 300 employees, there are only 3 percent that
13 include minorities, Hispanics, orientals, Negroes, et
14 cetera? Is that relevant to the issue before the
15 Commission on the renewal of the license?

16 MR. CZARRA: Yes, it would be. The FCC looks
17 into all sorts of things, but employment of women and
18 minorities is one of the things they look at.

19 QUESTION: Why wouldn't the Commission then
20 have a hearing on the allegations that a station hadn't
21 lived up to its obligations under 504?

22 MR. CZARRA: Well, the FCC had said in 1970
23 and again in 1976 that we are not going to impose any
24 specific obligations because this whole question of
25 television service for the deaf is wrapped up in

1 technology and economics and other practical problems.
2 Therefore, we are not going to mandate some specific
3 actions. So that pleadings saying that a station had
4 only done X amount of programming for the deaf would not
5 run afoul of any stated policy, any standard, any
6 guideline that the FCC had laid down.

7 QUESTION: But allegedly had run afoul of
8 504.

9 MR. CZARRA: Well, that is correct, but --

10 QUESTION: Just like the Commission listens to
11 allegations that the station hasn't lived up to some of
12 its obligations under some other statutes.

13 MR. CZARRA: Well, the Commission evaluates
14 the factual allegations and the record of the station,
15 and it decides whether in its view of the public
16 interest, whether it takes into account fully the
17 provision of some other statute or only partially.

18 QUESTION: Well, did the Commission in this
19 case, or did it not, rule that the Section 504 provided
20 no basis for the non-renewal of the license?

21 MR. CZARRA: It did not so state that. It
22 said that it was not the enforcement agency for 504, and
23 that until an enforcement agency had ruled KCET to have
24 discriminated, there was nothing for it to evaluate,
25 bearing in mind again that it was satisfied that the

1 station had done for the deaf all the things that the
2 FCC had been saying that the deaf were entitled to
3 have.

4 I will reserve the rest of my time for
5 rebuttal.

6 CHIEF JUSTICE BURGER: Mr. Alito?

7 ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.,
8 ON BEHALF OF PETITIONER IN NO. 81-799

9 MR. ALITO: Mr. Chief Justice, and may it
10 please the Court, the narrow issue presented by this
11 case is which agency or agencies have the responsibility
12 for construing and enforcing Section 504 of the
13 Rehabilitation Act. Must the FCC do so in licensing
14 proceedings, as the Court of Appeals held, or is the
15 responsibility for interpreting and enforcing Section
16 504 exclusively that of the funding agencies, as we
17 believe Congress determined?

18 QUESTION: You think it must be one or the
19 other?

20 MR. ALITO: No, it could be both, Your Honor.
21 Our position is that Congress intended for Section 504
22 to be enforced by the funding agencies exclusively, and
23 not by agencies like the FCC, that do not provide --

24 QUESTION: So it couldn't be both under the
25 statute?

1 MR. ALITO: That's correct. We believe that
2 Congress's intent was that it be enforced --

3 QUESTION: So the FCC would have no authority
4 by rule to say that because of 504 the stations must do
5 so and so?

6 MR. ALITO: I believe the FCC certainly has
7 the authority under its own public interest standard to
8 impose captioning requirements, and it has said so.

9 QUESTION: Yes, but when it says particularly
10 because of 504, the requirements of 504, we are
11 incorporating into our public interest standard, it
12 would have authority to do that?

13 MR. ALITO: I believe that the enactment of
14 504 or any other statute is something that the
15 Commission could take into consideration in making its
16 public interest determination, but I don't believe the
17 Commission can take upon itself the responsibility for
18 enforcing statutes if that responsibility was committed
19 to other agencies by Congress, and I think --

20 QUESTION: Then you don't agree with your
21 colleague, who suggested that the employment policies of
22 the licensee are relevant factors in the license
23 renewal.

24 MR. ALITO: Oh, I agree that that is a
25 relevant factor, Your Honor. The Commission --

1 QUESTION: How does it affect the listeners?

2 MR. ALITO: Pardon me?

3 QUESTION: How does the employment practice of
4 technicians, stenographers, salesmen, et cetera, have
5 any bearing on what goes out over the air?

6 MR. ALITO: The Commission has taken the
7 position that a station that refuses to employ persons
8 regardless of race, sex, national origin, or religion,
9 cannot provide service to all members of the community,
10 as is required by the Communications Act. It is --

11 QUESTION: Well, then I am confused by your
12 other response that these -- I thought you were
13 indicating that the enforcement of these other statutory
14 duties entrusted to other agencies was left to them, and
15 not to be taken on by the FCC.

16 MR. ALITO: I think it's necessary to draw a
17 sharp distinction between the enforcement of other
18 statutes or the policies they express merely because
19 those policies happen to be expressed in the statute and
20 a factor that the Commission determines to be relevant
21 under the public interest standard.

22 QUESTION: What could be a greater enforcement
23 mechanism than the threat of losing a television
24 license?

25 MR. ALITO: It certainly is severe.

1 QUESTION: That is far more serious than an
2 order of the National Labor Relations Board or the EEOC,
3 is it not?

4 MR. ALITO: It certainly is a severe
5 sanction. The question is whether it is the sanction
6 Congress intended in this instance, and our position is,
7 Congress intended for Section 504 to be enforced by the
8 funding agencies. The very structure of Section 504
9 points clearly in that direction. 504 is not applicable
10 to all private entities or all that could be reached
11 under the commerce clause. It applies only to
12 recipients of federal financial assistance. Congress
13 merely attached certain conditions to the receipt of
14 federal aid, and if one of those conditions is violated,
15 then the most obvious and basic remedies are to cut off
16 the funding or to enjoin the recipient from continued
17 violation of the terms of the grant.

18 Now, the FCC and other licensing agencies,
19 unlike the funding agencies and unlike the courts, lack
20 the power to do either of those things. So, as I said,
21 the structure of Section 504 makes it ill suited for
22 enforcement by agencies like the Federal Communications
23 Commission. Beyond that, we believe that the
24 legislative history of Section 504 clearly illustrates
25 that Congress intended for that provision to be enforced

1 by the funding agencies. There is nothing in Section
2 504 itself and nothing in the legislative history of
3 that provision to indicate that Congress contemplated
4 enforcement by agencies like the FCC.

5 And in our view, that is highly significant,
6 for when Congress establishes a comprehensive
7 administrative procedure for the enforcement of the
8 statute, and commits that responsibility to a particular
9 agency or agencies, and it says nothing about
10 enforcement by other agencies, then we believe it may be
11 fairly inferred that Congress intended -- did not intend
12 for those agencies to have the enforcement
13 responsibility.

14 QUESTION: Do you make the same argument on
15 equal employment opportunity, for example, that the FCC
16 should not concern itself whatever with that in license
17 renewals?

18 MR. ALITO: Not at all, Your Honor. The FCC
19 has determined that employment discrimination is very
20 relevant to the license -- licensing decision, and
21 thus --

22 QUESTION: Don't you think the FCC has
23 determined that service to the hearing impaired is
24 relevant to its license renewal application?

25 MR. ALITO: It certainly has, and it has said

1 so.

2 QUESTION: Was that an erroneous decision?

3 MR. ALITO: Absolutely not. Employment
4 discrimination is different from captioning, for a
5 number of reasons. First of all, probably the most
6 important reason is that captioning, unlike refraining
7 from discriminating on the basis of race or any other
8 invidious classification, captioning is a problem of
9 considerable technical complexity. The technology is in
10 flux. There are competing technologies at this time,
11 and it is the Commission's judgment in the exercise of
12 its discretion in bringing its expertise to bear on this
13 problem that at the present time under its public
14 interest standard technological progress may best be
15 stimulated by refraining from imposing compulsory
16 constraints, but the Commission has made it clear that
17 it will continue to monitor developments in this area,
18 and will not hesitate to impose mandatory requirements
19 if sufficient progress is not demonstrated by the
20 broadcasters, if the remaining technical and financial
21 questions are not resolved, and perhaps after Section
22 504's meaning is clarified by the funding agencies.

23 Let me address a bit more directly this
24 question of employment discrimination, because it is
25 central to Respondent's argument and also to the

1 reasoning of the Court of Appeals.

2 I think it is important to recognize that the
3 Commission's treatment of employment discrimination and
4 its treatment of the problem of captioning and making
5 television understandable for the deaf is parallel in
6 many respects. The Commission does not enforce Title
7 VII of the Civil Rights Act of 1964, which deals with
8 employment discrimination. The Commission does not
9 enforce Section 504 of the Rehabilitation Act. The
10 Commission has stated that under its public interest
11 standard, it will take into account employment
12 discrimination by licensees.

13 Similarly, under its public interest standard,
14 the Commission has long sought technically and
15 financially feasible means of making television
16 accessible to hearing impaired viewers, but it has
17 reached the judgment that imposing mandatory captioning
18 requirements at the present time under the public
19 interest standard is not wise.

20 The second point to remember is that the FCC
21 voluntarily and in the exercise of its discretion
22 decided to take on the responsibility for looking at
23 employment discrimination by licensees. It was not
24 compelled to do that by any court. And therefore, what
25 the Commission has done voluntarily in that area is

1 hardly precedent for what the Court of Appeals did in
2 this case.

3 And the third point which I --

4 QUESTION: Your thought there is that the
5 Commission may take into consideration some policies
6 from other statutes as a part of the public interest
7 standard on its own initiative, although had it declined
8 to do so, the Court of Appeals couldn't compel it to do
9 so.

10 MR. ALITO: The Commission's decision to
11 consider or not to consider a factor would be tested
12 against an abuse of discretion standard.

13 QUESTION: Well, do you think that in the
14 particular case that we are talking about, it is the
15 Commission's position that it couldn't have been
16 required to consider employment discrimination if it had
17 chosen not to, if that had been appealed to the Court of
18 Appeals the way the 504 situation was here?

19 MR. ALITO: The Commission might well have
20 been held by a court to have abused its discretion if it
21 had decided that no evidence of employment
22 discrimination, no matter how invidious, was relevant to
23 the public interest standard, and the same sort of test
24 is the proper one here. Did the Commission abuse its
25 broad discretion when it decided to treat the question

1 of captioning as it did? The Commission has thoroughly
2 considered this problem, and has developed a
3 comprehensive approach to the problem, and its approach
4 has three basic parts.

5 It requires the transmission of emergency
6 announcements in visual form. It has decided that at
7 the present time under the public interest standard
8 other mandatory requirements should not be imposed. It
9 has stated that it will not adjudicate violations of
10 Section 504 itself, but will take into account as
11 evidence of a licensee's character any violations found
12 by one of the appropriate funding agencies.

13 The test that the Court of Appeals ought to
14 have applied is, was this approach an abuse of
15 discretion, and if the court had applied that test, we
16 feel confident it would have been required to sustain
17 the Commission's approach.

18 QUESTION: Your argument, counsel, seems to go
19 beyond that of the station itself. The station says the
20 FCC recognized the relevance of the policies behind 504,
21 and it has made an appropriate response at the present
22 time, and you are saying that there was no obligation at
23 all on the part of FCC to even recognize those
24 policies. That seems to me perhaps not necessary to go
25 that far in this case. Would you agree with that?

1 MR. ALITO: Your Honor, I hope that that is
2 not the argument that I have left the impression I am
3 advancing. My argument is that the Commission was not
4 required to define and enforce Section 504. The
5 Commission may have been required under the public
6 interest standard to consider the problem of service to
7 the deaf. The Commission has considered that problem
8 beginning before the enactment of the Rehabilitation
9 Act, and it has not abused its discretion in the manner
10 in which it considered the problem.

11 QUESTION: Well, it did here just reject the
12 submission without hearing.

13 MR. ALITO: It rejected the submission here
14 without a hearing.

15 QUESTION: And it wasn't going to take any
16 evidence about the station's performance with respect --
17 under 504.

18 MR. ALITO: That's correct, Your Honor. It
19 said that it would take into account any violations
20 subsequently found by the appropriate funding agencies.

21 QUESTION: But apparently it did think that
22 the station wasn't out of line in terms of what the
23 Commission's own judgment had been in the past about
24 what stations ought to do.

25 MR. ALITO: The Commission has taken the

1 position that mandatory requirements should not be
2 imposed, largely for the technical reasons that I have
3 touched on, and therefore there was no reason to conduct
4 a hearing to determine whether the number of captioned
5 hours broadcast by KCET was sufficient to meet any
6 standard previously imposed.

7 QUESTION: So the Commission's policy was, the
8 station should not be made to do anything with respect
9 to 504.

10 MR. ALITO: That is correct, Your Honor, in a
11 sense.

12 CHIEF JUSTICE BURGER: We will resume there at
13 1:00 o'clock, counsel.

14 (Whereupon, at 12:00 o'clock p.m., the Court
15 was recessed, to reconvene at 1:00 o'clock p.m. of the
16 same day.)

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1 AFTERNOON SESSION

2 CHIEF JUSTICE BURGER: You may continue, Mr.
3 Alito.

4 ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.,
5 ON BEHALF OF PETITIONER IN NO. 81-799 - RESUMED

6 MR. ALITO: Mr. Chief Justice, and may it
7 please the Court, in FCC versus National Citizens
8 Commission for Broadcasting, this Court stated, "While
9 the Commission does not have the power to enforce the
10 antitrust laws as such, it is permitted to take
11 antitrust policies into account in making licensing
12 decisions pursuant to the public interest standard."

13 Paraphrasing that statement and applying it to
14 this case, while the Commission does not have the power
15 to enforce Section 504 as such, it is permitted to take
16 the problem of adapting television to the deaf into
17 account in making licensing decisions pursuant --

18 QUESTION: Must it? Must it?

19 MR. ALITO: That would be tested against the
20 public interest, against an abuse of discretion standard.

21 QUESTION: Well, how about the case you just
22 cited? Did it have to take antitrust considerations
23 into account?

24 MR. ALITO: The Court didn't find that it had
25 to.

1 QUESTION: What is your submission on that?
2 Must it, or not?

3 MR. ALITO: It varies, I think, Your Honor,
4 depending from case to case. I don't believe it's
5 possible to make a blanket statement.

6 QUESTION: What about -- Let's just take the
7 antitrust case then, if you want to do it case by case.
8 Must it take antitrust considerations into account?

9 MR. ALITO: In certain contexts, I think it
10 may be required to do so, but not --

11 QUESTION: Sometimes it must?

12 QUESTION: In the context of the antitrust
13 laws?

14 MR. ALITO: In certain --

15 QUESTION: Sometimes it must?

16 MR. ALITO: In certain contexts,
17 anticompetitive behavior by a licensee might be relevant
18 to the licensing decision.

19 QUESTION: So it must in certain cases.

20 MR. ALITO: Under an abuse of discretion
21 standard, it might be found to be required to do so.

22 QUESTION: So in our case, it must take into
23 consideration in the proper case, as you say, the
24 conduct of the licensee in the light of 504.

25 MR. ALITO: I don't mean -- by proper case, I

1 don't mean the case of one licensee as opposed to
2 another licensee. I mean with respect to a particular
3 problem and a particular policy. Here, the point is
4 that the Commission has adopted a considered policy with
5 respect to this problem of technological flux and
6 technological complexity.

7 QUESTION: Mr. Alito, may I ask you a question
8 about the particular problem that this case raises? As
9 I understand it, this is a license renewal proceeding,
10 and Mrs. Gottfried objected to the renewal of the
11 license, and filed an objection to the renewal which was
12 later supported by some kind of an affidavit. Is that
13 right? And what I want to know is, where is the
14 affidavit in the papers? What is it that she has filed
15 on which she did not get a hearing? I can't find it in
16 the papers.

17 MR. ALITO: Her claim was, she had two basic
18 claims.

19 QUESTION: My specific question first is,
20 where can I find it in the papers? Do you know?

21 QUESTION: Her claim, or her submission.

22 QUESTION: Her submission that --

23 MR. ALITO: It is in the record of the case.
24 It is not in the joint appendix.

25 QUESTION: It is not in the appendix at all?

1 MR. ALITO: No, it's not.

2 QUESTION: Oh. Then, what was her claim?

3 MR. ALITO: I believe she had two principal
4 claims. The first was a general allegation that the
5 programming of this licensee and the other Los Angeles
6 television stations involved was insufficient with
7 respect to the deaf. The second was that the --

8 QUESTION: Insufficient according to what
9 standard?

10 MR. ALITO: Under the -- Under Section 504 of
11 the Rehabilitation Act. Her second claim was that KCET
12 had abused its discretion by its decision concerning the
13 scheduling of the ABC captioned news, and as to that
14 question, the Commission inquired into the matter and
15 found that KCET had not abused its programming
16 discretion.

17 QUESTION: So she did get a hearing on the
18 second charge she made?

19 MR. ALITO: She certainly got an inquiry by
20 the Commission into that charge. She did not get an
21 inquiry into the general allegation of insufficient
22 programming for the deaf, because the Commission does
23 not have at this time mandatory requirements concerning
24 captioning.

25 What is basically wrong with the Court of

1 Appeals decision in this case is that it requires the
2 Commission to pave the way in construing what Section
3 504 requires. It requires something more than simply a
4 recitation of the language of Section 504, because 504's
5 requirements in the area of captioning are as yet not
6 fully defined. For example, it may be argued under this
7 Court's decision in Southeastern Community College
8 versus Davis that Section 504 requires no captioning
9 because Section 504 does not demand expensive
10 affirmative efforts to overcome handicaps, the
11 disabilities imposed by handicap.

12 On the other hand, it may be argued again
13 based on Davis that captioning is required because there
14 are instances in which the refusal to accommodate the
15 needs of the handicapped through captioning or some
16 other available technology might amount to
17 discrimination. Until such basic questions concerning
18 Section 504's applicability to the problem of captioning
19 are resolved, and in our view they should be resolved by
20 the funding agencies, it will be impossible for the
21 Commission to determine in a licensing proceeding
22 whether a licensee had complied with Section 504 --

23 QUESTION: May I ask another question?
24 Because I have a lot of difficulty with abstract
25 problems, as this seems to be. Did she in her paper

1 allege specific facts that she said constituted a
2 violation of a statute?

3 MR. ALITO: She alleged facts which she
4 claimed constituted a violation.

5 QUESTION: Essentially, what facts did she
6 allege? Basically, what did she say?

7 MR. ALITO: The specific allegation concerned
8 when KCET began to broadcast the ABC captioned news, and
9 the hour at which it was programmed. The general
10 allegations concerned the number of programs broadcast
11 during the license term that were accessible to hearing
12 impaired viewers.

13 QUESTION: And so, could it be said that by
14 denying a hearing, that the FCC said -- ruled, in
15 effect, that those allegations, even if true, do not
16 constitute a violation of that statute, or is it better
17 to say they don't care whether it constitutes a
18 violation of the statute? Which is their view?

19 MR. ALITO: Your Honor, I don't believe it's
20 either. They did not find that those did not constitute
21 a violation of 504. They certainly did not say that
22 whether or not KCET had violated 504 was irrelevant. It
23 was relevant to the character, to KCET's character and
24 therefore its fitness for a license, but the Commission
25 stated that it would wait until a violation of that

1 statute was found by one of the funding agencies.

2 QUESTION: That's like saying they don't care
3 unless some other agency finds there to be a violation.

4 MR. ALITO: I wouldn't say they don't care,
5 Your Honor. It is simply a recognition that one
6 administrative agency, even though required to implement
7 the public interest, cannot be expected to do the work
8 of all the other administrative agencies.

9 QUESTION: So it is a -- I asked you earlier
10 in this argument, didn't they say, it is irrelevant
11 until and unless some other agency decides there has
12 been a violation? Because they had no hearing.

13 MR. ALITO: It is true in that sense. Whether
14 or not they complied with 504. But not the general
15 question of adapting television to the deaf.

16 QUESTION: Yes, because they felt that they
17 were at least in line with Commission policy.

18 MR. ALITO: They felt they were in line with
19 the Commission policy of not imposing mandatory
20 requirements at this time.

21 QUESTION: Insofar as 504 is concerned, isn't
22 it a fairly orthodox application of primary jurisdiction
23 on behalf of one agency for another?

24 MR. ALITO: I believe it is, Your Honor. It
25 is what the Commission does in cases of allegations of

1 individual employment discrimination and other cases
2 concerning the violation of statutes committed by
3 Congress to other agencies.

4 Thank you.

5 QUESTION: Frequently in our opinions and
6 questions we refer to the alleged expertise, the
7 accumulated experience of these regulatory agencies.
8 Isn't that a factor to be taken into account, whether,
9 as Justice Rehnquist suggested, this is a primary
10 responsibility of the FCC, to delve into a subject
11 where another agency has total control?

12 MR. ALITO: I believe the FCC's expertise is
13 very relevant in this sense. The Commission has brought
14 its expertise to bear upon the problem of captioning,
15 and has developed an approach, and if the Court of
16 Appeals had applied the correct test, it would have
17 sustained the FCC's exercise of its expert judgment in
18 this case. The decision of the Court of Appeals can
19 hardly be sustained in the name of the Commission's
20 expertise, when that is precisely what it upset.

21 There is something a little bit strange, I
22 admit, on its face, about the FCC, the expert in the
23 area of broadcasting, deferring to a funding agency, but
24 this is where Congress allocated that responsibility,
25 and what Section 504 is about, at least in part, is how

1 an agency's funds are spent, and the FCC is not -- does
2 not claim particular expertise as to how the funds of
3 the Department of Education or another funding agency
4 should be spent.

5 Thank you.

6 CHIEF JUSTICE BURGER: Mr. Firestone.

7 ORAL ARGUMENT OF CHARLES M. FIRESTONE, ESQ.,

8 ON BEHALF OF THE RESPONDENTS IN BOTH CASES

9 MR. FIRESTONE: Mr. Chief Justice, and may it
10 please the Court, I represent Sue Gottfried and the
11 Greater Los Angeles Council on Deafness, who in turn
12 represent the estimated five and a half to eighteen
13 million severely hearing impaired people who have been
14 subject to a history of discrimination generally and
15 largely excluded from participation in and denied the
16 benefits of our nation's pervasive and influential
17 television system.

18 We are supported in this case, of course, by
19 deaf groups around the country who really seek to be
20 included in the television system, where --

21 QUESTION: The word -- when you use the word
22 "discrimination," what do you mean?

23 MR. FIRESTONE: Certainly that is a term of
24 art with respect to --

25 QUESTION: Well, I am just wondering -- it

1 must be in your mind, so how is it defined in your
2 mind?

3 MR. FIRESTONE: I think in the case of 504, I
4 think discrimination means failure to -- indifference,
5 exclusion, and failure to remove barriers that are at
6 least reasonably accommodable.

7 QUESTION: You don't suggest it means
8 purposeful discrimination because somebody can't hear?

9 MR. FIRESTONE: Well, I think that is part of
10 the definition of discrimination as well, and certainly
11 that --

12 QUESTION: Somebody is discriminating against
13 them because they can't hear?

14 MR. FIRESTONE: No.

15 QUESTION: Is that what you are saying?

16 MR. FIRESTONE: It is hard to believe that
17 that would be the case.

18 QUESTION: That isn't what you really mean, is
19 it?

20 MR. FIRESTONE: No, although that --

21 QUESTION: You mean they are discriminating in
22 the sense they don't have the same opportunity.

23 MR. FIRESTONE: Yes, they are denied equal
24 access, more or less, and denied --

25 QUESTION: They are not provided equal access.

1 MR. FIRESTONE: Not provided by reasonable
2 accommodations. Now, it is possible that, as the
3 Commission has held, that the policy of exclusion can be
4 inferred from -- excuse me, a policy of discrimination
5 can be inferred from a policy of exclusion of
6 minorities, or a policy of indifference. The Commission
7 has held that in a couple of cases, so that it is very
8 possible that as a legal matter there would be
9 discrimination, although somebody does not have the
10 animus, which is hard to believe, that somebody would
11 actually discriminate against the disabled.

12 QUESTION: Well, if this Court or any court,
13 for example, which is open to the public does not
14 provide amplifying equipment so that people who are hard
15 of hearing either can't follow the proceedings or have
16 great difficulty, is that a discrimination?

17 MR. FIRESTONE: Well, certainly you are not
18 under any obligation, legal obligation, as is in this
19 case, but I think that -- and I would also preface by
20 saying that the Court has been accommodating to --

21 QUESTION: Must it? Must it? That is the
22 question.

23 MR. FIRESTONE: Not under the law. Not under
24 the law. I don't think the Court would be covered by --

25 QUESTION: Then --

1 MR. FIRESTONE: You mean, if the Court --

2 QUESTION: Do I understand your answer that it
3 is not discriminatory not to provide caption, immediate
4 translation of everything that is going on here for the
5 benefit of the audience?

6 MR. FIRESTONE: Actually, I am -- I don't know
7 if the Court is considered -- you mean, under Section
8 504, or just generally discrimination?

9 QUESTION: No, generally. The term
10 discrimination isn't limited to this statute. It is a
11 broad term.

12 MR. FIRESTONE: I think what is required is
13 reasonable accommodation under the standard of Davis and
14 other cases that have looked at what is discrimination
15 against the disabled. Reasonable accommodation might
16 mean allowing signing, as the Court has done. It may
17 mean -- or the case of a lawyer who wants to argue, to
18 allow for simultaneous captioning. I think the Court's
19 record in this area is exemplary, but not to allow --
20 not to have amplification equipment that may or may not
21 help other people I don't think is required.

22 QUESTION: Well, are we subject to 504?

23 MR. FIRESTONE: I don't think so.

24 QUESTION: Why aren't we?

25 MR. FIRESTONE: I don't think you are defined

1 as a federal agency, are you?

2 (General laughter.)

3 MR. FIRESTONE: Officially.

4 QUESTION: Well, we are funded. I suppose we
5 are funded.

6 MR. FIRESTONE: Federally funded, but I don't
7 think --

8 QUESTION: No one can cancel our license.

9 QUESTION: We are not funded by grants under
10 the program, are we?

11 MR. FIRESTONE: Right.

12 (General laughter.)

13 QUESTION: And our license can't be cancelled
14 by anyone.

15 MR. FIRESTONE: Right. We are accountable to
16 you, not the other way around, as the licensees are
17 accountable to the FCC and to the public.

18 QUESTION: My hypothetical questions were put
19 to you in your use of the word "discrimination."

20 MR. FIRESTONE: Yes.

21 QUESTION: Which is not limited to 504 or any
22 other statute. It is a very broad term.

23 MR. FIRESTONE: Right, and I think that I was
24 somewhat careful not to only use the word
25 "discrimination," but also use the other words of the

1 statute, which say not to exclude from the benefits or
2 deny participation. In other words, the statute, I
3 think, still given the Davis case, which says that it
4 really is talking about intentional discrimination, but
5 it also goes on to say that discrimination, there is a
6 fine line between discrimination and failure to afford
7 affirmative action, illegal discrimination versus
8 affirmative action.

9 I think that 504 was definitely intended to
10 allow for access by the disabled to America's
11 institutions. It was really a step forward. It was the
12 Magna Carta of civil rights for the disabled, and in
13 this case, I think that Congress also intended that this
14 Magna Carta be taken into account not simply by an
15 occasional funding agency or at the whim of the funding
16 agency, but by all the government.

17 The issue in this case is whether or not one
18 government -- the one government institution which is
19 charged with the overall regulation of television may
20 ignore or find irrelevant Congressional policy designed
21 to aid the handicapped when it considers a license
22 renewal application of an applicant who is subject to
23 this requirement, and it is clear in this case that KCET
24 is subject to the --

25 QUESTION: Suppose the Commission said, well,

1 we are going to adopt a rule that we think 504 is a
2 relevant matter for the public interest, and here is our
3 rule, here is what stations must do.

4 MR. FIRESTONE: Yes.

5 QUESTION: And then a station comes up for
6 license renewal, and the Commission rules that the
7 station is in perfect conformity with its rule, and
8 denies a hearing on allegations that the station has not
9 lived up to 504.

10 MR. FIRESTONE: Well, in that case, then the
11 rule was adopted pursuant to 504. Presumably that could
12 be reviewed as to whether or not it is arbitrary or
13 capricious.

14 QUESTION: The action or the rule?

15 MR. FIRESTONE: It has a rule. I'm sorry.

16 QUESTION: Yes, well, the rule could be
17 subject to --

18 MR. FIRESTONE: Yes, or presumably at the
19 license renewal time, and that --

20 QUESTION: You think the rule could be
21 attacked at license renewal time?

22 MR. FIRESTONE: I think that if the rule were
23 an illegal rule, were found to be contrary to the law, I
24 think that it could be attacked. It would be certainly
25 an unusual situation. I can't think offhand of one --

1 QUESTION: Well, the Commission -- I gather
2 the Commission's argument is that it has done internally
3 all that it thinks necessary under 504.

4 MR. FIRESTONE: Well, the Commission --

5 QUESTION: And that it doesn't need to listen
6 to anything else.

7 MR. FIRESTONE: No, the Commission has one
8 grave omission, and that omission is 504. When it
9 adopted these policies, when it looked, you know, at
10 this application, it did not take into account the fact
11 that Congress intended that those who are disabled have
12 access to the communications system. We are talking
13 here about the communications handicapped, the people
14 who really don't have the opportunity to partake in this
15 system, and here is an opportunity not only to include
16 them, but certainly to look at how the recipients of
17 federal financial assistance, those who are under a
18 specific law, to apply this standard of inclusion, of
19 non-discrimination, however we want to describe the
20 dictates of 504.

21 It had an opportunity to bring them into the
22 communications system, and instead what it did was say,
23 we will not look at this. This is irrelevant. This is
24 -- A licensee can do nothing and still comply. In fact,
25 it could discriminate, presumably. Let's say that a

1 licensee intentionally -- I can't understand why, but
2 let's say that a licensee would intentionally refuse to
3 carry, let's say, close captioned. In fact, there is a
4 licensee that when they get the closed captions, they
5 remove the closed captions, as I understand it, before
6 they send it out. Now, I am not saying this is a public
7 broadcasting station, but let's say that the licensee
8 actually takes that affirmative step. The Commission
9 would say, this is irrelevant. It doesn't matter what
10 you do or what you don't do, in terms of providing some
11 service for the hearing impaired.

12 QUESTION: Let me ask you, suppose the funding
13 agency had considered a complaint that this particular
14 funded station hadn't lived up to its obligations under
15 504, and had decided that -- had rejected the complaint,
16 and said the station was living up to its obligations
17 under 504, doing all that was reasonably necessary, and
18 then the station came up for license renewal. Could you
19 relitigate that whole question or not?

20 MR. FIRESTONE: I think so, certainly,
21 because --

22 QUESTION: You have to say that, I gather,
23 don't you?

24 MR. FIRESTONE: Well, I wouldn't have to say
25 that, because in this case there was no reasonable

1 expectation that another agency would act. In other
2 words, I don't have to say it in this case.

3 QUESTION: Why? Why?

4 MR. FIRESTONE: Because the Commission was
5 told, and it admitted that HEW, who they were deferring
6 to, had no intention to act until Congress passed a law
7 to decide which agency was the appropriate agency.
8 There was no reasonable expectation that there would be
9 action in this case, and --

10 QUESTION: Well, if Congress hasn't yet passed
11 a law deciding which agency should be responsible, isn't
12 that an indication of some go slow attitude on
13 Congress's part --

14 MR. FIRESTONE: No.

15 QUESTION: -- until that law is passed?

16 MR. FIRESTONE: No. Your Honor, quite the
17 contrary. Certainly in 1974 the only statutory history
18 we have on Section 503, which -- actually it was a year
19 later when they amended the law, the Congress made very
20 clear in the Senate report that they expected action by
21 the end of 1974. They --

22 QUESTION: By whom?

23 MR. FIRESTONE: Well, they were mainly looking
24 for guidelines from the HEW, but they also specified
25 that there was no specific enforcement mechanism in the

1 statute. The Commission is arguing that there was -- I
2 think what they have to be arguing is that the
3 legislative history intended that they not consider,
4 because at the time of the passage of Section 504, the
5 FCC did consider allegations of discrimination,
6 allegations of employment discrimination as well as
7 programming discrimination, whether or not there is an
8 EEOC in existence, and Congress just intended to adopt a
9 civil rights law for the disabled as it has for the
10 minorities and women, and for them to say that the FCC
11 is intended not to enforce this, or -- excuse me. We
12 are not even talking about enforcement here. What we
13 are talking about is consideration.

14 All the court held in this case was not that
15 the FCC has to be the primary enforcer or actually
16 enforce the law. They are saying, take this into
17 consideration when you look at the public interest
18 merits of a license.

19 QUESTION: But the Court of Appeals did hold
20 that the agency was not entitled as a matter of its
21 discretion to defer to the other agency which had
22 primary responsibility for enforcing 504. Isn't that
23 correct?

24 MR. FIRESTONE: Well --

25 QUESTION: Is it correct, or not?

1 MR. FIRESTONE: In this case, and they did say
2 the special circumstances of this case, they said that
3 deference -- that they couldn't defer. In fact, I would
4 point out --

5 QUESTION: Was your answer yes or no?

6 MR. FIRESTONE: Yes. But I -- the special
7 circumstances of this case are not only what the Court
8 has pointed out, but in this case the Commission did not
9 condition the license, so in other words, let's say that
10 a further decision had been made by the Department of
11 Education now that did relate to the license period, and
12 by the way, they are not even considering factors that
13 relate to the license period, which is the period in
14 question under FCC law.

15 QUESTION: Mr. Firestone, that makes me -- I
16 hate to interrupt you, and maybe I shouldn't, but I
17 really want to be sure I understand the relief that you
18 think your client is entitled to. You were objecting to
19 the renewal of the license, which I take it means that
20 had you won, the license renewal would have been denied.

21 MR. FIRESTONE: Your Honor, in this case, had
22 we won, it would simply be considered as a -- we would
23 go through a hearing.

24 QUESTION: Is that the relief that you
25 requested, a denial of the license?

1 MR. FIRESTONE: That's the extreme relief that
2 is possible. In fact --

3 QUESTION: Well, is that what you requested?

4 MR. FIRESTONE: I think that as a matter of
5 law we put in, you petition to deny. That's the
6 standard procedure.

7 QUESTION: Well, if that isn't what you really
8 wanted, what did you want?

9 MR. FIRESTONE: We want access of programming
10 for the deaf. We want recognition.

11 QUESTION: Do you want something specific with
12 respect to this particular station, or do you want a
13 general rule to apply to all stations?

14 MR. FIRESTONE: Your Honor, we would like to
15 see -- I'm stepping back from this case for a second.
16 We would like to see a rule of broad applicability.

17 QUESTION: Well, we have to decide a lawsuit,
18 you know.

19 MR. FIRESTONE: The Commission can choose
20 whether it proceeds by rulemaking or adjudication.

21 QUESTION: Well, Judge McGowan said they ought
22 to proceed by rulemaking, and therefore you should lose
23 in this proceeding.

24 MR. FIRESTONE: Well, it would have been
25 tremendous if the Commission had proceeded by

1 rulemaking, but they specifically declined to adopt a
2 rule. Now, when we come before them in an adjudication,
3 they say, there is no rule, therefore we won't consider
4 it. I mean, it's a Catch 22 that the deaf are faced
5 with.

6 QUESTION: But what is it -- I still don't --
7 I have -- it is a very strange case for me, because the
8 pleadings are not before us, and that is what we are
9 arguing about, the sufficiency of your pleadings. I
10 don't know exactly what you want. I know you would like
11 the Commission to do something.

12 MR. FIRESTONE: Yes.

13 QUESTION: But is an objection to a license
14 renewal an appropriate way to get the Commission to
15 adopt a rule? Isn't that what you really want, is a
16 rule?

17 MR. FIRESTONE: Well, the Commission -- what
18 we want is a guideline. Now, it can come -- if the
19 Commission --

20 QUESTION: Well, should they deny this
21 applicant's license in order to give you a guideline?

22 MR. FIRESTONE: No, I think the court
23 recognized that the licensee would not lose its license,
24 that in fact there are plenty of other sanctions that
25 are available to the Commission in this area. They can

1 apply prospective reporting requirements. They can give
2 a conditional license. They can admonish a licensee.
3 They can even inquire. They did none of these.

4 QUESTION: Did they treat this licensee any
5 differently than any other licensee, according to your
6 allegations? Do you allege this station operates
7 differently than any other public station does?

8 MR. FIRESTONE: Well, we certainly allege that
9 their refusal to carry the ABC captioned news, for
10 example, or their refusal to put on the captioned
11 version of -- was indicative of an attitude of
12 indifference, at the least.

13 QUESTION: But is it unique to this station?

14 MR. FIRESTONE: Well, there were 118 stations
15 around the country that were carrying the ABC captioned
16 news when the Los Angeles station, where there may be
17 the second most number of people who are deaf in the
18 country, was not carrying this. I mean, there was a
19 certain indifference going on here. And it led to the
20 situation where the deaf were picketing the station, and
21 finally they put it on at 11:30 at night and repeated it
22 at 6:30 the next morning, and -- sometimes. Sometimes
23 they didn't put it on at 11:30. And that was considered
24 under --

25 QUESTION: Mr. Firestone, I take it your

1 position is, and arguably it is correct, that the
2 Commission ruled that considerations of 504 are
3 irrelevant to the license renewal proceeding. Is that
4 right?

5 MR. FIRESTONE: No, we --

6 QUESTION: I mean, the Commission. The
7 Commission's action was --

8 MR. FIRESTONE: Yes, the Commission's --
9 that's right.

10 QUESTION: -- that it is irrelevant, it is
11 just beside the point, in which event they would say
12 also if you asked them to make a rule that that is
13 irrelevant, too, because it just -- until somebody else
14 does something, it is none of our business.

15 MR. FIRESTONE: It seems to me that that is
16 their attitude. There was a request for action. They
17 constantly say, we will not adopt a rule, and then the
18 only way to come before them -- this is the appropriate
19 -- at this point, this is the appropriate means of
20 trying to seek a guideline as to what --

21 QUESTION: If they won't make a rule, you want
22 it by adjudication at an appropriate time.

23 MR. FIRESTONE: That's right. And also there
24 are other advantages of adjudication. Looking at a case
25 specifically, just as Your Honor would prefer to have

1 the specifics of a case before you than the abstract, is
2 very helpful to an agency, and of course we are dealing
3 here with the agency with the expertise over
4 broadcasting.

5 I would point out, for example, in the
6 Commission's brief they issue certain -- they mention
7 certain requirements that would be necessary for a 504
8 application to television. Two of those, at Page 32,
9 are, it must not place unreasonable restrictions upon
10 the journalistic and artistic freedom of television
11 broadcasters and producers. It must not impose such
12 high costs on public television stations that they are
13 driven out of business or forced to curtail other
14 important services.

15 Now, how does the agency that is charged with
16 the responsibility of licensing these television
17 stations, and remember that our system is that we deny
18 the right to broadcast to everyone but the few licensees
19 who get these licenses, and once they have those
20 licenses, they are public trustees accountable now every
21 five years to the government, and to the people, and how
22 they are going to avoid looking at this question when
23 these requirements are only within their expertise -- I
24 mean, they are suggesting that you go to the Department
25 of HEW, which is now the Department of Education. The

1 licensee in this case was funded by the Department of
2 Education for certain programming, by the Department of
3 Commerce. They get equipment.

4 QUESTION: Do you think the Commission in any
5 manner short of rulemaking has ever communicated to any
6 station what its preferences are with respect to the
7 handicapped? Are you a communications lawyer?

8 MR. FIRESTONE: Yes.

9 QUESTION: Well, are you aware that the
10 Commission has ever taken any position with respect to
11 communicating with the people who can't hear very well?

12 MR. FIRESTONE: The only thing that they did
13 was, in 1970 -- I will go through it. In 1970, they
14 said it would be very good to have television accessible
15 to the deaf. We are suggesting certain items, but we
16 will adopt no rule, and by the way, this was on a
17 request for ruling.

18 QUESTION: They suggested it, didn't they?

19 MR. FIRESTONE: They suggested some things.

20 QUESTION: And people knowledgeable in the
21 business knew what the suggestions are.

22 MR. FIRESTONE: If they read the deaf
23 captioning decision at 26 FCC 2nd 916 or whatever.

24 QUESTION: Well, lawyers for stations usually
25 do, don't they?

1 MR. FIRESTONE: I would hope so.

2 QUESTION: Yes. Well, was this station in
3 compliance with the suggestions of the Commission, or
4 not?

5 MR. FIRESTONE: Well, the Commission has never
6 -- won't look at that question.

7 QUESTION: I am asking you, not the
8 Commission.

9 MR. FIRESTONE: I think that they aren't in
10 compliance with the suggestions. The suggestions were
11 such things as getting together with other licensees
12 and --

13 QUESTION: So this station has followed the
14 lead of the Commission, is doing everything the
15 Commission thought needed to be done.

16 MR. FIRESTONE: No, it said that they had
17 not. They had not --

18 QUESTION: This station has not done
19 everything the Commission thought should be done?

20 MR. FIRESTONE: They have not done everything
21 that the Commission suggested in the 1970 statement.

22 QUESTION: Oh, they haven't?

23 MR. FIRESTONE: They have not. No. They --
24 Not only that, the Commission has not looked at it.
25 They refuse to look at that question. They said, we

1 adopted no rule, then they -- but they did say, this is
2 up to each individual licensee to show -- to determine
3 how to serve their local communities. We have come in
4 and said that they are not serving their local
5 community. It could be a case now where the
6 Commission's position is that somebody has affirmatively
7 refused to carry captioned programming, to send out the
8 encoded signal, taken an affirmative step.

9 QUESTION: I understood that the Commission
10 had stated that it did encourage experimentation with
11 technology by stations about this problem, and that it
12 actually issued a warning that it would consider
13 imposition of mandatory requirements if it determined in
14 the future that the voluntary efforts were not
15 satisfactory. Is that right?

16 MR. FIRESTONE: They did when they adopted the
17 Line 21 captioning, said that -- at that time, they said
18 it is still up to each individual licensee. It is each
19 individual licensee's responsibility to serve the local
20 community, the local deaf community. They indicated
21 that that would be something --

22 QUESTION: Well, is what the Court of Appeals
23 did here really to quarrel with the FCC's determination
24 of public interest?

25 MR. FIRESTONE: No, Your Honor.

1 QUESTION: What is in the public interest?

2 MR. FIRESTONE: The Court of Appeals was
3 extremely careful and extremely narrow in this decision
4 to say in the special circumstances of this case the FCC
5 must -- cannot ignore the dictates of 504. When they
6 look at these questions, they just should consider the
7 fact that Congress intended that the deaf have some
8 access, that they not be ignored, and that certainly was
9 the thrust of the Court of Appeals' decision.

10 QUESTION: Has the FCC also required that all
11 emergency messages be visually transmitted?

12 MR. FIRESTONE: Yes. But of course --

13 QUESTION: And it said that if the agency
14 charged with primary enforcement of 504 determines there
15 is a violation, it will take that into account?

16 MR. FIRESTONE: Well, I don't think they could
17 have taken it into account in this decision without
18 actually proceeding with revocation action, because they
19 did not condition the outcome of this proceeding on the
20 outcome of any other proceedings in the government.

21 QUESTION: Mr. Firestone --

22 QUESTION: What --

23 QUESTION: Go ahead.

24 QUESTION: My only question was, I thought we
25 might clarify, if you would give me your idea of what

1 the FCC has to do to comply with the opinion of the
2 court below.

3 MR. FIRESTONE: Your Honor, I think that they
4 have to inquire into the good faith of the licensee as
5 to how they were --

6 QUESTION: How would they do that?

7 MR. FIRESTONE: I think that the -- I suppose
8 that if -- first of all --

9 QUESTION: Can we get beyond supposing?

10 MR. FIRESTONE: Well, there are -- the
11 Commission has a variety of options that the court left
12 open to them. The court very much recognized this
13 Court's requirement that the court allow -- defer to the
14 Commissions' discretion, so they left open the
15 procedures to the Commission. Now, one possibility
16 would be that the Commission would designate for
17 hearing, in which case I would expect that the licensee
18 would come forward with a motion for summary judgment,
19 bringing forth affidavits of various Commission -- I
20 mean, various station officials to discuss what they had
21 done and --

22 QUESTION: All you want is a hearing?

23 MR. FIRESTONE: That's right. That is all --

24 QUESTION: That is all you want?

25 QUESTION: So far.

1 (General laughter.)

2 MR. FIRESTONE: Well, the Commission must be
3 reasonable. Let's take the situation of --

4 QUESTION: What do you want beyond a hearing?

5 MR. FIRESTONE: Beyond the hearing, we would
6 like guidelines. I think that what the Commission would
7 have to do --

8 QUESTION: You would get the guidelines on a
9 hearing involving one station?

10 MR. FIRESTONE: Well, the Commission has done
11 this on numerous occasions.

12 QUESTION: You want rulemaking or not?

13 MR. FIRESTONE: The Commission could defer --
14 This is another possibility. The Commission could
15 institute a rulemaking.

16 QUESTION: Well, what do you want?

17 MR. FIRESTONE: I would like to see a
18 rulemaking, but --

19 QUESTION: You've got a ruling.

20 QUESTION: You want an adjudication first as
21 to whether this license can be renewed. That is what
22 you asked for.

23 QUESTION: Mr. Firestone, do you think --

24 QUESTION: Where did you ask for a license to
25 be renewed?

1 MR. FIRESTONE: Pardon?

2 QUESTION: Where did you ask for relief?

3 MR. FIRESTONE: In the petition before the
4 Commission.

5 QUESTION: None of that is here.

6 MR. FIRESTONE: It is not, Your Honor.

7 QUESTION: It is in the record.

8 MR. FIRESTONE: It is in the joint appendix of
9 the D.C. Circuit. We were asked to keep down the record.

10 QUESTION: Isn't it in the record that has
11 been lodged here, somewhere?

12 MR. FIRESTONE: Yes.

13 QUESTION: It is not in the printed --

14 MR. FIRESTONE: It is not in the joint
15 appendix.

16 QUESTION: It is in the record lodged here,
17 isn't it?

18 MR. FIRESTONE: It's in the record. The
19 record would include, I assume, the joint appendix of
20 the D.C. Circuit, and we were asked to keep the record
21 down. The Commission did not -- well, I don't want to
22 go into the joint appendix problems, but I apologize for
23 not having --

24 QUESTION: Mr. Firestone, do you think it is
25 crystal clear that this television station and the

1 programming it presents is "a program or activity
2 receiving federal financial assistance" under the terms
3 of 504 --

4 MR. FIRESTONE: Yes, Your Honor.

5 QUESTION: -- and that it would have no
6 defense to an action, say, if the appropriate agency
7 brought it in court?

8 MR. FIRESTONE: Yes, Your Honor, and in fact
9 this has been held by everyone who has looked at.

10 QUESTION: What do you mean, held by everyone?

11 MR. FIRESTONE: Well, the District Court --

12 QUESTION: Are some of them judges?

13 MR. FIRESTONE: Yes, the District Court in Los
14 Angeles held that they were subject to 504. The
15 Department of Health, Education, and Welfare held that
16 they were subject to 504. And I would like to point out
17 that this licensee is -- receives assistance not only
18 from the Department of Education, the Department of
19 Commerce, the National Endowment for the Arts, the
20 National Endowment for the Humanities, the U.S.
21 Information Administration, but also the Corporation for
22 Public Broadcasting and the Public Broadcasting Service,
23 and particularly the Corporation for Public Broadcasting
24 is -- they float through federal funds to the licensee,
25 but they do not -- they are not a federal agency. They

1 don't have the enforcement power.

2 QUESTION: Didn't the station make some
3 defense in the Court of Appeals that it was not subject
4 to this provision, that it had a statutory exemption
5 from program control or something to that effect?

6 MR. FIRESTONE: Well, the Court of Appeals
7 disposed of it in a footnote. Yes.

8 QUESTION: Well, if we get back to your
9 contention that all these things ought to be originally
10 thrashed out before the FCC, does that really make much
11 sense, if it is deciding a fairly complicated question
12 of -- wouldn't you want the agency charged with the
13 statutory mandate whose administrative interpretation
14 would be entitled to considerable weight to make those
15 kind of determinations in the first place?

16 MR. FIRESTONE: Well, I don't see how the fact
17 that the licensee got \$5 million in federal money in
18 1977, and how they have gotten something like 30 percent
19 of their money from federal subsidies can be a difficult
20 question as to whether or not they are subject to 504.

21 QUESTION: Could you have just gone into a
22 district court somewhere and sought to enjoin or to get
23 an injunction against the station for violations of
24 504?

25 MR. FIRESTONE: Yes, there was an action.

1 There was such an action.

2 QUESTION: Well, there was such an action.

3 Did you win?

4 MR. FIRESTONE: No, the -- well --

5 QUESTION: What was the result of the action?

6 MR. FIRESTONE: The result was that the court
7 found that they couldn't -- that there was no standard
8 by any of these funding agencies.

9 QUESTION: Didn't they say you should go to
10 the funding agency, or not?

11 MR. FIRESTONE: It was the -- actually, the
12 licensee in that decision, and that is, I think, at Page
13 149 of the joint appendix that you have, argued that
14 there was primary jurisdiction in the FCC. That is
15 where they told -- that is what they were telling the
16 court.

17 QUESTION: Did you lose, or what happened?

18 MR. FIRESTONE: It is on appeal in the Ninth
19 Circuit.

20 QUESTION: Well, you lost in the district
21 court on the grounds that that was the wrong place to go?

22 MR. FIRESTONE: No, no. The district court
23 found that the -- they dismissed the licensee because
24 there was no standards for the licensee to comply with,
25 and they then issued an order for the --

1 QUESTION: No standards issued by the funding
2 agency.

3 MR. FIRESTONE: By the funding agencies, and
4 they included the Federal Communications Commission.

5 QUESTION: Now, this Court has said countless
6 times, and other courts have, that these regulatory
7 agencies have broad, very broad discretion as to what
8 they will weigh and take into account. Now, if an
9 agency has exercised that discretion and come up with
10 what someone regards as a wrong decision, isn't the
11 review of that decision limited to an abuse of
12 discretion, not a matter of a Court of Appeals deciding
13 that it should have been done some other way?

14 MR. FIRESTONE: Yes, Your Honor, and that's
15 exactly what happened in this case.

16 QUESTION: And you suggest there is an abuse
17 of discretion here on the part of the agency?

18 MR. FIRESTONE: Yes. Yes, there was an abuse
19 of discretion by failing to consider a relevant factor,
20 making the consideration of a law that is clearly
21 relevant to communications, to the Communications Act --
22 we are talking about inclusion of a segment -- a
23 minority segment of the audience, something that really
24 goes to the underlying purposes of the Communications
25 Act. In fact, if you --

1 QUESTION: An abuse of discretion on the
2 Commission's part because it decided to defer to an
3 agency which has a life or death control over a public
4 television station, life or death control by virtue of
5 the grants.

6 MR. FIRESTONE: Well, the agencies that they
7 deferred to do not have life and death control. The
8 life or death control is the Commission's, and in fact --

9 QUESTION: Don't you think the grants have a
10 lot to do -- perhaps life and death isn't quite it, but
11 they can shut off the supply of blood, can't they?

12 MR. FIRESTONE: They can, and that would be an
13 extreme remedy which we frankly would not like to see,
14 but the -- because we would like to see public -- we
15 don't want to hurt public broadcasting. We are trying
16 to get more service, not less. In other words, the
17 remedy -- we were faced there with a remedy that is an
18 unsatisfactory remedy to everyone.

19 QUESTION: But the grant agency doesn't always
20 just inflict a death blow right away. They inform the
21 grantee or the prospective grantee that if they don't do
22 certain things, then their grant will be cut off.

23 MR. FIRESTONE: Okay.

24 QUESTION: Isn't that the real control over
25 this problem?

1 MR. FIRESTONE: No, Your Honor, it isn't,
2 quite honestly.

3 QUESTION: Well, 504, though, isn't a commerce
4 power regulation. It's spending power, isn't it?

5 MR. FIRESTONE: Yes, but it is still aimed
6 at --

7 QUESTION: And it only affects people who get
8 federal money.

9 MR. FIRESTONE: That's right, which is this
10 licensee.

11 QUESTION: It is not a general regulation that
12 people who communicate over the airways that are
13 granted, that are licensed through a public authority
14 are subject to this regulation. It is just people who
15 get money.

16 MR. FIRESTONE: That's right.

17 QUESTION: What kind of an agency, or what
18 kind of a licensee do we have here? Do we have one who
19 got money?

20 MR. FIRESTONE: Yes.

21 QUESTION: Well, then --

22 MR. FIRESTONE: A licensee who received money
23 from the federal government.

24 QUESTION: Yes.

25 MR. FIRESTONE: However, some of the --

1 QUESTION: And if they don't play ball
2 according to the views of that agency, they aren't going
3 to get any more money. Isn't that the prospect?

4 MR. FIRESTONE: Perhaps that would be the
5 extreme repercussion.

6 QUESTION: Isn't that the statutory scheme?

7 MR. FIRESTONE: Your Honor, and I would really
8 like to go to the statutory scheme, which contemplates
9 not only that these factors would be enforced at the
10 individual funding agencies, and by the way, they get
11 most of their funds from the Corporation for Public
12 Broadcasting, which cannot in fact enforce this
13 statute. They also get a lot of their equipment from
14 the Department of Commerce through facilities grants,
15 and how do you enforce that after you have given them
16 the facilities? I mean, there are some real problems
17 with the enforcement aspect here.

18 But in the end, it is really the FCC that must
19 look at the overall operation of the station. The fact
20 that this licensee is subject to this law is simply -- I
21 mean, is very importantly a factor to be taken into
22 account when they look at whether or not a licensee is
23 law abiding, and look at the character of the licensee,
24 look at the operation of the station, look at the intent
25 of Congress.

1 Congress, at the time that they passed the
2 Rehabilitation Act, the FCC was considering allegations
3 of discrimination. They were considering equal
4 employment allegations. They were considering
5 programming allegations. Even though these could have
6 been affected by going to an agency.

7 Let me give an example. Let's say that in
8 Jackson, Mississippi, there is a licensee who always
9 excluded blacks from the screen, and they got money from
10 the federal government through -- let's say they are a
11 public licensee and they got their equipment, say, from
12 the government.

13 QUESTION: Wasn't that issue settled in United
14 Church of Christ against WLBT?

15 MR. FIRESTONE: That's right, and the
16 Commission had an obligation to --

17 QUESTION: That was a clear case of
18 discrimination on the basis of race, was it not?

19 MR. FIRESTONE: But the Commission is saying
20 that if there is another agency -- that's exactly what
21 this case is about. If there is another agency who can
22 enforce this law, because the law would be Title VI,
23 that would be a violation of Title VI, if there is
24 another agency that can enforce that, we won't look at
25 it. In that case, the Commission -- the analogy would

1 be here, we are not going to look at it until another
2 agency decides whether or not there is a violation.

3 QUESTION: But in the United Church of Christ
4 case, it was 50 or 60 percent of the audience that was
5 being discriminated against. What percentage of the
6 audience total is involved here?

7 MR. FIRESTONE: Your Honor, the percentage is
8 in single figures, I think. The hearing impaired may be
9 5 percent. The severely hearing impaired may be 5
10 percent. Somewhere between -- around 5 to 7 percent or
11 so. But that I don't think is the proper criterion in
12 this case to consider. The fact is that Congress
13 intended to protect this class of people. It intended
14 that licensees who receive federal money open up, lower
15 their barriers to the provision of the programming for
16 these people, and the FCC would be the -- really the
17 appropriate place to exert their expertise.

18 I mean, this -- we are talking about an
19 educational, informational, vital part of this country
20 which is, for better or worse, television, and it is
21 considered maybe the second most influential institution
22 in the United States, and we are now in 1982, and there
23 are -- the Commission has still not looked at this
24 question as to whether or not a licensee is complying or
25 even serving the purposes of the Communications Act -- I

1 mean, of the Rehabilitation Act.

2 I think that Congress intended in the
3 legislative history of Section 504 that this would be a
4 broad policy, and I would like to bring the Court to the
5 cases where the Court has said that the FCC cannot
6 ignore a relevant statute. Let me give you an example
7 of one that the Commission cites in its EEO rules, where
8 the National Labor Relations Board wanted to reinstate
9 some employees on a ship who had struck and in fact the
10 court found that this was a violation of the mutiny,
11 that the actual strike happened to be a violation of the
12 mutiny laws, and they said, you cannot apply the
13 National Labor Relations Act without considering other
14 relevant statutes to this matter.

15 There is no question that Congress intended
16 this law to be a broad policy to include the deaf,
17 include the disabled, and what the Commission is saying,
18 and I think quite clearly, today, is, this is not
19 something that we must take into account when we have --
20 make our independent public interest standard, and there
21 are plenty of cases, including the United Church of
22 Christ case, which say that the Commission must look at
23 the facts of that case. Remember, in that case they
24 tried to defer the question of the discrimination. It
25 is a very similar situation.

1 Let's say that the Commission in that case
2 said, well, this is something for another agency to
3 decide, we won't decide it, and they waited and waited,
4 and another agency didn't come forward. Or the NPC
5 case, which proposes or suggests -- this is the U.S.
6 Supreme Court case -- that because the licensee might be
7 in violation of the antitrust laws, which of course the
8 Justice Department primarily enforces, does not mean
9 that the Commission must not take the policies of the
10 antitrust laws into account in the Communications Act.

11 They have tried to distinguish the antitrust
12 laws by saying, well, this is so clearly related to the
13 Communications Act. There is no question that the
14 provision of service to minority groups is vitally
15 important to the --

16 QUESTION: In that case, the Commission should
17 take into consideration the antitrust laws on its own
18 motion? It wasn't forced to by a Court of Appeals.

19 MR. FIRESTONE: They weren't, but there are
20 other cases where Courts of Appeals have required, and
21 the Supreme Court, required that they take into account
22 the -- such as the Southern Steamship case that I was
23 referring to a minute ago.

24 QUESTION: That was the National Labor
25 Relations Board, wasn't it?

1 MR. FIRESTONE: Yes, but the principle is the
2 same. The principle is that where there is a -- and the
3 NAACP case is another example. Now, there, the NAACP
4 adopted a rule, but the point is that where there is a
5 clearly relevant statute, that what is happening here is
6 that Congress -- that the FCC is ignoring Congressional
7 policy.

8 QUESTION: So you say that the FCC must take
9 into account any clearly defined federal policy
10 expressed in a statute? Every one. And that the FCC is
11 not free to say in administering the public interest
12 standard that we are going to exclude from our
13 considerations of the public interest standard Statute
14 A, B, and C, but include them in D, E, and F. You say
15 that is just wrong?

16 MR. FIRESTONE: It is wrong if the statute
17 that they are excluding relates to the underlying values
18 of the Communications Act.

19 QUESTION: Well, may they exclude any statute
20 that has some relevance to the --

21 MR. FIRESTONE: May they exclude any statute
22 that has relevance?

23 QUESTION: -- from consideration of the public
24 interest? They say, we are in charge of administering
25 the public interest standard, here is a statute we think

1 is too tangential to be considered.

2 MR. FIRESTONE: They -- I would first preface
3 this by saying that that is -- this case -- that is
4 broader than what this case holds, and it is broader
5 than the NAACP versus Federal Power Commission.

6 QUESTION: Yes, but surely the Court of
7 Appeals imposed ingredients of the public interest that
8 the Communications Commission rejected. They are saying,
9 you must consider part of the public interest, A, B, and
10 C, even though you don't want to.

11 MR. FIRESTONE: Because the Commission abused
12 its discretion by failing to consider this relevant
13 factor which they agree is relevant. The Commission
14 itself said, well, we will take this into account at a
15 later time, perhaps, although they didn't condition --
16 they didn't do the formal action that they needed to do
17 in order to take that into account, but where there is a
18 relevant statute, certainly they must consider -- this
19 is -- says the same where the court says, okay, when we
20 look over -- the reviewing standard is arbitrary,
21 capricious, abuse of standard, or abiding by law, and
22 part of that discussion and search, scrutiny by the
23 court is whether or not they considered all relevant
24 factors.

25 QUESTION: Well, suppose the Commission had

1 undertaken a rulemaking proceeding about this subject,
2 and the submissions were so confusing and the technology
3 in such a state of flux that they declined to issue any
4 rule, that it just wasn't timely to issue a rule right
5 now, and then the next day this submission is made, that
6 the license should be denied because of failure to live
7 up to 504. Can't the Commission say, awfully sorry, but
8 it just isn't -- now is just not the time to do that?

9 MR. FIRESTONE: Well, I think what they would
10 have to do is at least look at the allegations.

11 QUESTION: Well, they did look at the
12 allegations, and they said, we don't want to have
13 another hearing, we just decided that it isn't time to
14 have a decision.

15 MR. FIRESTONE: No, what they did was, they
16 looked at those allegations in consideration of another
17 factor. In other words, they looked at it without
18 taking into account what the Congressional policy was
19 with respect to the deaf. They said, okay, we are not
20 going to look at the programming scheduling, but they
21 didn't look at the programming scheduling and the
22 decision of the licensee not to carry this programming,
23 for example, with the idea in mind of Congress intending
24 that the deaf -- that the recipients of federal
25 financial assistance make reasonable accommodations to

1 serve the disabled.

2 That was plain and simple what happened here,
3 was ignoring of federal policy and a clearly relevant
4 statute to the public interest standard, and the
5 Commission's failure to judge management of
6 discrimination.

7 CHIEF JUSTICE BURGER: Your time has expired
8 now, counsel.

9 MR. FIRESTONE: Thank you, Your Honor.

10 CHIEF JUSTICE BURGER: Mr. Czarra.

11 ORAL ARGUMENT OF EDGAR F. CZARRA, JR., ESQ.,

12 ON BEHALF OF PETITIONER IN NO. 81-298 - REBUTTAL

13 MR. CZARRA: Justice Stevens, the Respondents
14 here asked the FCC to deny KCET's license because it was
15 not broadcasting with open captions all of its
16 programs. That was their complaint. That was the
17 relief that they sought. Now, as far as what --

18 QUESTION: Does the record tell us whether any
19 station uses captioning in all its programs?

20 MR. CZARRA: The record, I think, does not
21 show that, Your Honor, but the point is, Justice White,
22 that KCET did everything that the FCC had said in its
23 policy statements it was going to require.

24 QUESTION: Your colleague denied that.

25 MR. CZARRA: He is incorrect.

1 QUESTION: Is that in the record?

2 MR. CZARRA: It is in the record.

3 QUESTION: That it complied with everything

4 the FCC had suggested stations ought to do?

5 MR. CZARRA: The only thing the FCC said it

6 was going to require stations to do --

7 QUESTION: Well, suggest, suggest.

8 MR. CZARRA: Well, all right. First we will

9 take require. Was emergency messages. There is not an

10 allegation anywhere that KCET failed to do that.

11 QUESTION: How about suggest?

12 MR. CZARRA: The suggestions were that the

13 faces of newscasters be present on the screen, that

14 scores of games be given visually. KCET didn't

15 broadcast any games.

16 QUESTION: You mean, not even scores?

17 MR. CZARRA: I think not. They are supposed

18 to be educational.

19 (General laughter.)

20 QUESTION: They would violate their license if

21 they broadcast one, I suppose.

22 MR. CZARRA: No, the question, I guess, is,

23 would they violate their license if they didn't

24 broadcast one.

25 QUESTION: If they didn't, okay.

1 MR. CZARRA: After a day and a half of trial
2 in federal district court in California, the judge
3 dismissed the complaint against KCET, the complaint of
4 discrimination, on the ground that there had been no
5 proof of discrimination. We didn't even have to put on
6 our defense. And -- Thank you.

7 QUESTION: Well, you can certainly finish
8 your --

9 CHIEF JUSTICE BURGER: Finish your sentence.

10 QUESTION: Finish your answer to my question.

11 MR. CZARRA: Well, I was going to another
12 point. I had finished that one.

13 QUESTION: Well, not quite.

14 (General laughter.)

15 MR. CZARRA: Wonderful.

16 QUESTION: Did the court find, or has anybody
17 found, or is it just your assertion, that the station
18 had lived up to every suggestion that the FCC had made
19 about taking care of the handicapped?

20 MR. CZARRA: The only express suggestions were
21 the ones that I enumerated, emergency bulletins,
22 focusing on the face of people so that lipreading would
23 be permissible, and giving scores in writing.

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

1 (Whereupon, at 1:53 o'clock p.m., the case in
2 the above-entitled matter was submitted.)

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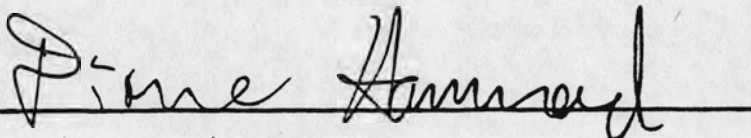
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA v. SUEGOTTFRIED ET AL # 81-298 and FEDERAL COMMUNICATIONS COMMISSION, vs. SUE GOTTFRIED ET AL # 81-799 and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pine Anderson", is written over a horizontal line.

(REPORTER)